

# UNDERSTANDING ISLAMIC LAW (*SHARĪʿA*)

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# Dedication

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To the trinity of great women in my life —

My patient mother, *Barbara Mae Mallory* (1937-2003), who in the 1960s introduced me to the beauty of Islam through Islamic arts and calligraphy exhibited at the New York Metropolitan Museum, and to the spiritualism of Islam from the poetry of Maulana Jalāluddin Rumi (1207-1273), whom she read even on her last day.

My dear wife, *Kara Tan Bhala*, who grew up in a Muslim country, Malaysia, in a Buddhist Chinese family and attended Catholic convent school, who has witnessed in many countries the evils of ignorance and extremism, and who rightly pushed me to write this book out of her compassion for people, regardless of their faith, so that they may be better educated.

Our little gift from God (Allāh), our daughter, *Shera Tan Bhala*, who has travelled with us to no fewer than 23 countries, many of them Islamic, and helped us see them better through her loving eyes, generous heart, and empathetic spirit, and for whom I pray this book makes her future world more peaceful.

# Preface

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... One race did not settle everything, as I had thought it would.  
One race is only the prelude to another.

— Sir Roger Bannister (1929– )

*The Four-Minute Mile* 225 (Guilford, Connecticut: The Lyons Press, 1981)

First person to run a sub-4 minute mile (3:59.4 on 6 May 1954 at the Iffley Road Track, Oxford University)

No background in law, religion, history, or foreign languages is required to read *Understanding Islamic Law (Shari'a)*. Only a dedicated mind and open heart are needed. This book is designed for two audiences: law students and legal practitioners. It is a textbook for future lawyers and reference for current ones. But, it cannot possibly resolve all issues about Islamic Law. It is a prelude for further study and contemplation, a point intimated in the above quotation from one of my heroes about one of my favorite activities — running. Finishing this book after nearly 3 years, like finishing a long run, left me with the certitude I had more to learn, just as I could improve as a runner.

This book also is eminently suitable for students of other disciplines, and non-lawyers, who are interested in or need to know about the subject. Along with my law students, many non-law graduate students and professionals in other fields have completed successfully the Islamic Law (*Shari'a*) course at the University of Kansas School of Law since I first offered it in the fall 2003 semester. That also is true of the honorable men and women, for whom I have enormous respect, who took the course in the fall 2010 semester at the Command and General Staff College (CGSC) at Fort Leavenworth, Kansas. To all of them, I owe much. Hailing from Bangladesh, Canada, China, Egypt, India, Iran, Korea, Pakistan, Saudi Arabia, Syria, United Arab Emirates (UAE), and from cities, suburbs, or farms around Kansas and across the United States, the students taught the teacher about the subject, and constructively criticized earlier iterations of this book.

It sounds not only striking, but also supercilious, to state that *Understanding Islamic Law (Shari'a)* is the first comprehensive textbook and treatise on the topic ever written for the English-speaking market by an American law professor. The book is the first work to incorporate systematically comparisons and contrasts with American law and Catholic Christian teaching.<sup>1</sup> And, it is the first such work to address frankly controversial matters from abortion to Wall Street, paying particular attention to women's issues. Still, there is no genius on the part of the author, who is nothing more than a struggling student of the *Shari'a*. Rather, the book reflects the under-developed state of Islamic Law in American legal education and practice.

<sup>1</sup> For an overview of the American legal system, see Gerald Paul McAlinn, Dan Rosen & John P. Stern, *An Introduction to American Law* (Durham, North Carolina: Carolina Academic Press, 2d ed., 2010). For brief discussions of Catholicism, by the Chaplain at Cambridge University and a Professor of Philosophy at Boston College, respectively, see Alban McCoy, *An Intelligent Person's Guide to Catholicism* (London, England: Continuum, 2005) and Peter Kreeft, *Fundamentals of the Faith — Essays in Christian Apologetics* (San Francisco, California: Ignatius Press, 1988). For a monumental work on the religion and history of Christianity, see Diarmaid MacCulloch, *Christianity — The First Three Thousand Years* (New York, New York: Viking, 2009).

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True, Dr. Majid Khadduri (1909-2007) and Dr. Herbert J. Liebesny (1911-1985), edited a collection of 15 essays, *Law in the Middle East*, published by the Middle East Institute in Washington, D.C. in 1955. In 1975, Dr. Liebesny produced *The Law of the Near & Middle East — Readings, Cases, & Materials*, published by the State University of New York Press, which compiled materials from a graduate seminar he taught at The George Washington University. Nevertheless, and despite more books appearing on a variety of Islamic topics in the intervening decades, no full-length, English-language treatment of Muslim law, religion, and history, covering not just the Arab world (in which roughly 300 million Muslims live), but also East Asia, Africa, and other regions (where the other 1 billion Muslims live), has appeared.

That a major text and reference work did not emerge after the Iran Hostage Crisis, which ran for 444 days starting on 4 November 1979, is shocking. After all, that debacle was a rude awakening involving legal issues and *Shi'ite* Islam. Before the terrorist atrocities of 11 September 2001, discourse on Islamic Law was the province a small group of law professors, many of whom were Muslim, and a niche area of practice for precious few specialist practitioners. Since then, the circle has expanded only modestly, even though the group never was a cabal. To the contrary, *Shari'a* experts are delighted and pleasantly welcome newcomers to the field.

The problem has been a lack of attention to modernizing the international and comparative law curriculum and practice in the United States in the wake of paradigmatic shifts around the globe. More accurately, the problem has been a lack of including Islam and the *Shari'a* in the modernization plans. Perhaps we in the American legal academy have been too complacent in our familiar Euro-centrism. Perhaps now we are too dazzled by China, and forget that even the Chinese Communist Party (CCP) has an uneasy time in its rule over a vast Muslim population, the Uyghurs, in the Far West of the People's Republic. Perhaps we exalt too much the preciously-placed law review article as a mode of scholarship over the old-fashioned book that is useful to students and practitioners. We use student law review editors as means to an end, especially when we leverage one journal over another. In so doing, we miss the opportunity to orient ourselves to be instruments of service through the patient preparation of teaching materials.

To be sure, Islamic legal scholarship is as old as Islam. Hence, there are innumerable volumes on the *Shari'a* — in Arabic, written by Muslims, with a Muslim audience in mind. There also are countless books in English, many written by Muslims, on the religion and history of Islam, and on specialty Islamic fields, such as Family Law, Inheritance Law, and International Law. Some such books are written originally in English. Others are in translation from Arabic, French, or German. With a few notable exceptions, many of which are cited herein, the authors tend not to be foreign lawyers or law professors. None of these books is oriented to the needs of the contemporary English-speaking legal classroom or demands of modern legal practice. Likewise, within the American legal academy and among practitioners, fine law review articles and books have been written on focused Islamic legal topics. But, the bottom-line is where can a newcomer, an average English-speaking law student or legal practitioner, learn about the breadth and depth of Islamic Law?

There certainly is nothing wrong with a book on Islamic Law written by a Muslim. But, it is not the same as one written by a non-Muslim. In first case, the author is writing from inside the system to which she adheres. It is difficult to see outside the paradigm, even if the author creatively and courageously advocates certain reforms against centuries

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of tradition and understanding. In the second case, the author is doing her best to empathize, but still is explaining and assessing the paradigm from the outside looking in. Her instincts may be less honed, her appreciation of nuances less sophisticated, than her Muslim counterpart. But, in contrast to her Muslim counterpart, perhaps she can view the paradigm more systemically and systematically, and ask different questions. One type of work is not better than the other. Both kinds of contributions are necessary for a full understanding and appraisal. Writing this book puts me in both positions. I am a non-Muslim writing about the *Shari'a*. I am an American lawyer and a Catholic comparing the subject to American law and Catholicism.

In the present age of globalization, such is the status of many law students and young lawyers in America. They — or shall I say, we? — are blended and mixed in ways scarcely imaginable when the last Kansan to become President, Dwight D. Eisenhower (1890-1969), occupied the White House. We are on the inside of some paradigms angling for a more holistic view, and on the outside of other systems yearning to get in. This problem is a good one to have. It suggests we are unwilling and even unable to be limited and defined by traditional boundaries. That spirit of adventure, along with a dedicated mind and open heart, surely ought to lead to greater peace, tolerance, and understanding.

In keeping with the present age and contemporary Kansas, *Understanding Islamic Law (Shari'a)* is the product of a decidedly mixed author: an imperfect Roman Catholic in love with his faith, who is proud of his half-Indian (Punjabi), half-Canadian (Scottish) heritage. These influences, plus the impressions of my Malaysian-Chinese wife, our blessedly mixed daughter, and our travels around the world, resonate throughout this book. I try to ensure they do so transparently, as teaching is not supposed to be an exercise in veiled indoctrination.

Accordingly, I confess a special exertion in respect of the influence of my faith. When drawing comparisons and contrasts to Catholic Christianity, I rely on the three recognized sources of Catholicism: Sacred Scripture (*i.e.*, the Bible), the Magisterium (*i.e.*, the teachings of the Church through the Popes, Cardinals, Bishops, Priests, and Nuns), and Sacred Tradition (*i.e.*, the practices of the Church, many of which are from its earliest days). The *Catechism of the Catholic Church* provides a single-volume summary of the substance of all three sources.<sup>2</sup>

Notably, in writing *Understanding Islamic Law (Shari'a)*, I am mindful of two quotes from such sources. First, there is the 2000 document, *Dominus Iesus*. In this Declaration, Pope John Paul II (1920-2005) states that “to consider the Church as one way of salvation alongside those constituted by the other religions” is “contrary to the faith.” Likewise, his successor, Pope Benedict XVI (1927-) warns repeatedly that one danger of relativism is the trivialization of different religions by equating them all. In turn, one consequence is false ecumenism and inauthentic inter-faith dialogue.

Second, in respect of Muslims, the Church teaches in the document from the Second Vatican Council, *Lumen Gentium*, that:

The plan of salvation also includes those who acknowledge the Creator, *in the first place amongst whom are the Muslims*; these profess to hold the faith of Abraham,

<sup>2</sup> See CATECHISM OF THE CATHOLIC CHURCH (United States Catholic Conference, Inc., Washington, D.C.: Libreria Editrice Vaticana, 2d ed. 1997).



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and together with us they adore the one merciful God, mankind's judge on the last day.<sup>3</sup>

*Dominus Iesus* is (*inter alia*) an admonition against relativism, against trivializing Catholicism by equating it with, or subordinating it to, other paths to salvation. *Lumen Gentium* is (*inter alia*) an admonition against pride, against arrogance. It is the province of God, not man, to judge fitness for salvation.

Until then, there are many joys from writing this book to cherish: a greater admiration for Islam and the *Shari'a*, a better appreciation of the gift of the Catholic faith, and a clearer understanding of the common points, amidst undeniable differences, shared by Muslims and Christians, and Muslim and Christian lawyers, in our common human dignity derived from God.

And for now, *Understanding Islamic Law (Shari'a)* spells the beginning of the end of one of the conventional excuses for not teaching a course in Islamic Law, namely, that there are no readily available, bound teaching materials. In time, there may well be more choices than this volume, and so there should be. Let 100 flowers bloom, particularly in a field as rich and elegant as the *Shari'a*.

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<sup>3</sup> *Lumen Gentium*, ¶ 16, quoted in CATECHISM, *supra*, at ¶ 841 (emphasis added).

## Notes on Manuscript Preparation

### Use of "Holy" and "PBUH"

It is respectful to refer to the sacred text of Islam, the Qur'ān, as the "Holy Qur'ān," somewhat akin to the phraseology "Holy Bible." Indeed, it is respectful to refer to insert "Holy" before each reference to the Qur'ān.

Likewise, it is respectful to use the phrase "Peace Be Upon Him," or "PBUH," sometimes put in parentheses, after mentioning the name of the Prophet Muhammad (570/571-632 A.D.). Thus, traditional constructions would be "The Prophet (PBUH)" or "Muhammad, Peace Be Upon Him." Similarly, following the name of special persons associated with Muhammad, such as his Companions (*Ṣaḥābah*), a phrase after the name of a male Companion, like "May Allāh Be Pleased with Him" or "May the Blessing of Allāh Be Upon Him" (*Raḍīa Allāhu 'Anhu*) is respectful. And, a phrase like "May Allāh Be Pleased With Her" or "May the Blessing of Allāh Be Upon Her" (*Raḍīa Allāhu 'Anhā*) after invoking the name of his female Companions or his wives, particularly, Khadyja (*circa* 555-619) and 'Ā'isha (614-678), is respectful.

The title Qur'ān and names "Prophet" and "Muhammad" are used a large number of times in *Understanding Islamic Law (Shari'a)*. That also is true of the *Ṣaḥābah*, Khadyja, and 'Ā'isha. I respect the conventions. Thus, I mean to say "Holy Qur'ān" and "PBUH" in every instance, and to include an expression of honor for the *Ṣaḥābah* and wives. Chapter titles manifest this respect explicitly. However, to repeat the prefix "Holy," suffix "PBUH," or phrase of honor throughout the text of every Chapter would consume space that may be dedicated to other substantive matters. The reader is sufficiently sensitive and sensible to appreciate my respect for the Qur'ān, Prophet, Companions, and wives, and mentally fill in the appropriate prefix or suffix. In other words, hereinafter all references to the Qur'ān implicitly mean "Holy Qur'ān," all references to Muhammad implicitly include "PBUH," and all references to the *Ṣaḥābah* and wives implicitly are followed by the customary phrase of honor.

### Use of Diacritical Signs

Notwithstanding the matter of Arabic, I spice the text of *Understanding Islamic Law (Shari'a)* heavily with Arabic terms, as well as quotations from the Qur'ān, *ḥadīth*, and Muslim scholars. I do not render Arabic terms into simpler, bowdlerized English words, such as "Koran." Rather, two British scholars of Sikhism, W. Owen Cole and Piara Singh Sambhi, inspire me:

We have decided to retain Sikh words as much as possible in the hope that readers will make the attempt to *enter the world of Sikhism rather than try to bring it into their own*.<sup>4</sup>

Likewise, to help the law student or lawyer enter the Islamic legal mind, I endeavor to be

<sup>4</sup> THE SIKHS, *supra*, at xiv (emphasis added).

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faithful to Arabic terms. I use diacritical marks on letters of Arabic terms to assist in their pronunciation.

The diacritics, and all Arabic terms, are explained in the Glossary in the final Part of this book. Also to make the text user-friendly, I put every Arabic term in italics, with five exceptions:

- Allāh
- Qur'ān
- Islam
- Muslim
- Proper nouns, specifically, names of persons (e.g., Muhammad) or places (e.g., Mecca).

Further, like a foreign language teacher, I repeat certain key terms so they become second nature and are incorporated into normal patterns of thought and discussion.

There is, of course, a considerable degree of variation in the English spelling of Arabic terms, as the title of the sacred text of Islam well illustrates. The distinctions present a problem not so much when I write a passage, but rather when I quote from another source with a spelling different from mine. Typically, my choice is to leave the different spelling in the quotation untouched rather than harmonize it with my own. (To be sure, the third option — to alter mine in conformity with the quote — is one I sometimes select.) I suspect I will not satisfy the reader who prefers perfect consistency when I report that my solution is *ad hoc*. On a case-by-case basis, I determine whether it seems in the best interests of a smooth and edifying text to leave original spellings in the quote, or to intrude and “correct” them for consistency. Certainly, I correct minor typographical and punctuation errors in any quote.

### Key Primary Sources

As for quotations from the Qur'ān, I use the following English language hardcover edition: *THE QUR'AN — A New Translation by M.A.S. Abdel Haleem* (Oxford, England: Oxford University Press, 2004). Technically, any version of the Islamic holy scripture other than the Arabic is considered not authentic, but rather a translation, which necessarily involves interpretative judgments by the translator. The first English language translation did not appear until 1649, roughly 1,000 years after the Prophet Muhammad received revelations from God (Allāh). The edition I use happens to be widely available, in both hardbound and paperback form, and received strong review in no less a publication than *The Economist*.<sup>5</sup>

I confess a bias in favor of this translator, Professor Haleem, of the School of Oriental and African Studies (SOAS) of the University of London. He “argues it is time that English become one of the familiar languages of Islam, like Urdu.”<sup>6</sup> Unless and until Islamic legal materials are available widely in English, and the Qur'ān itself is seen as

<sup>5</sup> See *Found in Translation*, *THE ECONOMIST*, 22 May 2004, at 77 (stating the translator “has managed to transform the complex grammar and structure of the holy book into a form of modern English which reads easily and flows smoothly without taking liberties with the inviolable text”). [Hereinafter, *Found in Translation*.]

<sup>6</sup> *Found in Translation*, *supra*.

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authentic in vernacular languages, like the Bible and other sacred texts, the claim of Islam to universality remains weaker than it might be. In any event, by no means is it the only esteemed English-language edition. One particularly beautiful one, approved by Cairo's renowned Al Azhar University, is *An Interpretation of the Qur'an*.<sup>7</sup> Readers may enjoy examining others to compare and contrast decisions on diction made by the translators.

For quotations of a *ḥadīth*, as far as possible I obtain them directly from either or both of the following sources:

- THE TRANSLATION OF THE MEANINGS OF SAHIH AL-BUKHARI, ARABIC-ENGLISH by Dr. Muhammad Muhsin Khan (Islamic University, Medina, Kingdom of Saudi Arabia: Dar Ahya Us-Sunnah, Al Nabawiya, March 1978), 8 volumes.
- SAHIH MUSLIM — BEING TRADITIONS OF THE SAYINGS AND DOINGS OF THE PROPHET MUHAMMAD AS NARRATED BY HIS COMPANIONS AND COMPILED UNDER THE TITLE AL-JAM'-US-SAHIH BY IMAM MUSLIM, RENDERED INTO ENGLISH BY ABDUL HAMID SIDDIQI, WITH EXPLANATORY NOTES AND BRIEF BIOGRAPHICAL SKETCHES OF MAJOR NARRATORS, CORRECTED AND REVISED BY DR. HASSAN (Lahore, Pakistan: Sh. Muhammad Ashraf Booksellers and Exporters, 1990), 8 volumes.

For the convenience of the reader, and in homage to the formidable work of the compilers, I introduce quotations from these sources by referring to “*Imām* Bukhari” and “*Imām* Muslim,” respectively.

Islamic religious and legal scholars regard as definitive any *ḥadīth* found in either, or better yet, both compilations. Fortunately, beautiful hard-bound multi-volume sets of *Bukhari* and *Muslim* are easily available in English. In certain instances, I take the liberty of correcting what are obvious, minor typographical errors apparently introduced by the Pakistani or other foreign printer, and left uncorrected by the editor or editors. Examples are corrections of a missing or wrong letter or punctuation mark. In no way do these corrections alter the substantive text or meaning of a *ḥadīth*. On occasion, I find it helpful to quote from a *ḥadīth* not recounted by *Imāms* Bukhari or Muslim. In such instances, I take them, with credit, from a secondary source.

Finally, all translations from the Bible are taken from *The Catholic Study Bible*. This edition, published by Oxford University Press (New York, New York) in 1990, is the New American Bible translation. It is highly appealing because of its prodigious yet accessible supplementary information and analysis. It contains a Readers Guide to every Book in the Old and New Testament, articles on key topics such as Biblical Texts and their Background, Biblical Archaeology, and the Geography of the Holy Land. It also has introductory notes, footnotes, and maps.

### Citations

Each Chapter of this book is self-contained, though the topics are all related. Thus, footnotes are numbered consecutively in each Chapter. To some degree, the Blue Book system of citation familiar to American lawyers is used. However, that system conveys

<sup>7</sup> See *AN INTERPRETATION OF THE QUR'AN — ENGLISH TRANSLATION OF THE MEANINGS, A BILINGUAL EDITION* (New York, New York: New York University Press, 2002, Majid Fakhry, trans.).



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insufficient information about some sources — for example, the name and location of a book publisher — which may be helpful to the reader seeking to access those sources. Moreover, that system uses abbreviations that may be unfamiliar to foreign readers. Thus, I have provided as full information as possible about each source, even if not called for by the Blue Book.

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## Acknowledgments

“Blessed” hardly is too strong a word to describe how I feel by my ten Research Assistants (RAs) at the University of Kansas, and their substantive contributions to the first edition of this book. It is not an overstatement to say that without the help of this elite but humble team, the end result would have been much diminished.

- Ahmed D. Alyousef

S.J.D. Candidate, University of Kansas School of Law. J.D., University of Kansas School of Law (Certificate in International Trade and Finance, and Certificate in Business and Commercial Law), 2009. LL.M., University of Missouri — Kansas City (UMKC) School of Law, 2006. LL.B., Imām Mohammed bin Saud University School of *Shari’a* (Riyadh, Kingdom of Saudi Arabia), 2000.

Ahmed, a native of Quassim, which is 300 kilometers north of Riyadh, and of Ras Al Khaimah, United Arab Emirates (UAE), is fluent in Arabic and English, and works on international business matters, including Islamic insurance (*takaful*). “Ras Al Khaimah” literally means the “top of the tent,” which is appropriate as he is a leader at Kansas in both the International Law Society and Islamic Law Students Association.

Ahmed’s research memo on Islamic partnerships is the basis for the Chapters on Business Associations. His memos on risk (*gharar*), interest (*ribā*), and Islamic insurance are the bases for portions of the Chapters on those topics. His memos on the life of the Prophet Muhammad are the basis for portions of the Chapters on the Prophet. His personal pilgrimage figures into the account of the *Hajj* in the Chapter on the Five Pillars.

- Adam Casner

J.D., University of Kansas (Certificate in International Trade and Finance), 2010. B.A. (Italian, Economics Minor), University of Texas, 2005.

Before coming to the Law School at Kansas, Adam worked in business development for a mobile radiology company. He has lived in Rome, Italy and Limerick, Ireland, and speaks Italian and Spanish. While in Law School, he did litigation work in litigation in Kansas City, and now practices domestic and international business law in Texas.

Adam’s research memos on the Four-Rightly Guided Caliphs (*Rashidun*) and Islamic Law of War are the bases for the Chapters on those topics.

- Elena Delkhah

J.D. University of Kansas (Certificate in International Trade and Finance), expected 2011. B.B.A., Business Administration (Concentration in International Business), University of Kansas, 2006.

Elena was born and raised in Tehran, Iran, and migrated to Lawrence, Kansas in 1987. She speaks Farsi, and travels back to Iran.

Her research memo on the history of Iran, covering the *Sunni* — *Shi’ite* split, *Safavid* Dynasty, regime of the Shah, 1978-79 Islamic Revolution, and Constitution of the Islamic Republic, factored into various Chapters.

- Adham Hashish

## Acknowledgments

S.J.D. candidate, University of Kansas School of Law. L.L.M. (International and Comparative Law), The George Washington University School of Law, 2008. L.L.B. *magna cum laude*, Alexandria University Faculty of Law (Alexandria, Egypt), 2003. Graduate Diploma (International Law), Tanta University (Tanta, Egypt), 2004. Graduate Diploma (Public Law), AinShams University (Cairo, Egypt), 2005.

Adham, who is from Egypt, was appointed Lecturer on Law at Alexandria University Faculty of Law in 2006. His scholarship focuses on law and development, especially as it affects good governance, the ethics of multinational corporate conduct, and weaknesses in the legal infrastructure of developing countries. In 2005, he served as a Delegate Judge on the Egyptian Administrative Court (State Council).

Adham is fluent in Arabic and English, and gave indispensable help on the Glossary of Arabic Terms, the meaning of the word "Qur'ān," and the wives of the Prophet Muhammad. Generously sharing his considerable knowledge and experience in Islamic Law, he provided invaluable insights and corrections on all of the Chapters.

- Beau Jackson

J.D., University of Kansas School of Law (Certificate in International Trade and Finance), 2009. B.A. (Political Science and History), University of Kansas, 2003.

Beau, originally from Wichita, Kansas, practices international trade law at Adduci, Mastriani & Schaumburg, L.L.P., in Washington, D.C. Before coming to the Law School, he served as a Peace Corps Volunteer in Cape Verde, West Africa. While at Kansas, he was President of the International Law Society and an editor on the *Kansas Journal of Law and Public Policy*.

Beau's research memos on the *Umayyad* and *Abbasid* Caliphates, Crusades, economic development in the Muslim world, the Muslim Brotherhood, and *Al Qaeda* are the bases for the Chapters on those topics.

- Ayesha Shebaryar Mehdi

J.D. and M.H.S.A. (Masters in Health Services Administration), University of Kansas School of Law, 2009. B.B.A. (Bachelors in Business Administration), Walsh College of Accountancy and Business Administration, Troy, Michigan, 2004.

Ayesha immigrated in 2002 to the United States from her hometown of Lahore, Pakistan, where she had a career as a journalist. At Kansas, Ayesha served as an editor of the *Kansas Journal of Law and Public Policy* for two consecutive years, and participated in the National Health Law Moot Court Competition. She teaches health care law at the University of Nevada Las Vegas (UNLV), is an Executive Director of the Hope Cancer Care of Nevada, Las Vegas, and balances her responsibilities as a wife and mother.

Ayesha's research memos on mixed marriages and inheritance are the bases for portions of the Chapters on Family Law and Inheritance Law, respectively.

- Matt Odom

J.D., University of Kansas School of Law (Certificate in International Trade and Finance), 2010. B.A. (Political Science), Fort Hays State University, 2004.

Before coming to the Law School at Kansas, Matt was a United States Army Enlisted Infantryman, and is a Veteran of Operation Iraqi Freedom, with service in Baghdad (2005-2006). He has a keen interest in international and comparative law, including

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human rights and humanitarian law. Matt's practice interests are in international and comparative law.

Matt's research work on the Prophet as a military leader is the basis for part of the Chapter on Muhammad. His research memo on the twelve *Shi'ite Imāms* is the basis for part of the Chapter on *Shi'ism*. His memos on the compilation of the Qur'ān, *naskh* (repeal), and Islamic countries and international law on religious freedom, are the bases for discussion on those topics.

- Ellen O'Leary

J.D., University of Kansas School of Law (Certificate in International Trade and Finance), 2011. B.A. (Classics, Political Science), Truman State University, 2006.

Ellen is from Shawnee, Kansas. She studied Comparative Law in Istanbul, Turkey, and Bio Diversity Law in the United States Virgin Islands. Likewise, she has worked abroad and at home — with the Istanbul office of the British law firm Denton Wilde Sapte, and with the Lawrence, Kansas firm of Wisler, Trevino, and Rosenthal. In college, Ellen was inducted into the Classics Honor Society, *Eta Sigma Phi*, and at the Kansas Law School she earned top honors in Islamic Law. Active in the Law School community, she served as Treasurer for the International Law Society and Women in Law. Ellen is a referee for youth and adult soccer, and an instructor to teach others to be referees.

Ellen carefully edited virtually every Chapter, re-drafted sections of several Chapters, and her insights on many points added great value. Her research memoranda on analogical reasoning (*ijma'*), consensus (*qiyās*), and *ijtihād* (independent reasoning) formed part of the basis of the Chapter on the Four Sources of Islamic Law (*uṣūl al-fiqh*), and on additional sources. A Latin scholar, Ellen also provided all Latin translations.

- Jomana Jihad Qaddour

J.D., University of Kansas School of Law (Certificate in International Trade and Finance), 2009. B.A. (Human Biology and International Studies), University of Kansas, 2006.

Jomana, a Syrian-American, is from Overland Park, Kansas and works on domestic and international business law, and intellectual property law matters. Fluent in Arabic and English, she has a keen interest in Middle Eastern affairs, has participated in a variety of activities designed to build understanding and tolerance among competing constituencies in that region, and travels frequently to the region.

Jomana's research memos on abortion, contraception, women's dress, and women's employment are the bases for portions of the Chapters on Family Law. Her memo on *hawāla* banking is the basis for a portion of a Chapter on Finance. Her memo on the meaning of "*jihād*" is the basis for a portion of a Chapter on International Law.

- Ben Sharp

J.D., University of Kansas School of Law (Certificate in International Trade and Finance, and Certificate in Business and Commercial Law), 2009. M.Sc. (Philosophy of the Social Sciences), London School of Economics, 2005. B.S. (Philosophy), Kansas State University, 2003.

Ben is from Rossville, Kansas and practices international business law. While at Kansas, he served as an editor of the *Kansas Journal of Law and Public Policy*. He



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practices domestic and international business law in Minneapolis.

Ben's research memos on non-Islamic debt instruments and insurance products, and on socially responsible investing, are the bases for portions of the Chapters on Islamic Finance. His memos on the Ottomans, Anglo-Muhammadan Law, Four *Sunni* Schools, and *Shi'ite* legal doctrines are the bases for Chapters on those topics.

As the Research Assistants and I worked collaboratively on this book, they became part of my family. My wife, Kara, our daughter, Shera, and I miss them. We shall always remember them well.

I am grateful to the University of Kansas School of Law for generous financial support provided through Research Assistant funds and summer research grants. Set amidst gorgeous landscape, Kansas is a marvelous mix of the cosmopolitan and contemplative.

## Introduction: Ten Threshold Issues

A fool finds no pleasure in understanding but delights in airing his own opinions.

THE BOOK OF PROVERBS (New International Version), 18:2

### SYNOPSIS

- [1] What Does "*Shari'a*" Mean?
- [2] What Does "Islam" Mean?
- [3] Use of Name "Allāh" and Promise of Muhammad to Saint Catherine (628 A.D.)?
- [4] Does Arabic Matter?
- [5] Sphere of Application of *Shari'a*?
- [6] Apology for *Shari'a*?
- [7] Attack on *Shari'a*?
- [8] Importance of Understanding *Shari'a*?
- [9] Compared To What?
- [10] Other Reasonable Comparisons?

### [1] WHAT DOES "*SHARĪ'A*" MEAN?

The word "*Shari'a*" typically is translated as "Islamic Law."<sup>1</sup> That was not its original meaning, as Professor Seymour Gonne Vesey-Fitzgerald (1884-1954 A.D.) of the School of Oriental and African Studies (SOAS) at the University of London explained:

The word *shari'a* originally meant the path or track by which camels were taken to water, and so by transfer the path ordained of God by which men achieve salvation. This conception of a path or way of life is very common in early Islam.<sup>2</sup>

Translating "*Shari'a*" as "Islamic Law" is not wrong. But, from an American legal mindset, it is incomplete in two respects.

As to the first respect, consider what Professor Joseph Schacht (1902-1969) of Columbia University wrote:

*Islamic Law is the epitome of the Islamic spirit, the most typical manifestation of the Islamic way of life, the kernel of Islam itself.* For the majority of Muslims, the law has always been and still is of much greater practical importance than the

<sup>1</sup> See, e.g., Michael J.T. McMillen, *International Legal Developments in Review: 2007 — Islamic Law Forum*, 42 THE INTERNATIONAL LAWYER 1017-1032 (Summer 2008) (stating the *Shari'a* "is what is commonly referred to as Islamic law.").

<sup>2</sup> S.G. Vesey-Fitzgerald, *Nature and Sources of the Shari'a*, in I LAW IN THE MIDDLE EAST 86 (Majid Khadduri & Herbert J. Liebesny, eds., Washington, D.C.: The Middle East Institute, 1955). [Hereinafter, Vesey-Fitzgerald.]



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dogma. Even today the law remains a decisive element in the struggle which is being fought in Islam between traditionalism and modernism under the impact of Western ideas.<sup>10</sup>

Similarly, Professor Vesey-Fitzgerald said:

Islam is not only a religion, it is a political system, and though in modern times devout Muslims have endeavored to separate the two aspects, Islam's whole classical literature is based upon the assumption that they are inseparable. Most legal systems have at one time or another in their history been intimately connected with religion; but the two great Semitic systems, the Jewish and the Islamic, are probably unique in the thoroughness with which they identify law with the personal command of a single Almighty God. . . .<sup>11</sup>

In other words, the *Shari'a* occupies a much more prestigious place in the minds of Muslims than does American law in the minds of Americans. It is one thing to respect the American legal system for its various geniuses (e.g., Bill of Rights, federalism, judicial independence, separation of powers, and transparency). It is quite another thing to revere a legal system because of its Divine characteristic.

As to the second reason why a straight equation of "*Shari'a*" with "Islamic Law" is incomplete, consider the contrast Professor Vesey-Fitzgerald draws:

To the Westerner, law is a system of commands enforced by the sanction of the state. This concept is wholly alien to Islamic theory. On the one hand, the state has from time to time enforced much which could not be called law; on the other hand, the law of God remains the law of God even though there is no one to enforce it, and even though in many of its details it is quite incapable of enforcement. Indeed, the law is revered for its divine character even by people who do not profess to obey it; and so we find communities living according to customs completely at variance with the divine command, yet on occasion imbued with religious fanaticism.

Law, then, in any sense in which a Western lawyer would recognize the term, is but a part of the whole Islamic system, or rather, it is not even a part but one of several inextricably combined elements thereof. *Shari'a*, the Islamic term which is commonly rendered in English by "law" is, rather, the "Whole Duty of Man." Moral and pastoral theology and ethics; high spiritual aspiration and the detailed ritualistic and formal observance which to some minds is a vehicle for such aspiration and to others a substitute for it; all aspects of law; public and private hygiene; and even courtesy and good manners are all part and parcel of the *Shari'a*, a system which sometimes appears to be rigid and inflexible; at other to be imbued with that dislike of extremes, that spirit of reasonable compromise which was part of the Prophet's own character.<sup>12</sup>

<sup>10</sup> Joseph Schacht, *Pre-Islamic Background and Early Development of Jurisprudence*, in I LAW IN THE MIDDLE EAST 86 (Majid Khadduri & Herbert J. Lievesny, eds., Washington, D.C.: The Middle East Institute, 1955) (emphasis added) (extracted from JOSEPH SCHACHT, THE ORIGINS OF MUHAMMADAN JURISPRUDENCE (London, England: Oxford University Press 1950).

<sup>11</sup> Vesey-Fitzgerald, *supra*, at 85.

<sup>12</sup> Vesey-Fitzgerald, *supra*, at 85-86 (emphasis added).

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The reference to law as a system of commands is to the legal philosophy of John Austin (1790-1859), who in his 1832 book *The Province of Jurisprudence Determined* defined "law" as a command of a sovereign that is habitually obeyed under the threat of punishment. This "Command Theory" of law is classified as strict positivism, meaning there is no connection between law, on the one hand, and morality or religion, on the other hand.

Muslims find such a proposition puzzling, absurd, or even heretical. *Surah* (Chapter) 6, *ayah* (verse) 162 states:

Say [Prophet], "My prayers and sacrifice, my life and death are all for God, Lord of all the Worlds. . . ."<sup>13</sup>

This passage connotes that the *Shari'a* is to govern all of life. Thus, legal positivism, the proposition that law and morality are or ought to be separate, and the project of its modern-day exponents, like Judge Richard Posner (1939-) of the United States Court of Appeals for the Seventh Circuit, which is "the demystification of law and in particular the freeing of it from moral theory, a great mystifier," are devilishly off track.<sup>14</sup> God (Allāh) revealed a law, the *Shari'a*, for all people, in all places, at all times. Why would man try to separate the inseparable, law from morality? Prominent Christian thinkers make the same point: Saints Augustine (354-430) and Thomas Aquinas (1225-1274) urged that a secular law that violates God's law is no law at all, and the Reverend Dr. Martin Luther King (1929-1968) agreed, citing them in his powerful 13 April 1963 *Letter from a Birmingham Jail*.

In truth, the likes of Judge Posner make two fatal errors. First, they presume utilitarian analysis is not a moral theory. All they are doing is substituting one moral theory for another. Along with deontology and virtue ethics, utilitarian theory is a recognized framework in moral philosophy. All three address the same question: is an action moral?:

- In a deontological framework, championed by Immanuel Kant (1724-1804), the emphasis is on duty. Actions are intrinsically right or wrong, regardless of their consequences, if they conform to moral imperatives such as "do not steal" or "do not kill."
- Under virtue ethics, originated by Aristotle (384-322 B.C.), the focus is not on the actions of an agent, but rather on the agent herself. Does she live an ethical life, possess virtues, and if so, which ones, and thereby have a moral character? If the agent has such a character, then her acts will be moral.
- Utilitarian theory is the most common form of consequentialism, and holds that whether an act is right depends not on the agent but the outcome of the act. It entails a cost-benefit calculation familiar in law and economics, with a judgment as to the morality of an act depending on whether that act maximizes the good, the good being defined as pleasure by Jeremy Bentham (1748-1832), or well-being by John Stuart Mill (1806-1873).

Notably, Christian theologians use all three of these moral frameworks in reasoning and

<sup>13</sup> THE QUR'AN — A New Translation by M.A.S. Abdel Haleem 6:162 at 93 (Oxford, England: Oxford University Press, 2004) (emphasis added). [Hereinafter, Qur'an.]

<sup>14</sup> RICHARD A. POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY vii (Cambridge, Massachusetts: Harvard University Press, 1999).



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argumentation, which is a testament to how much more broad-minded they are than positivist thinkers.

The second error of legal positivism is it endeavors to separate the inseparable. Pope John Paul II (1920-2005) spoke for Christians and Muslims alike when he said:

Even if some are reluctant to refer to the religious dimension of human beings and human history, even if others want to consign religion to the private sphere, even if believing communities are persecuted, Christians will still proclaim that *religious experience is part of human experience. It is a vital element in shaping the person and the society to which people belong.*<sup>15</sup>

Likewise, Blessed Cardinal John Henry Newman (1801-1890) stated in 1865:

Liberalism . . . is the mistake of subjecting to human judgment those revealed doctrines which are in their nature beyond and independent of it, and of claiming to determine on intrinsic grounds the truth and value of propositions which rest for their reception simply on the external authority of the Divine Word.<sup>16</sup>

Stated differently, both reasoned and revealed truth are sources of Truth, and they are at times independent — but never contradictory — of one another. From a Muslim as well as Christian perspective, law, morality, and religion are inseparable. In turn, the scope of law is not restricted to working out hypothetical disputes between abstract parties, like plaintiffs and defendants, prosecution and accused, debtors and creditors, shareholders and management, benefactors and beneficiaries, and so forth. That scope encompasses such matters, but extends far beyond them to religious practice (such as the Five Pillars of Islam), personal attire (*i.e.*, how to dress in public versus private), and etiquette. They are not merely matters of religious or social habit, as a legal positivist would say. Rather, they are part of the law — Islamic Law — itself.

In sum, to think of “the *Shari’a*” and “Islamic Law” as synonyms is to ignore the reality that for Muslims, the *Shari’a* is an entire way of life linked to Allāh.

### [2] WHAT DOES “ISLAM” MEAN?

“Islam” means “submission.” The purpose of life is to discern and submit to the Will of Allāh in preparation for a Day of Judgment. Through His mercy, God has made his will known, in an authoritative way, by the revelation of the Qur’ān to his Messenger, the Prophet Muhammad. Thus, during the last 14 centuries since the first revelation in 619 A.D., Muslims (especially Muslim scholars) have dedicated a large amount of time and attention to understanding precisely what it is God expects of them. They have studied and debated the Qur’ān, trying to derive from it the principles, requirements, rights, and duties that should govern their lives. And why bother considering submission to the Will of Allāh? Because a Day of Judgment will come, on which each person will be held accountable for his or her life, and merit entry into heaven or condemnation to hell based on the degree to which that person made a resolute effort to submit.

<sup>15</sup> Pope John Paul II, 13 January 2001 Address to the Diplomatic Corps accredited to the Holy See (quoted in *Address of the Holy Father to the New Ambassador of Iraq to the Holy See*, 28 April 2001), posted at [www.vatican.va](http://www.vatican.va) (emphasis added).

<sup>16</sup> JOHN HENRY NEWMAN, *Apologia Pro Vita Sua* Appendix 2: Matter Peculiar to the 1865 Edition, Note A — Liberalism, at 493 (1864).

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Thus, Islam is a system built around an ideal. The ideal is to identify everything that a Muslim should do in order to lead life in accordance with Divine Will. The consequence of the many centuries of study and debate over the text of the Qur’ān, and the elaborations on that text by the Prophet Muhammad (*ḥadīth*) and Muslim scholars through analogical reasoning (*qiyās*) and consensus (*ijma’*), is one of the great intellectual achievements in history: the development of an authoritative body of “dos” and “don’ts,” an expression of those things a Muslim is supposed to do, and those things a Muslim is not supposed to do, so as to behave in accordance with the Will of Allāh and thereby gain entry into Paradise. Those “dos” and “don’ts” are the *Shari’a*, or the “legislation” that is called “Islamic Law.”

It is sometimes remarked that Islam, like Judaism, is a legalistic system, because it focuses less on what a person believes about God than on what a person does or does not do in life. With the extraordinary elaboration of the Qur’ān and Qur’ānic-based legislation, the impression conveyed is that adhering to the *Shari’a* is a merely ticking boxes. This characterization is wrong. The “legislation,” ultimately, is advisory in character. Its purpose is to facilitate the ability of Muslims to know how to conform their lives with the Will of Allāh. While Islam is a regime to lead life in accordance with this Will, and while “Islamic law” is that regime, Islam, like any religion, is about trust in what is not usually seen readily or experienced directly. It is about faith.

### [3] USE OF NAME “ALLĀH” AND PROMISE OF MUHAMMAD TO SAINT CATHERINE (628 A.D.)?

We all worship the same God. All too often, religious extremists spread the poisonous message that our prayers are directed to different powers. The Ancient Greeks, Trojans, and Romans paid homage to the same deities, calling them different names. Yet, these Ancient peoples warred, as chronicled, for instance, in *The Iliad* by Homer (*circa* 8<sup>th</sup> century B.C.). In recent times, Islamist fanatics have asserted the name “Allāh” is reserved exclusively for Muslims. This assertion comes from quarters as disparate as Saudi Arabia and Malaysia. All adherents to it misunderstand pre-Islamic history and Islam itself, and attribute false motives to non-Muslims. These errors sow division where there is none, and in turn push all of us down the slippery slope toward violent conflict.

An example comes from Malaysia, which is home to approximately 850,000 Catholic Christians amidst a population of 25.7 million people. Of the total population, Muslims account for 60.4 percent, Buddhists 19.2 percent, Christians 9.1 percent (3.3 percent of whom are Catholic), and Hindus 6.3 percent.<sup>17</sup> Taking the position that “Allāh” is an Islamic word, the Malaysian government banned non-Muslims from using the word “Allāh” to refer to “God.”<sup>18</sup> The government, or its extremist backers, thought the Catholic Church posed a threat, namely, conversion of Muslims. There was an irony in that fear. Malaysia has four large ethnic groups: Malays (53 percent), Chinese (26 percent), Indian (8 percent), and Indigenous (12 percent); and Malays are required by the Constitution to be Muslim.<sup>19</sup> Arguably, some Malays feel insecure amidst economic

<sup>17</sup> See CENTRAL INTELLIGENCE AGENCY, *THE WORLD FACTBOOK, Malaysia*, posted at [www.cia.gov/library/publications/the-world-factbook/geos/my.html](http://www.cia.gov/library/publications/the-world-factbook/geos/my.html). The data are as of July 2010.

<sup>18</sup> See *Malaysian Court Rules Non-Muslims May Call God Allah*, BBC NEWS, 31 December 2009, posted at <http://news.bbc.co.uk>.

<sup>19</sup> See Kevin Brown, *The “Allah” Spat Masks Ethnic Malays’ Feelings of Insecurity*, FINANCIAL TIMES, 13 January 2010, at 2. [Hereinafter, BROWL.]



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reforms and political changes that undermine the dominance they have long enjoyed, partly through positive discrimination in their favor under the 1970 New Economic Policy implemented after race riots in 1969.<sup>20</sup>

Nevertheless, in 2007, Malaysian government prohibited *The Herald*, a publication of the Catholic Church in Malaysia, from using "Allāh" to describe the Christian God. Arguing that the name "Allāh" needed protection from insults and abuse, and use of this name by non-Muslims confused Muslims, the Malaysian government effectively ordered *The Herald* to cease publication, because it insisted on its right to use the word "Allāh" to refer to the one God of both Muslims and Christians. The argument of the government was more than shockingly patronizing toward Malays. It ignored the manifestly respectful use of "Allāh" by non-Muslims, and was incongruous with Islamic tradition and illogical.<sup>21</sup> That tradition holds there are 99 Names of Allāh, including *Al Rahman* (The All-Compassionate) and *Al Rahim* (The All Merciful). Surely the 100<sup>th</sup> name, "God," would not confuse a people who have successfully navigated the other 99 names.

In 2007, *The Herald* filed suit. In December 2009, the High Court of Malaysia, in Kuala Lumpur, held that Christians have the right to use the word "Allāh" when referring to "God." The High Court, in a decision by female Christian Chinese justice Lau Bee Lan, agreed with the argument of *The Herald* that Malay-speaking indigenous Christians in Malaysian Borneo (the states of Sabah and Sarawak) had used the word "Allāh" for decades, as there is no alternative in the Malay language, and Christians in Muslim countries like Egypt and Syria had used it for centuries.<sup>22</sup> Moreover, the Court said Articles 10-12 of the Malaysian Constitution protects freedom of speech and religion, and use of the "Allāh" is part of the exercise of those freedoms. The High Court won plaudits for its judicial independence. But, its decision triggered a spate of fire bombings of churches, many of the Protestant, by a small number of extremists.<sup>23</sup>

<sup>20</sup> See Brown, *supra*.

<sup>21</sup> Anecdotal, in 2007 the *Majlis Agama Negeri Perlis* (Religious Assembly of the State of Perlis) — a large group of learned Muslim Malaysian *ulema* — issued a *fatwā* stating there is absolutely nothing wrong with non-Muslims using the word "Allāh." The *fatwā* has not been circulated widely, but (assuming it exists) apparently the Malaysian government paid little heed to it. See *Marina Mahathir and the Word Allah*, 9 January 2010, posted at <http://all4one4all.wordpress.com/2010/01/09/marina-mahathir-the-word-allah/>. The blogger is the daughter of Dr. Mahathir bin Mohamad (1925-), who served as the Prime Minister of Malaysia from 1981-2003.

<sup>22</sup> See *Titular Roman Catholic Archbishop of Kuala Lumpur v. Menteri Dalam Negeri*, High Court in Malaya, No. R1-25-28-2009, 31 December 2009; Brown, *supra*; *God and Allah in Malaysia*, ASIA SENTINEL, 3 January 2010, posted at [www.asiasentinel.com/index.php?Itemid=178&id=2217&option=com\\_content&task=view](http://www.asiasentinel.com/index.php?Itemid=178&id=2217&option=com_content&task=view).

<sup>23</sup> The violence apparently caused the High Court to stay its own decision, pending a hearing of an appeal by the Malaysian government to the Federal Court of Malaysia (the apex of the Malaysian judiciary).

In March 2011, the Malaysian Home Ministry agreed to release 35,000 Bibles. For months it had impounded them because they used the word "Allāh." The Bibles, printed in Indonesia, principally were for Christians in East Malaysia, i.e., the states of Sabah and Sarawak. Christians explained their Bibles have referred to "Allāh" since before September 1963, when Malaysia was formed as a federal state (along with Sabah, Sarawak, and Singapore) following independence from Britain in August 1957 as the Federation of Malay States. (In August 1965, Singapore became an independent

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Not surprisingly, I have no patience for such nonsense, and nor does the Qur'ān. *Surah* 22, *ayat* 39-40 states:

<sup>39</sup>Those who have been attacked are permitted to take up arms because they have been wronged — God has the power to help them — <sup>40</sup>those who have been driven unjustly from their homes only for saying, "Our Lord is God." *If God did not repel some people by means of others, many monasteries, churches, synagogues, and mosques, where God's name is much invoked, would have been destroyed. God is sure to help those who help His cause — God is strong and mighty. . . .*<sup>24</sup>

This passage is about more than self-defense. It calls for respect for houses of worship, in which the name of God is invoked and extolled.

Likewise, the Prophet Muhammad clearly established a tradition (*Sunnah*) of tolerance toward Christians. Dr. Muqtedar Khan, the Director of Islamic Studies at the University of Delaware, explains the context and meaning of "The Promise to Saint Catherine's Monastery" by Muhammad, and quotes this extraordinary Promise in its entirety:

In 628 AD, a delegation from St. Catherine's Monastery came to Prophet Muhammad and requested his protection. He responded by granting them a charter of rights, which I reproduce below in its entirety. St. Catherine's Monastery is located at the foot of Mt. Sinai and is the world's oldest monastery. It possesses a huge collection of Christian manuscripts, second only to the Vatican, and is a world heritage site. It also boasts the oldest collection of Christian icons. It is a treasure house of Christian history that has remained safe for 1400 years under Muslim protection.

### *The Promise to St. Catherine:*

"This is a message from Muhammad ibn Abdullah, as a covenant to those who adopt Christianity, near and far, we are with them.

Verily I, the servants, the helpers, and my followers defend them, because Christians are my citizens; and by God! I hold out against anything that displeases them.

No compulsion is to be on them. Neither are their judges to be removed from their jobs nor their monks from their monasteries. No one is to destroy a house of their religion, to damage it, or to carry anything from it to the Muslims' houses.

Should anyone take any of these, he would spoil God's covenant and disobey His Prophet. Verily, they are my allies and have my secure charter against all that they hate.

No one is to force them to travel or to oblige them to fight. The Muslims are to fight for them. If a female Christian is married to a Muslim, it is not to take place without her approval. She is not to be prevented from visiting her church to pray. Their churches are to be respected. They are neither to be prevented from repairing them nor the sacredness of their covenants.

country). The Malaysian government insisted it took its decision to resolve inter-faith issues amicably, though political analysts suggested it sought increased support from Christian voters in future East Malaysian elections. See *Malaysia to Release 35,000 Bibles Amid "Allāh" Row*, BBC NEWS, 16 March 2011, posted at <http://www.bbc.co.uk/news>.

<sup>24</sup> QUR'AN, *supra*, 22:39-40 at 212.



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No one of the nation (Muslims) is to disobey the covenant till the Last Day (end of the world)."<sup>25</sup>

The first and the final sentence of the charter are critical. They make the promise eternal and universal. Muhammad asserts that Muslims are with Christians near and far straight away rejecting any future attempts to limit the promise to St. Catherine alone. By ordering Muslims to obey it until the Day of Judgment the charter again undermines any future attempts to revoke the privileges. These rights are inalienable. Muhammad declared Christians, all of them, as his allies and he equated ill treatment of Christians with violating God's covenant.

A remarkable aspect of the charter is that it imposes no conditions on Christians for enjoying its privileges. It is enough that they are Christians. They are not required to alter their beliefs, they do not have to make any payments and they do not have any obligations. This is a charter of rights without any duties!

The document is not a modern human rights treaty but even though it was penned in 628 A.D., it clearly protects the right to property, freedom of religion, freedom of work, and security of the person.

Accordingly, throughout *Understanding Islamic Law (Shari'a)*, the names "God" and "Allāh" are used interchangeably. Often, the expression "God (Allāh)" is used as a deliberate reminder that we do indeed worship the same Almighty.

### [4] DOES ARABIC MATTER?

The Qur'ān was recited to the Prophet Muhammad from Allāh through the Archangel Gabriel (Jibreel) between the years 610 and 632 A.D. in the Arabic language. The vast majority of Muslims do not speak Arabic, much less the Classical Arabic in which the Qur'ān is written and recited. Most non-Arab Muslims try to learn a bit of Arabic, perhaps enough to know a few verses (*ayat*) and chapters (*surat*), or even the entire text. But, aside from the call to prayer and certain readings from the Qur'ān in a mosque, most non-Arab Muslims live their religious and secular life in the vernacular.

Nonetheless, the fact, which is referred to in the Qur'ān, the revelation occurred in Arabic explains the reverence all Muslims, whether Arabs or not, have for Arabic. There is little if any analogy here to Latin and Catholic Christians. Different parts of the Bible were written in different original languages, notably Hebrew and Ancient Greek, and translated from them. For Catholics, there is nothing particularly sacrosanct about the original languages. To the contrary, Pentecost, which marks the end of the Easter Season in the Church calendar, is a seminal event in establishing the universality of the Christian message. As Jesus promised, the Holy Spirit came down from above, and as described in *The Acts of the Apostles*:

<sup>1</sup>When the time for Pentecost was fulfilled, they [the Twelve Apostles, Peter, John, James, Andrew, Philip, Thomas, Bartholomew, Matthew, James (son of Alphaeus), Simon the Zealot, Judas (son of James), and Matthias] were all in one place together. <sup>2</sup>And suddenly there came from the sky a noise like a strong driving wind,

<sup>25</sup> Dr. Muqtadar Khan, *Prophet Muhammad's Promise to Christians*, AL JAZEERA MAGAZINE, 1 January 2010, posted at <http://aljazeera.com/news/articles/39/Prophet-Muhammads-promise-to-Christians.html>.

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and it filled the entire house in which they were. <sup>3</sup>Then there appeared to them tongues as of fire, which parted and came to rest on each one of them. <sup>4</sup>And they were all filled with the Holy Spirit and began to speak in different tongues, as the Spirit enabled them to proclaim.

<sup>5</sup>Now there were devout Jews from every nation under heaven staying in Jerusalem. <sup>6</sup>At this sound, they gathered in a large crowd, but they were confused because each one heard them speaking in his own language. <sup>7</sup>They were astounded, and in amazement they asked, "Are not all these people [the Apostles] who are speaking Galileans?" <sup>8</sup>Then how does each of us hear them in his own native language? <sup>9</sup>We are Parthians, Medes, and Elamites, inhabitants of Mesopotamia, Judea and Cappadocia, Pontus and Asia, <sup>10</sup>Phrygia and Pamphylia, Egypt and the districts of Libya, near Cyrene, as well as travelers from Rome, <sup>11</sup>both Jews and converts to Judaism, Cretans and Arabs, yet we hear them speaking in our own tongues of the mighty acts of God."<sup>26</sup>

Put simply, the Apostles spoke fluently in different languages, ones they never had studied, and each person listening to them understood what was said in his or her own native language. That each Apostle could convey the message in different languages, and that each listener could understand the other regardless of the language spoken, meant the Christian message was a universal one, and could be conveyed in any language.

Here, then, is an important contrast with implications for studying the *Shari'a*. While Islam, like Christianity, proclaims a universal message, Islamic history knows no event like Pentecost. For one faith, the original language of its message matters. For the other faith, the message transcends the original medium of its expression.

Whether Arab or not, Muslims try to learn rudimentary Classical Arabic. To them, the proper way to comprehend completely the Qur'ān is in that language. It is not possible to translate the Qur'ān into any other language and call the resulting text an authentic "Qur'ān." This sacred text is to be read, recited, and heard in its original mode of expression. Any translation is an interpretation bearing the qualification (often in a subtitle) of "interpretation" or "translation." Only in the language in which Allāh chose to reveal the Message is the full, accurate, and complete meaning conveyed.

Catholic Christians simply do not approach the Bible in a like manner. Certainly, knowledge of Hebrew, Ancient Greek, or Latin is encouraged for laity and non-specialists, as it can broaden and deepen understanding of that sacred text. But, over the last 6 centuries, the Bible has been printed in over 2,000 languages.<sup>27</sup> It may be added that Buddhists, like Catholics, do not take that view of sacred texts, including the earliest ones of Theravada Buddhism, which were composed in Pāli (and are called the *Tipitaka*, or *Pāli Canon*, written down in Sri Lanka in the 1<sup>st</sup> century B.C. at the Fourth Buddhist

<sup>26</sup> See *The Acts of the Apostles*, 2:1-11, in THE CATHOLIC STUDY BIBLE 186-187 (New York, New York: Oxford University Press, 1990, New American Bible trans.). (emphasis added). See also *Sermon by a Sixth Century African Author*, in THE DIVINE OFFICE — THE LITURGY OF THE HOURS vol. II (Lenten Season & Easter Season), second reading for Seventh Week of Easter, Saturday, at 1005-1007 (New York, New York: Catholic Book Publishing Co., 1976) (stating: "The disciples spoke in the language of every nation. At Pentecost God chose this means to indicate the presence of the Holy Spirit: whoever had received the Spirit spoke in every kind of tongue.").

<sup>27</sup> See Beth Griffin, *Librarian Oversees Rare Collection of Bibles*, THE LEAVEN (Newspaper of the Archdiocese of Kansas City, Kansas) 4 June 2010, at 10.



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Council). To be sure, some monks, scholars, and practicing Buddhists study Pāli so as to read or chant the texts in the original. But, the message of these texts, too, is universal — catholic with a small “c.” Hence, for example, Tibetan monks read them in Tibetan.

As a further illustration of contrast, the relationship between the Qur’ān and Arabic is not analogous to the relationship between the sacred text of Sikhism and the original languages in which it was composed. That text is the *Adi Granth* (“First Book”), or *Sri Guru Granth Sahib*. Compiled initially in 1604 by the fifth of the 10 Sikh Gurus, Arjan Dev (1563-1606), and supplemented between 1704-1706 by the tenth one, Gobind Singh (1666-1708), it is written in Gurmukhi script.<sup>28</sup> This script, commonly called “Punjabi,” is used regardless of whether the passage (technically, hymn) originally was composed in medieval Hindi, Punjabi, or some other language such as Persian.<sup>29</sup> Following the passing of Guru Gobind Singh, as of 1708, the *Adi Granth* became the perpetual Guru for Sikhs, a fascinating transformation from a line of living, human Gurus to a single, scriptural one.<sup>30</sup> However, among all sacred scriptures in the world, the *Adi Granth* is unique in that it records passages from other faiths, namely, from Hinduism and Islam.<sup>31</sup> The Sikh text is “catholic,” then, in this sense of inclusiveness, and it was Guru Arjan Dev who insisted on the use of a uniform script, namely, Gurmukhi.

In any event, the obvious problem for prospective students of the *Shari’a*, and interested legal practitioners, be they Muslim or not, is that most of them do not know Classical Arabic — and, frankly, never will. For English-speaking law students and lawyers, the problem is acute: few of them ever are likely to allocate the years of time required to master that beautiful language. Even if they would like to, they do not have the time. To some of them, this reality is a “deal breaker.” Paralyzed with insecurity about their linguistic limits, they over-react, and abandon the effort to learn about Islamic Law. Alas, the perfect (knowing Classical Arabic) becomes the enemy of the good (learning about the *Shari’a* in English). The consequences are potentially dreadful.

The vast majority of Muslims, like their non-Muslim sisters and brothers, are not intransigent about how to approach the *Shari’a*. They agree it is perfectly appropriate to “interpret” the Qur’ān. They welcome the interest and enthusiasm of non-Muslims to learn a bit about their law, religion, and history. Yet, should the project be abandoned, then a vital bridge to building peace, tolerance, and understanding (learning the *Shari’a* and Islamic religion and history from which it is inseparable) never gets built. Put bluntly, to remain paralyzed poses a national security threat to the United States and other non-Muslim countries. Law students are supposed to be at the forefront of bridge builders within and across countries, not remain behind walls of ignorance and prejudice buttressed by a fear of imperfection. An “us-versus-them” mentality sets in, those walls become fortresses, miscalculations occur, and violence erupts (again).

<sup>28</sup> “Guru” typically is translated as “teacher.” It comes from two words, “gu” (darkness) and “ru” (light). See W. OWEN COLE & PIARA SINGH SAMBHI, *THE SIKHS — THEIR RELIGIOUS BELIEFS AND PRACTICES* 50 (New York, New York: Routledge, 1978). [Hereinafter, *THE SIKHS*.] Hence, a Guru is “one who delivers a person from ignorance by giving him the message which liberates and the technique to realize it.” *Id.* at xxii.

<sup>29</sup> See *THE SIKHS*, *supra*, at 50.

<sup>30</sup> See *THE SIKHS*, *supra*, at 43.

<sup>31</sup> See *THE SIKHS*, *supra*, at 52.

## Introduction: Ten Threshold Issues

### [5] SPHERE OF APPLICATION OF SHARI’A?

To whom and when is Islamic Law applicable? The message of Islam and disciplines of the *Shari’a* purport to be for all time, place, and people. Universally applicable, the precepts of Islam, and the *Shari’a* at least in the sense of the personal obligations it establishes, such as the Five Pillars, bind all Muslims, regardless of when or where they live. This fact intimates there are two dimensions to discerning the scope of the *Shari’a*.

First, is the person a Muslim or a non-Muslim? Generally, the *Shari’a* is not imposed on non-Muslims. But, depending on the country and matter at issue, it may be. For example, non-Muslims are expected to respect the Islamic legal obligation not to drink alcohol when living or traveling in the Kingdom of Saudi Arabia. Should they commit the crime of drinking alcohol (*shurb al-khamr*), they risk having imposed on them a *Shari’a* punishment (specifically, a “hadd,” or “limit,” sanction — flogging — which is associated with a *haqq Allāh* offense, or “claim of God”). As another example, a non-Muslim doing business in a Muslim country with Muslims may want, or even have, to respect *Shari’a* rules on banking and financial transactions, particularly as they concern interest (*ribā*).

Second, in what jurisdiction does the person, Muslim or non-Muslim, reside? Muslim countries can be divided into six categories in terms of whether, and how, they adhere to the *Shari’a* on matters in the public sphere, such as Contracts, Property, Business Associations, Banking and Finance, Family Law, and Criminal Law. Consider the diversity in the Middle East, South Asia, and Far East:

#### (1) Officially Islamic Country, but Secular Legal System —

Islam is the official religion of the country. But, the *Shari’a* plays little (if any) role in the legal life of the country. Islamic Law affects the private lives of Muslims, such as adherence to the Five Pillars, to the extent they are devout practitioners. Examples include Iraq before 2005.

#### (2) Islamic Majority Country, but Secular Legal System —

Islam is the official religion of a majority of people in the country. But, there is no official state religion. The *Shari’a* plays little (if any) role in the legal life of the country. Again, it affects the private sphere, to the extent individual Muslims prefer. Examples include Jordan and Syria.

#### (3) Secular Country and Legal System —

Nothing is mentioned in the Constitution of the country about Islam as a religion or the *Shari’a* as a legal system. Once again, adherence to the personal obligations associated with Islamic Law is regarded as a private matter. An example would be Turkey. Likewise, Iraq under Saddam Hussein was the most militantly secular country in the Arab Muslim World.

#### (4) Islam is the Basis for Some Law —

The country is all or majority Muslim, and Islam may or may not be declared as the official state religion. The legal system uses the *Shari’a* in certain areas. Thus, Islamic Law governs not only the private sphere, but also some aspects of the public life. For example, Israel and Palestine adhere to the Millet System on matters of Personal Status. Under the secular Constitution of India, the minority Muslim community is permitted to follow Islamic Family Law.

#### (5) Islam is Part of a Mixed Legal System —

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Again the country is all or majority Muslim, and Islam may or may not be propounded as the official religion. The legal system is mixed, in that it has features from Common Law, Civil Law, and Islamic Law. Depending on the country, the *Shari'a* component in the legal system is increasingly prominent. Here again, Islamic Law matters in both the private and public spheres. Mixed, or hybrid legal systems characterize almost all Muslim countries on the Indian Subcontinent and in East Asia. They include Bangladesh, Brunei, Indonesia, Malaysia, and Pakistan.

### (6) *Islam is the Legal System* —

Again the country is all or majority Muslim, but Islam almost certainly is the officially recognized state religion. Islam is the law itself, that is, the *Shari'a* is the “law of the land.” It is supplemented by governmental decrees of one form or another, but only when and to the extent necessary. Consequently, Islamic Law affects private behavior, plus all aspects of public life. The Kingdom of Saudi Arabia and Libya are examples. Indeed, adorning the green flag of the Kingdom is the *Shahada*. Certain violent extremist groups, most notoriously *Al Qaeda*, seek to impose the *Shari'a* in areas under their control or influence.

Table I-1 summarizes the two dimensions of the question of applicability of Islamic Law.

The Table also can be used diagonally, that is, to consider the applicability of the *Shari'a* to Muslims in a Muslim country entering into transactions with non-Muslims in a non-Muslim country (or vice versa). For example, does the *Shari'a* apply to a contract or banking transaction between a Muslim in Saudi Arabia and a non-Muslim in England? The answer is “it depends.” First, the Muslim party may prefer the transaction comport with Islamic Law, for example, have no interest (*ribā*), and the British party may agree. Alternatively, the British party may insist on non-Islamic rules (such as English banking law), which allow for interest. In this latter instance, the transaction still would be legally valid in Saudi Arabia. But, in the event of a dispute between the parties, a *Shari'a* court would not enforce the deal.

### [6] APOLOGY FOR *SHARĪ'A*?

Two aspects are missing from *Understanding Islamic Law (Shari'a)*, and intentionally so. First, this book is not an apology for Islam or the *Shari'a*. In modern parlance, “apology” connotes a statement of sorrow, sometimes coupled with an explanation. The Latin root of the term “apology” refers to offering a reasoned defense of a proposition. The point here is not to defend Islam and the *Shari'a* against any and all challenges.

Yet, this book is not a mere regurgitation of Islamic legal precepts. To the contrary, it endeavors to show the reasons for them. Often, these reasons are impressive, appealing in an ecumenical sense, and even persuasive. Credit must be given where credit is due, and all the more so if doing so contributes to dialogue among faiths and legal systems by spotlighting areas of agreement and narrowing points of disagreement.

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Table I-1:  
Applicability of the *Shari'a*

Country →	Muslim Country in which the <i>Shari'a</i> is All or Part of the Legal System		Non-Muslim Country
	↓		
Muslim	The <i>Shari'a</i> is applicable in both the public and private spheres.		The <i>Shari'a</i> is applicable in the private sphere, to the extent the individual seeks to follow it.
Non-Muslim	The <i>Shari'a</i> is not applicable in the private sphere, but may be applicable to certain transactions or events (e.g., contracts, banking, and certain criminal matters) in the public sphere.		The <i>Shari'a</i> is not applicable.

It is appropriate to emphasize reason in a book on Islamic Law. Not to do so is a terrible disservice to this sacred legal system. Reason — the application of the intellect manifest through non-violent discourse — has been a part of Islam since the Prophet Muhammad received the message of the Qur'ān from Allāh. *Surah* (chapter) 16, *ayah* (verse) 125 of the Qur'ān states clearly:

[Prophet Muhammad], call people to the way of your Lord with wisdom and beautiful teaching. Argue with them in the most courteous way, for your Lord knows best who has strayed from His way and who is rightly guided.<sup>32</sup>

That *surah* 16 is a Meccan *surah*, meaning (*inter alia*) it was revealed to Muhammad early on, before the *Hijra*, is all the more evidence that reason is an innate part of Islam. Of course, the use of reason has ebbed and flowed in Islam, as in all religions. At different times, and led (sometimes misguided) by different leaders, reason has been de-emphasized at the expense of faith. At other times, the opposite has occurred.

To my mind, reason and faith are inseparable, as Pope John Paul II beautifully points out in his September 1998 Encyclical Letter, *Fides et Ratio*.<sup>33</sup> His successor, Pope Benedict XVI (1927-), calls for a re-balancing of faith and reason in Islam, with greater emphasis on reason, even independent reasoning (*ijtihad*). Many observers view this call as provocative, particularly in respect of the September 2006 address at Regensburg

<sup>32</sup> QUR'AN, *supra* 16:125 at 174 (emphasis added).

<sup>33</sup> See Encyclical Letter, *Fides et Ratio*, of the Supreme Pontiff John Paul II to the Bishops of the Catholic Church on the Relationship Between Faith and Reason (14 September 1998), posted at [www.vatican.va](http://www.vatican.va).



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University, Germany.<sup>34</sup> In that speech, the Holy Father quotes, without endorsing, a Byzantine ruler. The quote and the key paragraphs around it are as follows:

... I read the edition by Professor [Adel] Theodore Khoury (Münster) [a German Catholic theologian and expert on Islam (1930-)] of part of the dialogue carried on — perhaps in 1391 in the winter barracks near Ankara — by the erudite Byzantine emperor Manuel II Palaiologos (1350-1425) and an educated Persian on the subject of Christianity and Islam, and the truth of both. It was presumably the emperor himself who set down this dialogue, during the siege of Constantinople between 1394 and 1402; and this would explain why his arguments are given in greater detail than those of his Persian interlocutor. The dialogue ranges widely over the structures of faith contained in the Bible and in the Qur'an, and deals especially with the image of God and of man, while necessarily returning repeatedly to the relationship between — as they were called — three "Laws" or "rules of life:" the Old Testament, the New Testament and the Qur'an. It is not my intention to discuss this question in the present lecture; here I would like to discuss only one point — itself rather marginal to the dialogue as a whole — which, in the context of the issue of "faith and reason," I found interesting and which can serve as the starting-point for my reflections on this issue.

In the seventh conversation . . . edited by Professor Khoury, the emperor touches on the theme of the holy war. The emperor must have known that surah 2, 256 reads: "There is no compulsion in religion." According to some of the experts, this is probably one of the surahs of the early period, when Mohammed was still powerless and under threat. But naturally the emperor also knew the instructions, developed later and recorded in the Qur'an, concerning holy war. Without descending to details, such as the difference in treatment accorded to those who have the "Book" and the "infidels," he addresses his interlocutor with a startling brusqueness, a brusqueness that we find unacceptable, on the central question about the relationship between religion and violence in general, saying:

"Show me just what Mohammed brought that was new, and there you will find things only evil and inhuman, such as his command to spread by the sword the faith he preached."

The emperor, after having expressed himself so forcefully, goes on to explain in detail the reasons why spreading the faith through violence is something unreasonable. Violence is incompatible with the nature of God and the nature of the soul. "God", he says,

"is not pleased by blood — and not acting reasonably . . . is contrary to God's nature. Faith is born of the soul, not the body. Whoever would lead someone to faith needs the ability to speak well and to reason properly, without violence and threats. . . . To convince a reasonable soul, one does not need a strong arm, or weapons of any kind, or any other means of threatening a person with death. . . ."

The decisive statement in this argument against violent conversion is this: not to act in accordance with reason is contrary to God's nature. The editor, Theodore Khoury, observes: For the emperor, as a Byzantine shaped by Greek philosophy, this statement

<sup>34</sup> For one synopsis of the controversy, see *Regensburg Lecture*, WIKIPEDIA, posted at [http://en.wikipedia.org/wiki/Regensburg\\_lecture](http://en.wikipedia.org/wiki/Regensburg_lecture).

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is self-evident. But for Muslim teaching, God is absolutely transcendent. His will is not bound up with any of our categories, even that of rationality. Here Khoury quotes a work of the noted French Islamist R. Armaldez, who points out that Ibn Hazm went so far as to state that God is not bound even by his own word, and that nothing would oblige him to reveal the truth to us. Were it God's will, we would even have to practice idolatry.

At this point, as far as understanding of God and thus the concrete practice of religion is concerned, we are faced with an unavoidable dilemma. Is the conviction that acting unreasonably contradicts God's nature merely a Greek idea, or is it always and intrinsically true? I believe that here we can see the profound harmony between what is Greek in the best sense of the word and the biblical understanding of faith in God.<sup>35</sup>

Manifestly, the speech was drafted by an academic at heart for scholarly debate about faith, reason, and violence.<sup>36</sup>

One reaction to the speech was:

It is not so much that what he says is controversial, but that people find it painful to hear.<sup>37</sup>

This reaction is an intelligent, nuanced one. There were less open-minded and even violent responses, despite Pope Benedict adding in a footnote to the controversial quotation:

In the Muslim world, this quotation has unfortunately been taken as an expression of my personal position, thus arousing understandable indignation. I hope that the reader of my text can see immediately that this sentence does not express my personal view of the Qur'an, for which I have the respect due to the holy book of a great religion. In quoting the text of the Emperor Manuel II, I intended solely to draw out the essential relationship between faith and reason. On this point I am in agreement with Manuel II, but without endorsing his polemic.<sup>38</sup>

The broader, deeper, and indispensable point made in *Fides et Ratio*, and exemplified in the Regensburg speech, is a courageous one: faith without reason leads to blind adherence, and even extremism; and reason without faith is a cold intellectual cul-de-sac that historically has justified hideously inhuman acts. Thus, as Pope John Paul II put it metaphorically, faith and reason are two wings of the same bird, without which the bird cannot fly, but with which it can soar.

<sup>35</sup> Papal Address at University of Regensburg, "Three Stages in the Program of De-Hellenization," Apostolic Journey of His Holiness Benedict XVI to München, Altötting and Regensburg, 9-14 September 2006, Meeting with the Representatives of Science, Lecture of the Holy Father, Aula Magna of the University of Regensburg (12 September 2006), Faith, Reason and the University — Memories and Reflections, posted at <http://www.zenit.org/article-16955?l=english> (official Vatican translation) (footnotes omitted, emphasis added, minor formatting and spelling changes). [Hereinafter, Regensburg Address.] The Address also is posted at [www.vatican.va/holy\\_father/benedict\\_xvi/speeches/2006/september/documents/hf\\_ben-xvi\\_spe\\_20060912\\_university-regensburg\\_en.html](http://www.vatican.va/holy_father/benedict_xvi/speeches/2006/september/documents/hf_ben-xvi_spe_20060912_university-regensburg_en.html).

<sup>36</sup> Quoted in *A Chapter of Accidents*, THE ECONOMIST, 65, 66, 16 May 2009.

<sup>37</sup> *A Chapter of Accidents*, THE ECONOMIST, 65, 67, 16 May 2009 (quoting a "conservative Catholic layman in Rome").

<sup>38</sup> Regensburg Address, *supra*, at fn. 3.

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Extremism is antithetical to flight. It kills the bird. Yet, among some liberal, elite intellectual circles, it is popular to eschew use of the word "extremism." Former British Foreign Secretary David Miliband (1965-) argued in a May 2009 speech to the Oxford Centre for Islamic Studies that habitual use of the distinction between "moderates" and "extremists" among Muslim political and religious movements results in lazy stereotypes.<sup>39</sup> Worse yet, the distinction obfuscates a variety of national territorial struggles with pan-Islamist *jihādī* struggles. Are Uyghur Muslims in Xinjiang Province, China, Kashmiri Muslims in northwest India and Pakistan, and Chechnyan Muslims in the Russian Caucasus all part of a broad *Al Qaeda* movement? Or, are they more an eclectic and diverse group of nationalist fighters? Ostensibly, the question is academic. They are violent, and commit heinous terrorist acts. But, if they are to be dealt successfully and justly, then the question matters. How to deal with them depends partly on who they are and how they think.

The Foreign Secretary makes a valid point. Nevertheless, I do rely on the distinction between "moderates" and "extremists" in various parts of this book. A person entirely unwilling to entertain the possibility of synthesizing faith and reason is an "extremist" in the lexicographic meaning, given by the *Oxford English Dictionary*, of the term: "lacking restraint or moderation," "advocating immoderate measures," "outermost," "furthest from the center," "situated at either end." Its synonyms include "rigid," "harsh," "draconian," "uncompromising," "drastic," "outrageous," and "beyond the pale." As do all faiths at one point or another in history, Islam is bedeviled by a small minority of "extremists." That is no secret, including to Muslims, and to use euphemisms is to commit the same blunder: obfuscation of the truth.

### [7] ATTACK ON *SHARĪʿA*?

The second missing dimension is attack. This book is not an attack on Islam or the *Sharīʿa*. A prospective reader hoping for a polemical account, or castigation, of the religion and sacred legal tradition it has spawned will be disappointed. I have no interest in the level of discourse about Islam characteristic typical of the mainstream American media. Even after the horrors of 9/11 and the blunders in Iraq and Afghanistan, in the United States and throughout the English-speaking world, the inattentiveness, misunderstanding, ignorance, and prejudice toward Islam and its legal system remain dangerously high and widespread. The "danger" is that inattentiveness, misunderstanding, ignorance, and prejudice lead to clashes between civilizations. Given the destructive potential of modern weaponry, the world cannot afford such clashes. Our survival depends in part on proving that the thesis of Samuel Huntington, in *The Clash of Civilizations*, is wrong, or cannot be allowed to come true. Writing a tract would be orthogonal to the common interests of Muslims and non-Muslims alike.

That is not to say this book is uncritical of Islam or Islamic Law. If I am not an antagonist against Islam and the *Sharīʿa*, I also am not a cheerleader. There are plenty of points at which the book offers candid observations. The two leading examples, and the ones about which I cannot pretend to be objective, are religious freedom and the treatment of women. Bluntly put, on these topics, many parts of the Muslim world are backward, and some of the trends therein are depressing if not outrageous. Many of my Muslim friends not only agree with these points, but argue far more articulately than I do in

<sup>39</sup> See *Engaging Islamists — Miliband Asks Right Questions as Muslims Await Obama*, FINANCIAL TIMES, 22 May 2009, at 8.

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first-rate research publications like the *Arab Human Development Report*.

### [8] IMPORTANCE OF UNDERSTANDING *SHARĪʿA*?

The purpose of this book is aptly conveyed by the first word of the title — "Understanding." The book is supposed to be a reasonably comprehensive and balanced treatment of a sacred legal system and the religion and history associated with that system. This treatment is designed for the student of the *Sharīʿa*, whether she is enrolled formally in a law school or other graduate program, or has moved on into professional legal practice or the academy.

Unless the world is content with rising tensions and deeper schisms that too often yield the poisons of incivility and violence, more understanding is needed than currently exists about Islam. Non-Muslims in the United States generally have little knowledge of Islam, and concomitantly, some prejudice against it. In January 2010, Gallup published *Religious Perceptions in America*. The report contains an in-depth analysis of the attitudes of in the United States toward Muslims and Islam. Among its most striking findings are:<sup>40</sup>

- Of the four faiths studied, Judaism, Christianity, Islam, and Buddhism, Islam elicits the most negative views. Over half of Americans (53 percent) state that their opinion of Islam is "not favorable at all" (31 percent) or "not too favorable" (22 percent).
- Nearly two-thirds of Americans (63 percent) confess they have "very little knowledge" of Islam (40 percent), or "none at all" (23 percent).
- Americans view Islam more negatively than they view Muslims, suggesting an ability to distinguish between a religion and its adherents. But, Americans are more than twice as likely to hold negative feelings toward Muslims than toward Jews, Christians, or Buddhists. Nearly half of Americans (43 percent) confess they are "a little" prejudiced toward Muslims. Almost 1 in 10 Americans (9 percent) say they harbor "a great deal of prejudice" against them.
- In respect of individual prejudice, Americans who do not know a Muslim are twice as likely to say they are greatly prejudiced toward Muslims. Knowing the name of the Prophet of Islam (Muhammad) makes an American twice as likely to have "a great deal of prejudice" toward Islam.
- Notably, neither other faiths (except for their extreme fringes) nor adherence to them is to blame for prejudicial attitudes. A key variable associated with "a great deal of prejudice" by Americans against Muslims is absence (in terms of attendance less than once a week) from church or other religious service. In contrast, Americans who attend a service more than once a week are more than twice as likely to say they feel no prejudice against Muslims.
- On religious freedom, two-thirds of Americans (66 percent) feel Muslims are not accepting of other religions. A similar proportion (68 percent) disagrees with the proposition that the religious beliefs of Christians and Muslims are basically the same.
- On women and diversity, the vast majority of Americans (81 percent) do not agree that most Muslims believe women and men should have equal rights.

<sup>40</sup> See Gallup, *Religious Perceptions in America*, Executive Summary 4-5 (2009).



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Nearly half (47 percent) of Americans think most Muslims accept others from different races.

Lest it be thought this negativity is an American phenomenon, consider the result of an October 2010 opinion poll of Germans by ARD state television: 37 percent of Germans agreed with the proposition that " 'Germany without Islam' would be a better place."<sup>41</sup>

The mirror-image of many of these points also seems to be true. Muslims, both in the United States and around the world are not always familiar with those other faiths. That is especially true if they do not live in close proximity to persons of other faiths. This ignorance is a breeding ground for stereotypes and prejudice. One consolation in the Gallup findings is that nearly three-quarters of Americans (70 percent) agree that most Muslims want peace. There is reason to believe most Muslims would say the same about most Americans, and thus both groups would adduce the ability to differentiate individuals from governments, and people from policies.

My professional station in life is a teacher. A teacher is supposed to explain, and in doing so probe with a critical intellect and compassionate heart. The explanation is supposed to stimulate the student, which occurs only if the teacher is passionate about the subject matter. I am passionate about the study of Islam and the *Shari'a*. That is not to say I am a master of the subject — hardly.

My primary area of scholarship is International Trade Law. I know well, in my head and heart, that I do not have the confidence or command in writing about the *Shari'a* that I sense (perhaps foolishly so!) in Trade. That is, I am more cognizant of what I do not know in Trade than in Islamic Law. After all, through the 1,600 years since the advent of Islam, thousands upon thousands of scholars (who know Arabic, which I do not, aside from a few tutorials and limited vocabulary) have devoted their lives to the study of Islamic Law. I am not, and never will be, in their league.

Nevertheless, my sense of "mission" to write this book has never wavered, and indeed increased with each day of work on the project. The problem with that elite league is it has not engaged the contemporary English-speaking law student. Treatises on the *Shari'a*, written in Arabic, stacked away on some dusty shelf at a school of Qur'anic thought in Damascus, are inaccessible to this student. The grand scholarship of Islamic scholars through the ages plays little role in the life of the average American law student. That, by the way, is ironic. Many Anglo-American legal doctrines originate (directly or indirectly) in Islamic Law concepts, or bear an uncanny resemblance to them.

So, there is a choice: be paralyzed with fear of what I do not know, and do nothing, or try to bridge the gap with what I do know and can readily learn in a limited span of time. The teacher in me, moved by the critical period in world history in which my students are destined to practice, impelled me to write this book. In making that choice, I faced a stark truth: I cannot be objective. Indeed, I do not believe value-free scholarship is possible, or even desirable. C.S. Lewis (1898-1963) persuaded me of this truth through his 1944 book, *The Abolition of Man*.<sup>42</sup>

<sup>41</sup> Quentin Peel, *Merkel Needs to Reconcile the Economic and Political Realities*, FINANCIAL TIMES, 19 October 2010, at 2.

<sup>42</sup> See C.S. LEWIS, *THE ABOLITION OF MAN — REFLECTIONS ON EDUCATION WITH SPECIAL REFERENCE TO THE TEACHING OF ENGLISH IN THE UPPER FORMS OF SCHOOLS* (1944, New York, New York: Harper Collins Publishers, Inc., 2001 ed.).

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### [9] COMPARED TO WHAT?

Islamic Law as taught in American and other English-medium law schools is not a course in catechesis, though it certainly can have the positive benefit of helping students think through their own questions about religion. It is not, strictly speaking, a trade course in the sense of preparing students to practice Islamic Law, though it certainly can have that positive benefit. Instead, Islamic Law is a course that falls under the rubric of "Comparative Law." For most of the post-Second World War era, that rubric was far narrower than it sounds: it meant comparing American Law to Civil Law, *i.e.*, it was a Euro-centric label under which most courses examined French or German Law.

In more recent decades, "Comparative Law" has come to encompass courses in Chinese Law, Japanese Law, the Law of Latin American countries, and the Law of Indigenous Peoples. That is a right and proper development, if for no other reason than to correct the prior imbalance in favor of the western European continent. An additional supporting rationale is the rising cultural, economic, and political importance of the non-western world. No law student, regardless of where he or she practices, is immune from influences from the "Third World."

It is equally right and proper that Islamic Law has been incorporated into the Comparative Law curriculum of a large and growing number of American and English-medium law schools. It may well be the case that Islamic Law is increasingly mainstreamed into this curriculum, and viewed by Deans and faculties alike not as an "exotic" course, but rather as fairly important to producing educated, globally-minded lawyers — the way, for example, Chinese Law seems to be.

Yet, this happy trend begs a question: to what should Islamic Law be compared? The question is asked in any Comparative Law course. What, for instance, is the reference point for examining Chinese Law? At one level, it is important not to dwell on the question. The highest and noblest goal of a Comparative Law course is to develop a sense of empathy for the other legal system. That requires an effort to see the other legal system from within, and view it as lawyers and scholars in that legal system would view it. But, in a practical sense, a frame of reference — a starting point — always is helpful. It is in the nature of the legal mind to examine the unfamiliar by relating it to the known.

I answer the question of what the *Shari'a* ought to be compared with as I suspect most lawyers and legal scholars do: I start with what I know. But, Islamic Law is a sacred legal system. It comes from God (Allāh), not just a secular parliament or court. That means the *Shari'a* is best compared not only with a secular legal system, but also another sacred tradition. To compare an Islamic legal rule only with American law is a recipe for under-appreciating the richness and depth of *Shari'a*, with no disrespect intended to American law. The dimension of the Divine cannot be extricated from Islamic Law, whereas it can and often is in respect of American Law. (Whether it should be is another, and hotly debated, question.)

Setting aside the insight most authors get from writing a book — the more they learn, the more they realize what they do not know — my familiarity is with a little bit of American Law and Catholic Christianity. Stress should be placed on "a little bit." Much as I love and respect them, I do not claim to know either of these broad and deep areas well. I am fairly certain that in the pages of this book, experts in these fields, along with authentic scholars of the *Shari'a*, will find I have goofed up various points. I apologize,



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of course, in advance, and assure that no disrespect is intended. I welcome corrections for a Second Edition. Yet, the facts remain I am educated in the American legal system, practiced at the Federal Reserve in New York, and am a (flawed) Roman Catholic. The American legal and Catholic Christian paradigms are the ones in which my mind, body, and soul operate everyday. I neither can nor wish to leave them at home when I go to work. They impart the reference points for comparisons with Islamic Law.

### (1) Demographics Matter

Certainly, a less personally expedient, and more pragmatic, defense of comparing the *Shari'a* with American Law, and with Catholic Christianity, exists. Consider the following three arguments. First, demographics matter. They drive a great deal of life. There are now 1.57 billion Muslims in the world:<sup>43</sup>

- 2.5 million Muslims are in the United States, accounting for 0.8 percent of the American population, and 0.2 percent of the global Islamic population.
- 315.3 million Muslims are in the Middle East and North Africa, accounting for 91.2 percent or more of the people in these regions, but just 20.1 percent of the global Islamic population.
- 972.5 million Muslims are in the Asia — Pacific region, accounting for over 61.9 percent of the global Islamic population.
- The largest Islamic country in the world is Indonesia, with roughly 220 million people, most of whom are Muslim. India is home to between 180-250 million Muslims. Bangladesh and Pakistan boast populations, almost all of which are Muslim, of about 170 million each. If the numbers of Muslims on the Indian Subcontinent, specifically, Bangladesh, India, and Pakistan, are summed together, they exceed the number of Hindus in India.
- Undergoing rapid population growth, Pakistan soon may be the fourth largest country in the world, following China, India, and the United States.<sup>44</sup> But, its decrepit infrastructure and corrupt political system render it incapable of supporting that population with a decent standard of living.
- With about 6.8 billion people on the planet, about one out of every four persons, or 22.9 percent of the population of the world, is a Muslim.
- Of the total Islamic population in the world, between 10-13 percent are *Shi'ites*, with between 68-80 percent of them living in Iran, Iraq, India, and Pakistan, and the remaining 87-90 percent of Muslims are *Sunnis*.

It must be added that two out of five people in the Arab world live on less than U.S. \$2 per day.<sup>45</sup> This last statistic is poignant in light of the oft-remarked link between poverty, or oppression more generally, on the one hand, and vulnerability to the evil temptation of

<sup>43</sup> Unless otherwise noted, these data are from an October 2009 study by the Pew Forum on Religion & Public Life, *Mapping the Global Muslim Population: A Report on the Size and Distribution of the World's Muslim Population*, and are based on research in over 200 countries. See <http://pewforum.org>. For further statistics, see, e.g., *CIA World Factbook*, posted at [www.cia.gov/library/publications/the-world-factbook/](http://www.cia.gov/library/publications/the-world-factbook/).

<sup>44</sup> See [www.businessinsider.com/10-countries-on-the-verge-of-a-demographic-crisis-2010-2#pakistan-167-billion-gdp-2](http://www.businessinsider.com/10-countries-on-the-verge-of-a-demographic-crisis-2010-2#pakistan-167-billion-gdp-2). (The data are as of June 2010.)

<sup>45</sup> *Waking From Its Sleep*, THE ECONOMIST, 25 July 2009, at 9.

## Introduction: Ten Threshold Issues

extremism, on the other hand. Saudi Arabia is a case in point. Like Pakistan and Egypt, it is experiencing rapid population growth.<sup>46</sup> Over 60 percent of the Saudi population is less than 30 years old. But, it lacks the robust educational and job opportunities to match the aspirations of its young people, a disconnect that is all the more excruciating given the tight cultural, social, and religious milieu in the Kingdom.

There also are 1.13 billion Roman Catholics, and a further roughly 1.1 billion Protestants. Thus, one out of every three persons is Christian, with nearly out of ever five being Catholic or Protestant. By comparing Islam and Catholic Christianity, over 40 percent of the professed faith of the world — nearly half — is covered. Insofar as adherents to Protestantism are familiar with Catholicism, the figure rises to almost 60 percent, or nearly two out of every three persons. In any work on Comparative Law, the opportunity to have that work resonate with such large percentages of the global community is rare.

As an important aside, one obvious inference from the above demographic statistics is that the tendency to equate "Arab" and "Muslim," fueled by mainstream media coverage of Islam in the non-Muslim western world, is erroneous. Indeed, it can prove insulting to Arab and non-Arab Muslim communities around the world. The Muslim population of China probably exceeds the entire population of any Arab country.

Note some basic terminology: an "Arab" is a speaker of Arabic, regardless of his or her faith. The word "Islam" means "submission." It is properly and specifically used to mean submission to the Will of Allāh. A "Muslim" is anyone who follows "Islam," and thus who seeks to submit to the Will of Allāh. To submit to that Will, a Muslim must exert effort, or struggle, that is, practice a "*jihad al-akbar*," to discern what it is God wants from him or her. Manifestly, not all Arabs are Muslims. Conversely, not all Muslims are Arabs. Indeed, the vast majority of Muslims are not Arabs. Rather, they make their home in East and South Asia. A large and growing number of Catholic Christians also make their home in East and South Asia. And, American influence — while arguably in relative decline vis-à-vis other powers — still is pre-eminent. It will be for decades. Thus, to study the *Shari'a* with some comparisons to Catholic Christianity and American Law "works" to appreciate a bit about Islam in a pluralistic and somewhat American-oriented environment.

To be sure, Arabs play an important role in Islamic history. It was on the Arabian Peninsula the Qur'ān was revealed, in Arabic. It is to the Arabian Peninsula every Muslim goes, or tries to go, on the *Hajj* pilgrimage. Consequently, all Muslims have a special reverence for Arabs, Arab lands, and Arabic. But, there are rivalries, sometimes fierce and violent, between Arabs and non-Arab Muslims, such as Persians or Turks. Ironically, of the three largest countries in the Middle East — Iran, Turkey, and Egypt — only one of them, Egypt, is Arab. The demographic significance of Egypt is partly in its population density. As Herodotus said, Egypt is the gift of the Nile. Nearly all of its population lives around this river. Omitting the desert from the calculation makes Egypt the most densely populated place on earth, with 2,000 people per square kilometer, double that of Bangladesh.<sup>47</sup>

<sup>46</sup> See [www.businessinsider.com/10-countries-on-the-verge-of-a-demographic-crisis-2010-2#saudi-arabia-380-billion-gdp-4](http://www.businessinsider.com/10-countries-on-the-verge-of-a-demographic-crisis-2010-2#saudi-arabia-380-billion-gdp-4). (The data are as of June 2010.)

<sup>47</sup> See [www.businessinsider.com/10-countries-on-the-verge-of-a-demographic-crisis-2010-2#egypt-188-billion-gdp-3](http://www.businessinsider.com/10-countries-on-the-verge-of-a-demographic-crisis-2010-2#egypt-188-billion-gdp-3). (The data are as of June 2010.)

(2) History Matters

As for the second defense of the comparative undertaking here, it is this: history matters. It shapes our present consciousness and future dispositions. Christianity has known Islam since the birth of that great faith. Much of the early interaction was unpleasant, indeed violent. To this day, Christianity still is getting to know Islam better, and recover from past misinterpretations and misunderstandings.

The Catholic Church has global interests, not only in the doctrinal sense of proclaiming a universal message of salvation, but also in the practical sense of protecting Christian minorities in Muslim lands. As for the United States, in the post-Second World War era, or actually just before it with the discovery of oil on the Arabian Peninsula in the 1930s, it came into direct, sustained interaction with the Arab Muslim world. Since then, the contacts have metastasized throughout the Islamic world.

(3) Political Economy Matters

Third, political economy matters. It is about the grand issues of war and peace, and wealth and poverty. In the post-9/11 era, the United States must come to a peaceful accommodation with the Islamic world, and assist it in its continued economic development. The alternative is continued uneasy, unstable, and unpredictable relations.

As a (if not the) superpower, the United States has global interests. That is true whether the topic is energy and natural resources, democracy, nuclear proliferation, religious freedom, or women's rights. On virtually every topic of cross-border relevance, America cannot avoid Islam any more than Christianity can do so: Islam is a "fact on the ground," and a growing one at that.

Perhaps the greatest global interest America has is security. Security is unattainable when a sizeable percentage of the population of the world feels a sense of oppression and, rightly or wrongly, lists Americans or Christians as among the causes. Ironically, through more and richer comparisons among the *Shari'a*, American law, and Catholic Christianity, on many such topics, and on security itself, the three parties might well find themselves in agreement, even alliance. Americans and Muslims, as well as Christians and Muslims, know each other as brothers and sisters. And, yet, they do not. It is in their collective self-interest to do so.

[10] OTHER REASONABLE COMPARISONS?

I concede the argument that a better analogy than (1) Islamic Law-to-American Law and Islamic Law-to-Catholic Christian teaching would be (2) Islamic Law-to-Canon Law, (3) Islamic Law-to-Jewish Law, or (4) Islamic Law-to-Hindu Law. Indeed, what Jesuit Father John A. Hardon (1914-2000) writes of Canon Law easily be said of the *Shari'a*:

Canon Law is only an attempt to organize and systematize for prudential reasons the external aspects of what is essentially not juridical: *the will of God in its demands on the will of man*.<sup>49</sup>

Thus, when making comparisons, why not draw them directly to another sacred legal

<sup>49</sup> JOHN A. HARDON, S.J., *THE CATHOLIC CATECHISM — A CONTEMPORARY CATECHISM OF THE TEACHINGS OF THE CATHOLIC CHURCH* 336 (New York, New York: Doubleday, 1981) (emphasis added).

tradition? I offer two rather anemic answers.

First, my knowledge of Jewish and Hindu Law is woefully inadequate, and bested by only a marginal understanding of a few points in Canon Law. As the title connotes, the point of *Understanding Islamic Law (Shari'a)* is to understand Islamic Law. Comparisons to American law and Catholic Christian teaching are used to facilitate that understanding. Given my constraints, comparisons to other sacred legal systems would obfuscate matters and rightly subject the book to criticism.

Second, Canon, Jewish, and Hindu Law are of relatively limited applicability. The demographic and political economy factors render such a comparison relatively less compelling as a practical matter, however intellectually appealing they may be. Canon Law, which is the law of the Catholic Church itself, has its roots in the Council of Jerusalem (or Apostolic Conference), which occurred around 50 A.D. There are 1,752 canons. They govern ecclesiastical matters, particularly the actions of Bishops, who are responsible for all decisions in their dioceses and oversee the operations of their local churches. While there are a large number of Catholics in the world affected by that Law, the direct, daily impact is on the clergy and religious orders. The *Shari'a* is more expansive in scope than Canon Law, guiding not only Islamic clergy, but also extending into economic, social, and political realms. Perhaps this difference is based on the foundational sacred texts: while the New Testament of the Bible provides general guidelines and examples of virtue and sin, the Qur'ān specifies punishments for those sins and metes out inheritance in a specific way.<sup>50</sup>

There are approximately 14 million Jews in the world (with estimates ranging from 12 to over 17 million, based on different interpretations of who qualifies as a "Jew"), accounting for roughly 0.25 percent of the global population.<sup>50</sup> (To be sure, it is important to be mindful of the principle of human dignity in mind, and the Catholic Christian precept that each life is unique, unrepeatable, and of inestimable value. Hence, the importance of life must never be valued in a utilitarian calculation involving numbers.) Even Israel does not run itself entirely on Jewish Law.

As for Hindu Law, the majority population of India, the Hindus, are for the most part bound by the secular legal system of India guaranteed by the Constitution of that country and the principles of its founders, namely, Mahatma Gandhi (1869-1948) and Jawaharlal Nehru (1889-1964). Arguably India's finest post-Partition achievement is it is a home for adherents of all faiths, who live in relative peace alongside and integrated with one another, in the largest free-market democracy in the world.

A final point about comparisons is worth making. I try to avoid being profoundly stupid, though perhaps surrender an opportunity to be stunningly brave. That is, I eschew extending the comparison of the *Shari'a* along both the secular and sacred axes.

On the secular axis, I refer to "American" law, by which I mean the law of the United States at a federal or state level. Thus, I have resisted the temptation to use the term "Anglo-American" law, and thereby encompass the law of the United Kingdom. America received much law from England. England still provides America with legal inspiration.

<sup>49</sup> See JAMES A. BILL & JOHN ALDEN WILLIAMS, *ROMAN CATHOLICISM AND SHI'IT MUSLIMS: PRAYER, PASSION, AND POLITICS* 97 (Chapel Hill, North Carolina: University of North Carolina Press, 2002).

<sup>50</sup> See [www.adherents.com](http://www.adherents.com).



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Indubitably, there are comparisons and contrasts that are legitimate between Islamic and English law, but I best leave them to be drawn by others.

On the sacred axis, I dearly would like to include comparisons and contrasts to Protestant Christianity, at least as I understand it through mainstream denominations such as Anglicanism, Lutheranism, and Methodism. I occasionally do so in the classroom from the safety of standing behind the lecture podium. Yet, as with English law, I simply lack the competence to put these points in writing in any credible fashion. Consequently, at the risk of passing up some potentially edifying, and even obvious, comparisons and contrasts with Protestantism, I have erred on the side of caution. I would not want to perpetrate an intellectual injustice to my Protestant brothers and sisters. After all, it is quite enough of a task to try and get Islamic Law "right," and not do too much damage in rendering comparisons to Catholic Christianity and American Law.

I ask the reader to accept my limitations, and of course forgive my mistakes. I hope that in doing so, the reader — regardless of the faith she follows or legal jurisdiction in which she resides — still will find *Understanding Islamic Law (Shari'a)* to be an inclusive and thought-provoking text.

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## Chapter 1

### MUHAMMAD (PBUH) BEFORE PROPHETHOOD (570/571–610 A.D.)

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Let me tell you something that we Israelis have against Moses. He took us 40 years through the desert in order to bring us to the one spot in the Middle East that has no oil!

Golda Meir (1898-1978), 4th Prime Minister of Israel (1969-1974),  
Dinner in Honor of Willy Brandt, Chancellor, West Germany,  
10 June 1973 (as reported in *The New York Times*)

#### SYNOPSIS

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## § 1.01 PRE-ISLAMIC TIMES ON ARABIAN PENINSULA

## [A] Two Great Empires

The Prophet Muhammad was born in the year 570 or 571 A.D. in the midst of two great empires. To the west, the Roman Empire, now fully Christian and headquartered in Byzantium, was enjoying its last days of true glory. The lavish *Sassanid* Empire in the east spread all the way from Persia to India. Although much of the fighting occurred further north (near modern Syria and Iraq), Muhammad grew up in a time and place where the two powers battled constantly for control.

- *Sassanid* Persian Empire (224–651 A.D.)

Persia had been a source of consternation to Mediterranean powers since the time of the Ancient Greeks in 500 B.C. In 224 A.D., the *Sassanids* seized control over vast territory of the Parthian Empire (247 B.C.–224 A.D.), centered in Iraq and Iran, and held them until 651. *Sassanid* rule was characterized by a strong central government over a highly complex system of social organization. Along with the *Byzantines*, the *Sassanids* prized science, art and literature, and their Empire — the last pre-Islamic one in Persia — housed the greatest university of the day at Gundishapur.

- Byzantine Roman Empire (330–1453 A.D.)

The Roman Empire, led by Byzantine Emperor Justinian (483–565, reigning from 527–565), was prosperous, despite the fall of Rome itself, and the western part of the Roman Empire, in 476. The Byzantines saw themselves as the heirs of the empire built by Augustus (63 B.C.–14 A.D., reigning from 27 B.C.–14 A.D.). Although marred by frequent warfare, relations with the *Sassanid* Empire were stable, allowing an open exchange of culture and knowledge. Justinian commissioned legal scholars to research and reinstitute old Roman law through Christian eyes. Perhaps the single most influential legal document ever compiled, the *Corpus Juris Civilis*, was issued at his direction in 529. Widely considered the grandest building of the time, construction on the Church of the Holy Wisdom (*Hagia Sophia*) in Constantinople (Istanbul) also began at his behest.

## [B] Arabian Bedouin Society

The Arabian Peninsula lay to the south of the most intense fighting between the Roman and Persian Empires, though it was hardly immune from cultural influence. Most Arabs of the day were Pagan, while others adopted Christianity or Judaism from the Romans or Zoroastrianism from the Persians.

Bedouin society on the peninsula was comprised of Arab tribes. Each tribe consisted of several clans, which, in turn, broke down into family groups. People lived on the fringes of the Great Arabian Desert (which occupied the interior of the Peninsula), generally near a source of water. Tribal life was harsh and often violent, or in the terms of *Leviathan* (1651), by English political philosopher Thomas Hobbes (1588–1679), “nasty, brutish, and short.” Laws were rarely written down and justice often meant revenge.

Many settled on the western side of the Peninsula by the Red Sea to take advantage of the trade routes nearby. Ships from the Red Sea and Mediterranean Sea, and caravans from India converged in Northwestern Arabia. Mecca, where Muhammad was born, was a thriving commercial and cultural city. As the geographic midpoint on the road between Yemen (south) and Syria (north), it was the perfect trade center. Culturally, Mecca was an important pilgrimage site for many different religions. Pilgrims came from far and wide to worship at the Sacred House (*Ka’ba*) and numerous surrounding idols.

## [C] Muhammad, Hashim Clan, and Quraysh Tribe

Although from a religious perspective the tribe or clan of Muhammad are not relevant (all persons are equal before God (Allāh)), history of the Islamic Empire as well as the lineage of modern rulers speaks differently. Muhammad was born into the *Hashim* clan of the larger *Quraysh* tribe, one of the strongest and most respected tribes on the Arabian Peninsula. Edward Gibbon (1737–1794 A.D.), famed author of one of the greatest historical works ever written and Member of the British Parliament, *The Decline and Fall of the Roman Empire* (1776), points out:

He [Muhammad] sprung from the tribe of *Koreish* and the family of *Hashem*, the most illustrious of the Arabs, the princes of Mecca, and the hereditary guardians of the *Caaba* [*i.e.*, *Ka’ba*].<sup>1</sup>

This heritage gave Muhammad a certain amount of prestige and status among Arabs and later Muslims. Today, King Abdullah of the *Hashemite* Kingdom of Jordan derives power and legitimacy from his family’s direct link to the clan of Muhammad.

The *Hashim* clan name, taken from the great-grandfather of Muhammad, holds great significance itself:

‘Abd al-Muṭṭalib [the grandfather of Muhammad] was the son of Hāshim, whose name was ‘Amr; he was called Hāshim because he used to break up (*hashama*) bread for *tharid* [already-made bread that has been smashed up into small pieces, which in turn are blended into other dishes — a common and ancient practice on the Arabian Peninsula] for his people in Mecca and feed them with it.<sup>2</sup>

<sup>1</sup> EDWARD GIBBON, *THE DECLINE AND FALL OF THE ROMAN EMPIRE* 649 (1776) (New York, New York: Penguin Books, abridged version, 1980) (emphasis added). [Hereinafter, GIBBON.] The six volumes of this work originally were published between 1776 and 1788.

<sup>2</sup> THE HISTORY OF AL-JABARI (TA’RIKH AL-RUSUL WA’L-MULUK) vol. VI at 16 (Albany, New York: State of

This illustrates the clan's devotion to and protection of the city of Mecca and her people. Clan members understood they gained honor and respect by seeing to the needs of the people and caring for the sacred *Ka'ba*.

The full name of the Prophet is a map of his heritage: Muhammad Ibn Abdullah Ibn 'Abd Al-Muṭṭalib Ibn Hāshim. "Ibn" means "son," whereas "Abū," means "father." The word "Abd" means "slave," thus "Abdullah" means "slave of God." Thus, his entire name reads: Muhammad, Son of Abdullah, the slave of God, who is the son of 'Abd Al-Muṭṭalib, who is the son Hāshim. The name 'Abd Al-Muṭṭalib derives from pagan times.

The ancestors and immediate family of Muhammad embody were examples of the noble tradition of the clan:

The grandfather of Mohammed was Abdol Motalleb (i.e., 'Abd Al-Muṭṭalib), the son of Hashem, a wealthy and generous citizen who relieved the distress of famine with the supplies of commerce. Mecca, which had been fed by the liberality of the father [Hashem], was saved by the courage of the son ['Abd Al-Muṭṭalib]. The kingdom of Yemen was subject to the Christian princes of Abyssinia; their vassal Abrahah was provoked by an insult to avenge the honour of the cross; and the holy city [Mecca] was invested by a train of elephants and an army of Africans. A treaty was proposed; and in the first audience the grandfather of Mohammed demanded the restitution of his cattle. "And why," said Abrahah, "do you not rather implore my clemency in favour of your temple [the *Ka'ba*], which I have threatened to destroy?" "Because," replied the intrepid chief, "the cattle is [*sic*] my own; the Caaba belongs to the gods, and *they* will defend their house from injury and sacrilege." The want of provisions, or the valour of the Koreish, compelled the Abyssinians to a disgraceful retreat. . . .

The glory of Abdol Motalleb was crowned with domestic happiness; his life was prolonged to the age of one hundred and ten years; and he became the father of six daughters and thirteen sons. His best beloved Abdallah [father of Muhammad] was the most beautiful and modest of the Arabian youth; and in the first night, when he consummated his marriage with Amina [mother of Muhammad], of the noble race of the Zahrites, two hundred virgins are said to have expired of jealousy and despair. Mohammed, the only son of Abdallah and Amina, was born at Mecca four years after the death of [the Roman Emperor] Justinian and two months after the defeat of the Abyssinians, whose victory would have introduced into the Caaba the religion of the Christians.<sup>3</sup>

Clearly, Muhammad was brought up in a respected tradition in an honorable family.

New York Press, 1988) (W. Montgomery Watt & M. V. McDonald, trans. and annot.). [Hereinafter, *AL TABAHI*.]

<sup>3</sup> Gibson, *supra*, at 650.

## [D] Profane Law of Arabian Bedouins

The Bedouins may have lacked a single, unified government, but the tribes shared several common rules. A system of customary tribal law existed to prevent the strong from crushing the weak, giving people a means of settling disputes over property, succession, or crime beyond the law of the sword. The laws accrued from previous decisions and were grounded in practicality rather than piety.

In criminal cases between tribes, punishment became a matter of redress. In a modern legal sense, criminal wrongs were treated as torts. Jail time was not an option for the migrant tribes. Instead, guilty individuals or their tribes compensated the victim's family or tribe for the harm with "blood money." This practice gave rise to a complex network of blood feuds when a tribe's guilt or liability was questioned.

## [E] Arbitration among Bedouins and *Ḥakam* (Arbitrator)

The Bedouin tribes and populations of the Arab cities did not have a formal, central government until the Prophet united them under the banner of Islam. Until then, parties negotiated directly if a problem arose among them. Failure to reach a settlement led the parties to seek the counsel of an arbitrator (*ḥakam*). A *ḥakam* could be anyone the parties could agree upon, based on outstanding personal qualities, reputation, and competence. Over time certain families became well known for solving disputes.

After the selection of the *ḥakam*, the parties had to agree on and submit the legal issue at the heart of the dispute. Depending on the question, a *ḥakam* could refuse to take the case. He may refuse it anyway if he believed his decision was not likely to be followed. To ensure compliance with the judgment, parties provided collateral in the form of property or hostages to the *ḥakam* or other appropriate neutral entity.

All decisions of the *ḥakam* were final. There was no appellate process in the desert. Enforcement was left up to tribal honor and retention of the collateral was the only thing binding a losing party to an unfavorable outcome in the absence of a sheriff.

The final decision of a *ḥakam* functioned as a statement of rights on a disputed point.<sup>4</sup> These judgments were often recorded both before and after the time of Muhammad. The practice of writing down legal matters may be rooted in the traditions of Syria and Iraq, where written language first developed.

Significantly, the decisions of *ḥakams* carried serious weight. Because they were written down, and added to the body of customary law, prior rulings affected later judgments in similar cases, formulating an early system of legal precedent:

It [the decision of the *ḥakam*] therefore became easily an authoritative statement of what the customary law was, or ought to be; the function of the arbitrator merged into that of a lawmaker, an authoritative expounder of

<sup>4</sup> JOSEPH SCHACHT, AN INTRODUCTION TO ISLAMIC LAW 8 (Oxford, England: Oxford University Press (Clarendon Paperbacks) 1982). [Hereinafter, *SCHACHT*.]



the normative legal custom or *sunna*. The arbitrators applied and at the same time developed the *sunna*; it was the *sunna*, with the force of public opinion behind it, which had in the first place insisted on the procedure of negotiation and arbitration.<sup>5</sup>

The Arab tribes deferred to these decisions and held the *hakam* in high respect. Due to a lack of central authority, the *hakams* began to shape the law with their decisions, evolving a legislative function. The personal characteristics of Muhammad made him the quintessential *hakam* and positioned him to define the law in Islamic terms.

## [F] Cities of Medina and Mecca

Just before, and during the lifetime of Muhammad, several cities along the Hejaz Mountains prospered. Located between these Mountains and Red Sea, Medina and Mecca were valuable trading and cultural centers. As permanent settlements, these towns had a more-fully developed legal system than the nomadic Bedouins.

### • Medina (Yathrib)

Medina, originally known as Yathrib, is one of the three holy cities of Islam (with Mecca and Jerusalem). Today, it is known as “Al-Medina Al-Monawwarrah,” meaning “the Illuminated (*Monawwarrah*) City (*Medina*).” The city was established on an oasis of palm trees along the caravan routes along the Peninsula. Medina was closely connected with Mecca, even before the *Hijra*, by family ties, including the mother and grandfather of Muhammad. Additionally, Medina was home to a significant minority of Arab Jews, ensuring a multicultural atmosphere inside the city walls.

### • Mecca

Mecca has been an important Arab city since it was founded by the Prophet Abraham (Ibrahim), when he moved his wife, Hagar (Hajar), and son Ishmael (Ismā‘il). Major tribes began settling here, as well, once the *ZamZam* Well was dug. Located at the crossroads between civilizations, Mecca grew into a significant hub for trade. Caravans from southern Arabia, Byzantine Syria, *Sassanid* Persia, and India converged on Mecca, forcing the city to develop a customary commercial law, not unlike the European *lex mercatoria* (law of the merchant), strictly enforced by the traders themselves. Before the advent and spread of Islam, loans with interest were common in commercial dealings.

With the advent of Islam, Mecca became the epicenter of the faith. Mecca is the birthplace of Muhammad as well as the site of the *Ka’ba*, an ancient pagan shrine. When the Muslims returned to Mecca in 10 *Ramādān* 8 A.H. (January 630 A.D.), all pagan idols were removed and the *Ka’ba* was rededicated to Allāh. For every devout Muslim today, daily prayer (*salah*) is preformed facing toward the *Ka’ba* in Mecca.

<sup>5</sup> See SCHACHT, *supra*, at 8.

## § 1.02 MUHAMMAD AND JESUS

### [A] Muhammad and Prophetic Tradition

A threshold question about Muhammad is epistemological: how are the events of his life known? After Muhammad died, in 632 A.D., and for the first few centuries thereafter, his life was the subject of prodigious and meticulous research by Muslim scholars. They collected, compiled, and wrote down accounts of the life of Muhammad. One of the leading biographers was a Persian scholar named Abū Ja’far Muhammad ibn Jarir Al Tabari, known as Al Tabari. Born in 838 (224 A.H.) in Amol, Tabaristan, Iran, near the Caspian Sea, and dying in 923 (310 A.H.), Al Tabari produced not only a multi-volume biography of Muhammad, but also an exegesis of the Qur’ān. Indeed, he memorized the sacred text by age 7. Al Tabari is perhaps the most important source on early Islamic history, and though he wrote in Arabic, his works are available in English.

Muhammad Ibn Abdullah Ibn ‘Abd Al-Muṭṭalib Ibn Hāshim is only the immediate lineage of the Prophet. Muhammad garnered respect in his time not only as a member of the *Hashim* clan and *Quraysh* tribe, but also through his Prophetic heritage. Al Tabari recounts Adam, Abraham, and Ishmael as ancestors of Muhammad. Through this sacred heritage, Muslims regard Islam as the continuation of the Judeo-Christian tradition. Muhammad is the recipient of the final revelation in a long line of prophets, including Jesus Christ. Thus, it is puzzling, if not insulting, to Muslims to consider Muhammad as outside of this line, or to consider Islam as an “other” religion.

The chain of prophecy, which Muslims believe Muhammad sealed, is long and grand. Allāh began to guide mankind with prophecy long before Muhammad. Continuous revelation is acknowledged in the Qur’ān in *surah* 4, *ayah* 163–65:

<sup>163</sup>We [God] have enlightened you [Muhammad], as we enlightened Noah, and the Prophets after him. We enlightened Abraham, and Ishmael, and Isaac, and Jacob and the tribes, and Jesus, and Job, and Jonah, and Aaron, and Solomon, and we gave David the Psalms. <sup>164</sup>Concerning some Messengers, We have already told you their stories. Concerning other Messengers, We have not told you their stories. And, God spoke directly to Moses. <sup>165</sup>But, God bears witness that what He has sent to you [Muhammad], He has sent it from His own comprehension.<sup>6</sup>

Abraham, an important figure in Judaism and Christianity, is recognized in the Qur’ān as an important figure in Islam as well. Consider a passage from *surah* 3, *ayah* 67 of the Qur’ān:

<sup>67</sup>Abraham was not a Jew, nor a Christian, but rather he was true in faith. He was a Muslim [i.e., one who has bowed down before God and submitted to God’s will].<sup>7</sup>

<sup>6</sup> THE QUR’AN — A New Translation by M.A.S. Abdel Haleem (Oxford, England: Oxford University Press, 2004), 4:163–65 at 65–66. [Hereinafter, QUR’AN.]

<sup>7</sup> QUR’AN, *supra*, 3:67 at 39.

Revelation, begun with Adam, continuing through the Prophets of the Old and New Testaments, is recognized and revered by Muslims:

The God of nature has written his existence on all his works, and his law in the heart of man. To restore the knowledge of the one, and the practice of the other, has been the real or pretended aim of the prophets of every age; the liberality of Mohammed allowed to his predecessors the same credit which he claimed for himself; and the chain of inspiration was prolonged from the fall of Adam to the promulgation of the Koran. . . . The authority and station of Adam, Noah, Abraham, Moses, Christ, and Mohammed rise in just gradation above each other; *but whosoever hates or rejects any one of the prophets is numbered with the infidels.*<sup>8</sup>

Islam teaches that when Muhammad died in 632 A.D., he brought the Judeo-Christian and Islamic Prophetic traditions to a close.

### [B] Comparisons between Islam and Catholic Christianity

Table 1-1:

Summary of Key Comparisons and Contrasts between Islam and Catholic Christianity on Foundational Points

Foundational Point	Islam	Catholic Christianity
<i>God</i>		
<i>One God or Many?</i>	Monotheism	Monotheism
<i>Nature of God?</i>	Omnipotent, Omniscient, Omnipresent	Omnipotent, Omniscient, Omnipresent
<i>Trinity?</i>	No	Yes, Triune God, which means 3 persons in one God Head: God the Father, God the Son, and God the Holy Spirit.
<i>Creation</i>		
<i>What did God create?</i>	Universe and everything in it, including Angels (from light), <i>jinn</i> s (from fire), human beings (from mud), animals, birds, fish, insects, and plants. God created the devil, Satan (from fire, like <i>jinn</i> s), who is either a fallen angel or a <i>jinn</i> .	Universe and everything in it, including Angels, human beings, animals, birds, fish, insects, and plants. God created the devil, Satan, who is a fallen angel.
<i>Adam and Eve?</i>	Fall from Paradise	Fall from Paradise

Foundational Point	Islam	Catholic Christianity
<i>Temptation?</i>	Tempted by Satan, disobeyed the order of Allāh not to eat from the Forbidden Tree, and thus committed the sin of disobedience.	Tempted by Satan, disobeyed the order of God not to eat from the Forbidden Tree, and this disobedience reflected pride and a desire to be equal with God.
<i>Doctrine of Original Sin?</i>	No	Yes, the souls of all human beings are tainted by the stain of the sin of Adam and Eve.
<i>Free will?</i>	Yes, Allāh knows what a person is going to do, what choices the person will make, but each person has free will to make those choices.	Yes, God knows what a person is going to do, what choices the person will make, but each person has free will to make those choices.
<i>Marian Dogmas</i>		
<i>Immaculate Conception?</i>	Yes, Mary was conceived without sin and committed no sin.	Yes, Mary was conceived without sin and committed no sin.
<i>Annunciation?</i>	Yes, the Archangel Gabriel (Jibreel) was sent by Allāh to inform Mary that she would have a child by miraculous means.	Yes, the Archangel Gabriel was sent by God to inform Mary that God had chosen her to have a child, and she responded affirmatively.
<i>Virginity of Mary?</i>	Yes, Mary conceived by miraculous means. Like Adam, Jesus has no human father, nor does he have a step-father, as Mary was never married. Note the miracle of Jesus speaking as an infant to explain his miraculous birth and that he is a servant of God.	Yes, Mary conceived Jesus of the Holy Spirit. Like Adam, Jesus has no human father, but rather a step-father, Joseph.
<i>Assumption?</i>	Yes, in that Mary went to Heaven after she died.	Yes, the body and soul of Mary are assumed into Heaven with no time in Purgatory.
<i>Special Reverence for Mary?</i>	Yes	Yes
<i>Jesus</i>		

<sup>8</sup> Ginnos, *supra*, at 654–655 (emphasis added).



Foundational Point	Islam	Catholic Christianity
<i>Nature of Jesus?</i>	Fully human only. Greatest of all Prophets before Muhammad.  Muslims accept the entire line of Judeo-Christian Prophets, starting with Adam, Enoch (Idris), Noah, and so on through Moses and Jesus, and regard Muhammad as in this tradition.  Further, some Islamic scholars highlight the four greatest Prophets: Abraham, Moses, Jesus, and Muhammad.	Fully Divine and fully human. Son of God.
<i>Crucifixion?</i>	No, Jesus did not die on the Cross.  Angels took Jesus up to Heaven, where he is alive to this day, and an imposter died in his place.	Yes, Jesus died on the Cross.
<i>Resurrection?</i>	No	Yes
<i>Ascension?</i>	Yes, but not after his death.  Rather, before he died Jesus was taken up to Heaven by Angels, where he remains alive.	Yes, following the Resurrection.
<b>The End</b>		
<i>Day of Judgment? (Particular Judgment)</i>	Yes, called the "First Judgment."  Upon death, each person is judged according to his or her deeds in life, though the result is not a final determination as to entry into Heaven or condemnation to Hell.  The First Judgment metes out rewards or punishments to a person, while resting in his grave as something akin to a room from Paradise or a room from Hell, to await the Final Judgment.	Yes, which occurs upon the death of each person.

Foundational Point	Islam	Catholic Christianity
<i>Final Judgment (including Second Coming of Christ)</i>	Yes, when Christ fights and kills the Anti-Christ in the Battle of Armageddon, resulting in world peace.  Thereafter, Jesus will live as the leader, and Prophet, and die as a normal person. The prophecy of Jesus will continue from the past, whereas Muhammad, having been born after Jesus, remains the last "new" Prophet.  After Armageddon, at the end of time, Allāh will order the Angel of Death to take the soul of each person, and each soul faces a Final Judgment to go to Paradise or Hell, the ultimate reward or punishment.  Final Judgment will be based not only on the deeds of a person during their life, but also on the mercy of Allāh.	Yes, there is a Battle of Armageddon at the end of time, <i>Parousia</i> (the second coming) occurs, resulting in final victory as foretold in <i>The Book of Revelations</i> .
<i>Possible Outcomes?</i>	Heaven or Hell, arguably soul may go through a cleansing process before Heaven.	Heaven or Hell, possible cleansing of soul in Purgatory before Heaven.

Throughout the course of human history few people have been as revered and reviled as much as the Prophet Muhammad. Those who revere him do so for the same reasons as those who revile him. Muslims exalt Muhammad, because he founded the whole structure of Islamic Law and all legal and religious institutions. The first Islamic community was build up around his personality and practices. So, Muslims today revere him as much as Muslims did when Muhammad lived fourteen centuries ago.

In contrast to the Christian view of Jesus, Muslims do not regard Muhammad as divine. Instead, Islam teaches that he was fallible as a man in his normal life, but infallible as the Prophet bearing the messages of Allāh. The Table below offers a basic and simplistic comparison between Catholic Christianity and Islamic beliefs. Note that Protestant and Catholic views are the same on most points and Islam shares many of the foundations of faith with them.

Christians believe Jesus Christ holds a dual nature — both fully divine, as the Son of God, and fully human. Muslims accept Jesus as the greatest prophet since

Abraham and until Muhammad. However, they do not regard Jesus as Divine:

... Jesus was a mere mortal; and at the day of judgment his testimony will serve to condemn both the Jews, who reject him as a prophet, and the Christians, who adore him as the Son of God.<sup>9</sup>

The question for Christians — which Jesus himself poses when He asks His disciples, “But who do you say that I am?” — is about His true nature.<sup>10</sup> Is Jesus a dead hero or the resurrected Lord?

The nature of Jesus is the first of several contrasts between Islamic and Catholic Christianity. Both faiths agree God is the only True God, and believe He is omnipotent, omniscient, and omnipresent. But, they diverge on the concept of the Holy Trinity. The Holy Trinity is God the Father, God the Son (Jesus), and God the Holy Spirit. In Islam, the Trinity is at best an unnecessary complication concerning a monotheistic God, and at worst a heretical step towards polytheism. *Surah 4, ayah 171* states:

People of the Book, do not go to excess in your religion, and do not say anything about God except the truth: the Messiah, Jesus, son of Mary, was nothing more than a messenger of God, His word, conveyed to Mary, a spirit from Him. So believe in God and His messengers and do not speak of a “Trinity” — stop [this], that is better for you — God is only one God, He is far above having a son, everything in the heavens and earth belongs to Him and He is sufficient protector.<sup>11</sup>

In contrast, the Trinity is an essential part of Catholic (and, indeed, Protestant) Christian faith, and understood ultimately as a mystery.

Both faiths agree God created the universe and everything in it, though Muslims believe He also created *jinn*s (spirits neither angels nor human), which are not part of Christian views. Satan, also created by God, is a fallen angel in Catholic Christianity, but Muslims debate whether or not the devil may be a *jinn* instead. All agree the race of Man began with Adam and Eve and their Fall from Paradise. However, Muslims do not believe in the Doctrine of Original Sin (i.e. the sin of Pride when Adam and Eve sought to be equal with God), which taints the souls of all subsequent people.

Mary, the Mother of Jesus, offers considerable common ground. Both faiths essentially agree on the Doctrine of the Annunciation.<sup>12</sup> Like Catholic Christianity,

<sup>9</sup> Gibbon, *supra*, at 656.

<sup>10</sup> See *The Gospel According to Mark*, 8:29, in *THE CATHOLIC STUDY BIBLE* 81 (New York, New York: Oxford University Press, 1990, New American Bible trans.).

<sup>11</sup> Qur'an, *supra*, 4:171, at 66 (emphasis).

Perhaps it is sign of how little many correspondents, including religion writers, in the mainstream secular media know about religion that they cite passages such as this one to support the proposition that Muslims accept Jesus as the “Word” of God in the same way as do Christians, and analogize this passage to that in *The Gospel According to John*, 1:1. See, e.g., Robert Wright, *The Meaning of the Koran*, *NEW YORK TIMES*, 14 September 2010, posted at <http://opinionator.blogs.nytimes.com/2010/09/14/the-meaning-of-the-koran/>.

<sup>12</sup> See Qur'an, 19:16–26, at 191–192.

Islam professes two of the Marian Dogmas: the Doctrine of the Immaculate Conception, i.e. that Mary was conceived without sin, and the Virginity of Mary, i.e. that Mary conceived of the Holy Spirit.<sup>13</sup> In emphasizing the special place Christ has in Islam, Gibbon even suggests the Qur'an provided inspiration for the Catholic Christian Doctrine of the Immaculate Conception:

For the author of Christianity the Mohammedans are taught by the prophet [Muhammad] to entertain a *high and mysterious reverence*. “Verily, Christ Jesus, the son of Mary, is the apostle of God, and his word, which he conveyed unto Mary, and a Spirit proceeding from him: honourable in this world, and in the world to come; and one of those who approach near to the presence of God.” The wonders of the genuine and apocryphal Gospels are profusely heaped on his head, and the *Latin church has not disdained to borrow from the Koran the immaculate conception of his virgin mother*.<sup>14</sup>

In fact, Mary is referred to more times in the Qur'an than in the New Testament.

Some of the largest doctrinal differences concern the death and Resurrection of Jesus. Unlike Catholic Christianity, Islam does not hold to a belief in the Crucifixion. From an Islamic perspective, Christ did not die on the Cross.

The malice of his [Jesus'] enemies aspersed his reputation and conspired against his life; but their intention only was guilty; a phantom or a criminal was substituted on the cross; and the innocent saint was translated to the seventh heaven.<sup>15</sup>

Specifically, Jesus knew he would be arrested by the Roman soldiers, and asked his disciples if any of them were willing to take his place and sacrifice himself for Jesus. One disciple, who looked like Jesus, volunteered, was arrested by the soldiers, and crucified in lieu of Jesus. Jesus was rescued by Angels, and taken up to Heaven by them, where he remains, alive, to this day. Whereas the Resurrection is an essential part of Catholic Christian faith, it is not accepted in Islam.

That said, both faiths teach that there is a Day of Judgment, i.e. a Particular Judgment for each person upon death, and a Final Judgment that results in permanent entry into Heaven or damnation in hell. Catholic Christianity, and arguably Islam, holds to a concept of Purgatory. Both faiths also believe the Final Judgment will be marked by the Second Coming of Christ. According to some Islamic sources, the Second Coming may occur with Christ returning through a minaret at the *Umayyad* Mosque in Damascus.

One way to summarize these comparisons and contrasts is to consider the question: Does God intervene in human history? Both Islam and Catholic Christianity respond in the affirmative. But, they take a different view as to how God intervenes. In Islam, the intervention was Allāh giving the Qur'an to Muhammad through the Archangel Gabriel (Jibreel), to be passed on to humanity. Thereafter,

<sup>13</sup> See Qur'an, 19:27–35, at 192.

<sup>14</sup> Gibbon, *supra*, at 655 (emphasis added).

<sup>15</sup> Gibbon, *supra*, at 656.



people must struggle to learn the Will of God for themselves in their lives, and to submit to it. People must climb "up" the mountain, toward God and Eternal Life. In contrast, Catholic Christianity proposes God intervened in human history by incarnating Himself in the human flesh (Jesus), conducting a ministry on earth, dying, and being resurrected. God came "down" from the mountain, to and for all people.

For Muslims, Muhammad is a unique figure of utter probity and of total honesty. He was an example of perfect integrity, as the perfect father, a model husband, businessman, and leader and organizer as ever existed. In brief, Muslims believe that in all ways, the Prophet came as close to perfection as is possible for a fallible human being.

Professor Hussain explains:

At the time of the Prophet, trade routes crisscrossed the Arabian Peninsula and the people of Mecca were in the forefront of trading activity. The Prophet himself had been a successful businessman, as agent for his first wife, Khadijah. The traditions [such as recounted by Majid Ali Khan, *Muhammad the Final Messenger* 62-64 (1983)] relate that she first employed him to take charge of a trading expedition to Syria on her behalf. Later, she was so impressed by his honesty and trustworthiness that she offered to marry him and he accepted the offer. After the marriage, he undertook further trading ventures to differing places in Arabia, including Yemen and Bahrain.<sup>16</sup>

This account is remarkable not only for what it says about Muhammad himself, namely, his professional probity and cosmopolitan experience around the Levant and Gulf regions, but also for two other reasons.

First, Muhammad's complete integrity in business should be emulated by all Muslims. He is a role model for all economic agents, from farmers to financiers. Second, it was the woman business owner (Khadija) who proposed marriage to the man (Muhammad). There is nothing un-Islamic about the empowerment of women in family or commercial matters. To the contrary, the idea of a partnership in all matters between wife and husband was acceptable. Despite the appearance of customs, practices, and ideologies from time to time, and in certain countries, no revelations came to Muhammad to alter the status of, or esteem for, his wife Khadija.

### [C] Free Will versus Pre-Destination

One point worth emphasizing is that Islam, like Catholic Christianity, is not a fatalistic religion. The first basic tenet of Islam is Allāh is the one, true God. He is omnipotent, omniscient, and omnipresent, and who will render a Final Judgment for each person based on the extent to which he or she led his life in accordance with His Will. "Islam" means submission, and the criterion for judgment is whether

a person exerted an effort to learn, understand, and submit to the Will of God. Success in submission in every instance is not required. People try, fall down, and get up again. Rather, the challenge is to get up again, not succumb to a faithless life, i.e. at Final Judgment, the key issue is whether a person struggled — engaged in *jihād* — to submit. (Note "*jihād*" is not primarily a military concept.)

How can a person possibly discern the Will of God? Through His mercy, God gave humankind an expression of His will: the Qur'ān. This sacred text serves as a guide for acts and omissions. Moreover, God provided a guide-to-the-guide, the Prophet Muhammad. As the Qur'ān states, the Prophet provides an "excellent pattern,"<sup>17</sup> hence the importance of the tradition of Muhammad (*Sunnah*).

Interestingly, over the last 1,400 years, Muslim religious scholars (*ulema*) have asked a logical question: if God is all powerful, so much so that everything that happens is the Will of God, and if God knows everything and created everything, then what role is left in this system for individual human responsibility? Put differently, if God has determined all things, then has God already determined whether a particular individual will, or will not, lead his life in accordance with God's Will? Non-Muslim Western theologians and philosophers dub the problem one of free will versus pre-destination.

One way to approach this problem is to point out many *ulema* view it as irrelevant because God is unknowable. It is a theme resonating throughout the Qur'ān that God has a purpose in what He does, but it is foolish for a human being, possessing only a weak mind, to presume this purpose can be comprehended fully. Only if God makes the purpose known specifically in the Qur'ān can it be appreciated.

This approach, however true, is unsatisfying insofar as human beings have curious intellects and an innate sense of purpose. Surely people are not to behave with impunity under the guise of a pre-destined outcome on the Day of Final Judgment. Surely they must remain "on the hook" to try to live according to the Will of God. There are plenty of Qur'ānic injunctions to the effect that each person is accountable to God, and must decide what to do in light of that existential fact. Maybe God has predetermined matters, but the individual does not know with certainty this to be so. It is prudent not to give up the effort to implement in life the Will of God.

Islam, then, is not a fatalistic religion. Yet, there is a misperception in the non-Muslim West about this point, leading to stereotypes about Muslims:

The doctrine of eternal decrees and *absolute predestination* is strictly embraced by the Mohammedans; and they struggle with the common difficulties, *how* to reconcile the prescience of God with the freedom and responsibility of man, *how* to explain the permission of evil under the reign of infinite power and infinite goodness.<sup>18</sup>

<sup>16</sup> JAMILA HUSSAIN, *ISLAMIC LAW AND SOCIETY — AN INTRODUCTION* 158-159 (Annandale, New South Wales, Australia: The Federation Press, 1999) (emphasis added). Professor Hussain is a Lecturer in Law at the University of Technology Sydney (UTS) in Sydney, Australia.

<sup>17</sup> See Qur'an, *supra*, 33:21 at 268.

<sup>18</sup> GIBBON, *supra*, at 654 (emphasis on "how" original; other emphasis added).

Some observers not only believe Muslims are fatalistic, but also extend this error to say that because Islam preaches fatalism, some Muslims do not work hard. They are wont to use terms like “*insha’Allah*” (“God willing”) when things do not work out, and “*al hamdulillah*” (“thanks be to God”) or “*māshā’Allah*” (“God has willed it”) when they do. In truth, Muslims do not approach life from a fatalistic standpoint. God’s Will is God’s business, and He has made some of His Will explicit to human beings, in the Qur’ān, so they can structure their life properly. Indeed, the inference from the very fact of the revelation, that God gave the Qur’ān as a guide, is obvious: A person must strive to meet the challenge of living up to His Will.

Thus, unlike the task of Sisyphus, the struggle (*jihād*) is not bleak or hopeless.<sup>19</sup> The act of struggle is a statement of hope and faith. It is the obligation of a Muslim to struggle unceasingly to meet the challenge of living according to the Will of God. At each moment in life, a Muslim is duty-bound to apply the principles revealed in the Qur’ān so as to address the circumstances of the moment and thereby meet the Will of God. Throughout the life of a Muslim, every act should be motivated by a sense of responding to the Will of God. That is the true *jihād*. Conceptually, there is little disagreement with Catholic Christianity. Each adherent is asked to reflect prayerfully on what God calls him or her to do in a given situation, and let Jesus, through His teachings in sacred scripture, tradition, and the Church, dictate the response. For Muslims and Catholic Christians, responding to the challenge promises salvation at Final Judgment.

#### [D] Need for Final Revelation

If all the earlier revelations from God to the pre-Muhammadan Prophets were authentic, then why was it necessary for God to reveal more to the Prophet Muhammad? The Qur’ān unambiguously indicates that the way in which people interpreted and implemented the earlier revelations led to corruption. That is, the earlier revelations had value, but that value was corrupted over time:

During six hundred years [i.e., up until the lifetime of Muhammad] the Gospel was the way of truth and salvation; but the Christians insensibly forgot both the laws and the examples of their founder, and Muhammad was instructed by the Gnostics to accuse the church as well as the synagogue of corrupting the integrity of the sacred text. The piety of Moses and of Christ rejoiced in the assurance of a future Prophet, more illustrious than themselves: the evangetic promise of the *Paraclete*, or Holy Ghost [Holy Spirit], was prefigured in the name and accomplished in the person of Mohammed, the greatest and the last of the apostles of God.

...

... If the Christian apostles, St. Peter or St. Paul, could return to the Vatican, they might possibly inquire the name of the Deity who is worshipped with such mysterious rites in that magnificent temple. At Oxford or Geneva they would experience less surprise, but it might still be

<sup>19</sup> See OVID IV, METAMORPHOSES, BOOKS IX–XV 10.44 (8 A.D.) (Cambridge, Massachusetts: Harvard University Press Loeb Classical Library, 1984) (Frank Justus Miller, trans.); ALBERT CAMUS, THE MYTH OF SISYPHUS (1942) (New York, New York: Penguin Classics, 2000) (Justin O’Brien, trans.).

incumbent on them to peruse the catechism of the church and to study the orthodox commentators on their own writings and the words of their Master.<sup>20</sup>

Why, then, were the earlier Prophetic messages corrupted?

The simple answer is the nature of the human intellect. From a Muslim perspective, Jews and Christians were blessed by glimmerings of revelation. But, they came to misunderstand and misapply what had been sent down to them. Further, transmission is a risky business. During the process of passing on a Divine Message from one Prophet to a community, and to subsequent generations and their successors, teachings may become garbled. The faiths built around earlier revelations are deserving of respect, but suffer from fundamental flaws.

One such corruption, say Muslims, is the foundational Christian teaching that Jesus is the Son of God, and concomitantly, the Doctrine of the Trinity. Surely this line of belief is orthogonal to monotheism, to the tenet of the unity of God. Thus, to point out the corruption and return to the original Truth, God in His mercy sent another Message, this time via Muhammad.

This Message, the Qur’ān, describes itself as a “*kitāb*” (“book,” particularly in the sense of “scripture”). “*Kitāb*” refers to a living document that is the full expression of the Will of God, of something that is in Heaven, which sometimes is referred to as the “*Umm al-Kitāb*” (Mother of the Book). That *Kitāb* existed long before the days of Muhammad, and God entrusted each of the earlier Prophets with the responsibility of passing on a portion of its contents, to help people learn to know what God willed for them.

Consequently, Christians and Jews are “people of the book,” or “*ahl al kitāb*,” and the Qur’ān refers to them as such. They are to be respected and for much of Islamic history Muslims have sought to create a place in their societies for them. But the earlier revelations to them were insufficient, perhaps even incomplete. The revelation to Muhammad is an opportunity to eliminate all confusion, and eradicate all misunderstanding. The revelation to Muhammad is, concept-by-concept, chapter-by-chapter, verse-for-verse, word-for-word, the *Kitāb*. That is, the Qur’ān contains a whole, unimpeachable Message from God, and is the recitation of the True *Kitāb* that is the literal expression of His Will. It was the greatest act of Divine mercy to intervene, once again, in human history to reveal this entirety.

#### § 1.03 NON-MUSLIM CHARACTERIZATIONS OF MUHAMMAD

##### [A] Portraying Muhammad

It is a myth the *Shari’a* forbids any and all depictions — in the sense of drawings, paintings, or sculptures — of the Prophet Muhammad. The Qur’ān, in *surah* 21, states:

<sup>20</sup> GIBBON, *supra*, at 656, 659.



<sup>51</sup>Long ago We bestowed right judgment on Abraham and We knew him well. <sup>52</sup>He [Abraham] said to his father and his people, "What are these images to which you are so devoted?" <sup>53</sup>They replied, "We found our fathers worshipping them." <sup>54</sup>He said, "You and your fathers have clearly gone astray."<sup>21</sup>

Indeed, there is no Qur'anic provision, nor any credible *hadith*, forbidding anyone — Muslim or non-Muslim — from portraying the Prophet. Yet, in practice there is a broad bar, which seems to be based on culture. Not only are movies, television programs, and plays depicting the Prophet off-limits in Islamic countries, but so too are productions about his Companions (*Ṣaḥābah*) and other Prophets before Muhammad. Thus, for example, *The Passion of the Christ*, the controversial 2004 movie by Mel Gibson, was banned in Egyptian cinemas. (There was no controversy in Saudi Arabia, as the Kingdom does not have public cinemas.)

The above-quoted Qur'anic passage concerns ritualistic worship of pagan idols, which Islam does not countenance. Extremist groups, such as the Taliban, cite passages in the Qur'an about the singular uniqueness and oneness of God, as well as certain *hadiths*, to support a prophylactic ban on depicting Muhammad. Their advocacy has led to un-Islamic acts, such as the destruction of symbols of other faiths, as when the Taliban blew up two 6th century A.D. Buddhist statues (the Buddhas of Bayman) in Hazarajat, central Afghanistan, in March 2001. Such advocacy also runs counter to much of Islamic history. Through the ages, Islamic art has been full of gorgeous scenes from the life of Muhammad. These depictions are a testament to the glory of Islamic civilization.

In the non-Muslim world, one of the most important depictions is in the United States Supreme Court. It contains a frieze showing Muhammad, along with Moses and other famous figures. All of the figures in that frieze are revered for their law-giving roles and their search for justice. Notably, in 2000, Professor Taha Jaber Al-Alwani of Al Azhar University, who also served as Chairman of the *Fiqh* Council of North America, said the Supreme Court depiction of Muhammad was permissible under the *Shari'a*<sup>22</sup> because the intent is to praise Muhammad as a statesman, not to suggest either Muhammad or the Supreme Court embody or emulate divine power. So, what is inappropriate in terms of a depiction of Muhammad?

<sup>21</sup> Qur'an, *supra*, 21:51–54, at 205.

<sup>22</sup> Characterizations of the Prophet are a subject of academic controversy within the Islamic world. For example, in February 2010, scholars at Al Azhar University in Cairo debated the topic, not only in relation to Muhammad and his Companions (*Ṣaḥābah*), but also to Prophets and leading figures from other faiths, including Jesus. Interestingly, what prompted the Al Azhar conference was an Iranian television drama about the life story of the Old Testament Prophet Joseph (Yūsuf), son of Jacob. In January 2010, the Islamic Research Institute in Cairo (which is related to Al Azhar University, and headed by the Grand *Imām* of Al Azhar) issued a *fatwā* ruling that characterizations of Muhammad, *Ṣaḥābah*, and earlier Prophets, such as in a theatrical production, are forbidden (*harām*). (This *fatwā* restated the long-standing view of Al Azhar as reflected in an earlier *fatwā*.) Based on the *fatwā*, the Egyptian government declined to allow the program to be aired on television.

A related development occurred on September 30, 2010 when the United Arab Emirates (UAE), specifically, Dubai and Qatar (namely, the MBC Group, which is incorporated in Dubai and Qatar Television), agreed to cooperate on production of an historical television drama on the life of the Second of the Four Rightly Guided Caliphs (*Rashidun*), 'Umar. Under the Al Azhar *fatwā*, depicting the Companions of the Prophet is *harām*, and 'Umar most definitely was one of the *Ṣaḥābah*.

There are two boundaries. First, no depiction should infringe on the province of God. Any suggestion that the Prophet is divine, and the subject of worship, would be un-Islamic. Second, no depiction should be insulting. Mere depiction is not unlawful; rather, any depiction should portray Muhammad in a positive light. Of course, these boundaries may be easier to conceptualize than to apply in practice: take the potentially blasphemous 2005 Danish Cartoon Affair as a case in point.<sup>23</sup>

## [B] Through Early 19th Century

The view of the Prophet Muhammad held by non-Muslims is neither monolithic nor constant through history. Non-Muslims have held different views, which have changed over time. Throughout much of western history, neither the Qur'an nor the Prophet Muhammad has been widely or well understood. Consequently, in the centuries since the birth of Islam, both have been treated disrespectfully in the non-Muslim world.

From the Middle Ages up through the early 19th century, non-Muslim western writers tended to insult the Prophet. He is described by some Medieval writers as the Anti-Christ. He is portrayed as a figure who lacked morals, of total iniquity. He is said to be the man who introduced the great threat to Christianity, and who brought about the loss of the "Christian heartland" (i.e. parts of the Middle East, especially Jerusalem).

A notable exception to these negative depictions is that by Gibbon, who describes Muhammad from those who lived with him:

According to the tradition of his companions [the *Ṣaḥābah*], Mohammed was distinguished by the beauty of his person, an outward gift which is seldom despised except by those to whom it has been refused. Before he spoke, the orator engaged on his side the affections of a public or private audience. They applauded his commanding presence, his majestic aspect, his piercing eye, his gracious smile, his flowing beard, his countenance that painted every sensation of the soul, and his gestures that enforced each expression of the tongue. . . . His memory was capacious and retentive; his wit easy and social; his imagination sublime; his judgment clear, rapid, and decisive. He possessed the courage both of thought and action; and although his designs might gradually expand with his success, the first idea which he entertained of his divine mission bears the stamp of an original and superior genius.<sup>24</sup>

Yet, even Gibbon was not immune from prejudicial remarks. Consider this passage:

. . . In the spirit of enthusiasm or vanity the prophet rests the truth of his mission on the merit of his book, audaciously challenges both men and angels to imitate the beauties of a single page, and presumes to assert that God alone could dictate this incomparable performance:

<sup>23</sup> See JYTTE KLAUSEN, *THE CARTOONS THAT SHOOK THE WORLD* 141 (New Haven, Connecticut: Yale University Press, 2009).

<sup>24</sup> GIBBON, *supra*, at 651–652.

This argument is most powerfully addressed to a devout Arabian whose mind is attuned to faith and rapture, whose ear is delighted by the music of sounds, and whose ignorance is incapable of comparing the productions of human genius. . . .

. . .

The talents of Mohammed are entitled to our applause, but his success has perhaps too strongly attracted our admiration. Are we surprised that a multitude of proselytes should embrace the doctrine and the passions of an eloquent fanatic? In the heresies of the church the same seduction has been tried and repeated from the time of the apostles to that of the reformers.<sup>25</sup>

The passages seem to describe different people, the first one presenting a glowing account of Muhammad, but the second one intimates a certain pride and employs a depreciatory epithet. Moreover, the second passage, while not impugning all Arabs, certainly casts in a negative light those of simple faith.

These passages from *The Decline and Fall of the Roman Empire*, a book in the Western canon, bespeak the spectrum of views about Muhammad, and by extension Islam and Arabs, in the non-Muslim West during the Middle Ages and even to the present day. Gibbon displays two or more competing views of Islam. Worse, not everyone was as charitable as having two minds about Islam and its Prophet. Some renditions carelessly or intentionally neglected the *Ṣahābah*, and were unflattering.

Candidly, the Christian Church had difficulty coming to terms with Muhammad. Arguably, it did not do so during the first several centuries following the life of Muhammad. Ignorance and the prejudice it bred prevailed over knowledge and understanding. Evidence seems to have been manufactured to "demonstrate" his lack of morality, reject his status as a Prophet, and deny the validity of the Message that passed through him. Still today, Muslims believe many Westerners still harbor old-fashioned, negative views of the Prophet. They point out their historical and literary classics do not treat Jesus in a base manner, for to do so would be contrary to Islamic precepts.

### [C] Recent Writings

More recently, in the later 19th, 20th and 21st centuries A.D., non-Muslim Western writing on Muhammad tends to portray him as a unique, inspired man. But, from the perspective of Muslims, these Western writings still harbor a bias, namely, they look at the life of the Prophet only in order to see how Islam began as a religion. In other words, Muslims say that Westerners care about the life of the Prophet only for the reason of understanding how Revelation came about.

That is not to say that Muslims are unconcerned with the life of Muhammad. They do care about the life of the Prophet, his circumstances, and how the first Islamic community came about. But, to Muslims, there is no point at all in seeking to understand where the Revelation came from. They do not see any purpose in investigating how the economic circumstances of the Prophet or the town into

which he was born created social disorder to which the Qur'an was a response. If the Qur'an responded to those social disorders, then it is because God chose to respond to those disorders. It has nothing to do with the judgment of Muhammad about those disorders.

### [D] Orientalist Fallacy

The term "Orientalist" is used — by Westerners and Arabs alike — to describe Western scholars who focus on the Middle East, particularly Islam and the Arab World. Orientalists have spent a great deal of time researching the 6th century A.D., i.e. the period in which Muhammad arose and Islam was born. Two Orientalist arguments in particular bring tension. First is the assertion Muhammad took, or borrowed, from Christianity and Judaism to create his new Revelation. The second assertion is that Muhammad responded to specific economic and social circumstances on the Arabian Peninsula. Why do Muslims get upset about these sorts of arguments?

The answer is because these assertions imply that Muhammad created the Revelations for himself. No Muslim in the world believes that is possible in any way. The Revelation is not the product of any human's mind. Thus, Muslims completely reject Western efforts to look for the origins or sources of the Revelation. Indeed, Muslims find that whole mode of discourse insulting. By means of a recital, God passed the Qur'an, the true essence of His will. Muslims agree God chose a particular moment for the Revelation of the Qur'an (in 610-632). He chose a particular people (Arabs), and He chose a particular person (Muhammad).

God gave the Revelation so Muhammad could pass the message onto his people, the Arabs, who in turn could pass the word on to the rest of humankind — a Revelation for all people. Inevitably, the Arabs have played, and continue to play, a major part in Islamic history. Also, the Qur'an is given in Arabic, making the Arabic language important to Muslims around the world. However, the vast majority of Muslims are not native speakers of Arabic, but all Muslims, to some degree, try to learn a bit of Arabic.

Essentially, Muslims do not believe the Revelation's sole intentions were to answer with the current economic, political, or social forces. Nor do they believe the Revelation was the product of the mind of Muhammad. In order to relate to Western thought, this sort of analysis has also been done on Christianity (looking at various Christian doctrines as the product of Vatican politics, and that Jesus was more human than divine). Some Christians agree, but many do not, with this sort of analysis. Muslims would probably agree that at a particular moment in human history God chose to act, and that kind of theological speculation in trying to find the answer leads nowhere.

<sup>25</sup> Gibbon, *supra*, at 657, 658.



## § 1.04 CHILDHOOD OF MUHAMMAD (570/571-595 A.D.)

## [A] Ahistorical Moment: Vitality of Life of Muhammad

Turning to the pre-Prophetic life of Muhammad, it is critical to appreciate that Muslims relate directly to Arab life during the days of the Prophet. Even though that era is long gone, many Muslims regard it as a unique and living period. Thus, Muslim children are reared on stories about the Prophet, about the people with whom he interacted, and the community that grew around him. Similarly, Christians teach Bible stories, which continue to inform and shape their lives.

For instance, Muslims and Christians frequently use names from their special ahistorical periods. Muslim males are often named "Muhammad," making it the most common first name in the world. They also use the name "Khadyja," the wife of the Prophet, or "Fātimah," the daughter of the Prophet, for Muslim daughters. Similarly, Christians use the names of the Gospels (Matthew, Mark, Luke, and John) frequently for boys, and Mary, the Virgin Mother of Jesus, for women. A large number of names from the *New Testament* are used widely by Christians as well.

## [B] Life Span: 570/571 A.D. to 632 A.D.

'Abd Al-Muṭṭalib, grandfather and ultimate guardian of an orphaned Muhammad, had ten sons, including 'Abdullah, father of the Prophet. 'Abdullah married Āminah bint Wāḥb ("bint" means "daughter"), also a member of the *Quraysh* tribe living in Mecca. Shortly after 'Abdullah and Āminah were married, he left for Syria in a trade caravan. Tragically, he died on the journey, and was buried in Medina, leaving Āminah a young and pregnant widow.

Āminah gave birth to her son in Mecca in 570 or 571 A.D. Upon receiving news of the birth of his grandson, Al-Muṭṭalib named the boy "Muhammad," and sent him to be raised in the desert among the Bedouins, following an old *Quraysh* custom. This tradition served, first, to educate children in pure Arabic language. It also was a practical way to protect children from diseases common in Mecca, a bustling city frequented by commercial and religious caravans. Finally, growing up in the harsh desert gave children greater physical strength and imbued them in time-honored cultural values. The *Quraysh* wanted their children to learn the responsibility and rich tradition of desert life.

Indispensable to this custom were Bedouin women, who came to Mecca as nurses to take a baby back to bring up in their tribe. Ḥalimah, a nurse from the *Banu Sa'd* tribe, was the final nurse to arrive to Mecca on the day Āminah sought to foster her son. All the other nurses refused to take Muhammad, because his father was dead, which made a substantial payment unlikely. Ḥalimah, left with no other options, took the infant Muhammad rather than return to her tribe empty-handed.

So it was that Muhammad came to be raised by Ḥalimah as a nomad. Muhammad turned out to be a clever child, learning the language and *Banu Sa'd* tribal customs quickly. When Ḥalimah returned to Mecca a few years later to

possibly chose another child to nurse, she kept Muhammad with her despite the desire of Āminah to have him back. Ḥalimah, who did not wish to be parted from Muhammad, convinced Āminah her son may still be in danger of urban diseases. In the end, Muhammad stayed in the desert with Ḥalimah for two more years.

## [C] Special Sign: Ḥalimah Story

Islamic tradition speaks of certain events in the youth of Muhammad that foretell his prophetic fate. Muhammad was four years old, playing with other children, when Ḥalimah's own son ran to report he had been taken to the ground by two strange men, robed in white, who opened his chest and reached inside. Ḥalimah raced to the scene to find him dazed and pale, but otherwise unharmed. Muhammad confirmed this story, adding the men had touched something inside his chest, but he was unsure what it was.<sup>26</sup>

Fearful for her foster child, Ḥalimah returned Muhammad to his mother. Once Ḥalimah recounted the tale, Āminah mentioned she had noticed strange things as well and believed they were signs foretelling his fate. Years later, Muhammad spoke of the event, saying the two men split open his chest to remove a black clot from his heart and then washed his chest with snow (or, in differing versions, water from the *ZamZam* Well).<sup>27</sup> Some *ulema* believe a Qur'anic verse confirms this particular cleansing story:

<sup>1</sup>Did We not relieve your heart for you [Prophet], <sup>2</sup>and remove the burden <sup>3</sup>that weighed so heavily on your back, <sup>4</sup>and raise your reputation high?<sup>28</sup>

Taken either literally or figuratively, this event can be seen as a purification of Muhammad's soul, allowing or foretelling of his eventual elevation to prophet-hood.

After his time in the desert, Muhammad lived with his mother in Mecca. When he turned 6 years old, Āminah decided to move to Medina. Tragically, Āminah died on the way, and Muhammad was returned to Mecca into the custody of his grandfather, 'Abd Al-Muṭṭalib. Muhammad enjoyed the attention of his loving grandfather for two years until the death of 'Abd Al-Muṭṭalib, when he passed into the care of Abū Ṭalib, his uncle.

'Abd Al-Muṭṭalib died eight years after the Year of the Elephant. 'Abd Al-Muṭṭalib had entrusted the Messenger of God to the care of his paternal uncle Abū Ṭalib, because Abū Ṭalib and 'Abdallah, the father of the Messenger of God, had had the same mother. Abū Ṭalib assumed responsibility for the Messenger of God after the death of his grandfather and kept him with him.<sup>29</sup>

Although fate was not kind to young Muhammad, these events shaped his personality, instilling a deep appreciation for family that he would pass on to the

<sup>26</sup> TARIQ RAMADAN, *IN THE FOOTSTEPS OF THE PROPHET — LESSONS FROM THE LIFE OF MUHAMMAD* 14 (New York, New York: Oxford University Press, 2007). [Hereinafter, RAMADAN.]

<sup>27</sup> See RAMADAN, *supra*, at 14.

<sup>28</sup> QUR'AN, *supra* 94:1-4 at 426.

<sup>29</sup> AL ṬABARI, *supra*, vol. VI at 45.

Islamic world.

### [D] Orphan, Early Childhood, and Uncle Abū Ṭalib

Abū Ṭalib, uncle and now guardian of Muhammad, was a well respected man in Mecca, albeit not an extraordinarily wealthy one.<sup>30</sup> Poverty proved a formative experience for Muhammad. Abū Ṭalib could not afford to put Muhammad through any further schooling, and Muhammad could not read or write as a result. But, the years spent with the Bedouins gave Muhammad a strong background in the spoken word, and his time with Abū Ṭalib gave him a forum to hone his eloquence.<sup>31</sup>

Muhammad had to find work early in life to support himself and his family. Auspiciously, he worked as a shepherd for the people of Mecca:

There was no prophet who was not a shepherd. He was asked: "And you too, Messenger of God?" He answered: "And myself as well."<sup>32</sup>

Shepherding taught Muhammad important virtues, especially responsibility and patience.

Muhammad matured with Abū Ṭalib and his wife, Fātimah, as his surrogate parents.<sup>33</sup> The family was close and supportive, even when Muhammad began receiving Revelations and others denounced him. Abū Ṭalib resolutely stood by him as his father-figure, teacher, and protector. His importance in Islamic history was solidified when he became one of the first converts to Islam.

### [E] Another Special Sign: Story of Christian Monk Bahīra

Like many Meccans, Abū Ṭalib was a trader. He traveled via merchant caravan to the Levant (modern-day Israel, Jordan, Lebanon, Palestine, and Syria). When Muhammad was 12 years old, he insisted on accompanying his uncle to Syria, just as the caravan was about to depart. Abū Ṭalib acquiesced:

Once Abū Ṭalib was going on a trading expedition to Syria with party of Quraysh, but when he had made his preparations and was ready to set out, the Messenger of God, as they allege, could not bear to be separated from him. Abū Ṭalib took pity on him and said, "By God, I will take him with me, and we shall never part from one another," or words to that effect; and took him with him.<sup>34</sup>

This journey, to the fair of Bostra, was the first of two Muhammad took to Syria.<sup>35</sup> The second came when Khadyja employed him to go to a commercial fair in Damascus.

<sup>30</sup> See GIBBON, *supra*, at 650–651.

<sup>31</sup> See GIBBON, *supra*, at 652.

<sup>32</sup> RAMADAN, *supra*, at 17.

<sup>33</sup> RAMADAN, *supra*, at 16.

<sup>34</sup> AL ṬABARĪ, *supra*, vol. VI at 45.

<sup>35</sup> See GIBBON, *supra*, at 652. Gibbon writes that Muhammad undertook this journey when age 13. See *id.*

While journeying with Uncle Abū Ṭalib to Syria, Muhammad passed Bahīra, a Christian monk. Bahīra noticed something different about this caravan:

The caravan halted at Buhra in Syria, where there was a learned Christian monk named Bahīra in his cell. There had always been a monk in that cell, and their knowledge was passed on, it is alleged, by means of a book which was handed down from generation to generation. When the caravan halted at Bahīra's cell this year, he prepared a copious meal for them, because while he was in his cell he had seen the Messenger of God shaded by a cloud which marked him out from among the company. Then they had come near, and, when they halted in the shade of a tree close to him, he observed the cloud covering the tree and bending down its branches over the Messenger of God until he was in the shade beneath it. When Bahīra saw this, he descended from his cell and sent the caravan a message inviting them all. When he saw the Messenger of God, he observed him very intently, noting features of his person whose description he had found in his book. After the company had finished the meal and dispersed, he asked the Messenger of God about certain matters which had taken place both when he was awake and when he was asleep. The Messenger of God told him, and he found that these things corresponded to the description which he had found in his book. Finally, he looked at Muhammad's back, and saw the seal of prophethood between his shoulders.

After this Bahīra asked Muhammad's uncle, Abū Ṭalib, "What relation is this boy to you?" "My son," he replied. "He is not your son," said Bahīra. "This boy's father cannot be living," "He is my brother's son," said Abū Ṭalib. "What happened to his father?" he asked. "He died while the boy's mother was pregnant with him," he replied. "You have spoken the truth," said Bahīra. "Take him back to your country, and be on your guard against the Jews, for, by God, if they see him and recognize what I have recognized in him, they will seek to do him harm. Great things lie ahead of him, so take him back quickly to his country!" His uncle then took him quickly back to Mecca.<sup>36</sup>

Muhammad returned to Mecca, continuing to live as a shepherd into his early twenties. He did not leave Mecca, nor join another caravan until he went as a trader with Khadyja more than a decade later.

## § 1.05 KHADYJA, MUHAMMAD, AND FAMILY BUSINESS (595–619 A.D.)

### [A] Employer, Wife, and Companion

Muhammad was known among the Meccans for his truthfulness. They would call him "Al Ṣādiq Al Amain" which means "The Truthful and The Trustworthy." This reputation encouraged Khadyja, who was one of the wealthiest people in Mecca, to hire Muhammad for one of her caravans to Syria. Khadyja chose the 25-year-old

<sup>36</sup> AL ṬABARĪ, *supra*, vol. VI at 45–46.



Muhammad to lead a caravan to Damascus based on his outstanding reputation, rather than his experience as a trader, as he had not completed a merchant trip before.<sup>37</sup>

This second opportunity to go to Syria was to be an important experience for Muhammad. While stopping to rest along the voyage, Muhammad encountered a different Christian Monk, also bearing a fateful message:

The Messenger of God accepted, and set out to trade with her property accompanied by her slave Maysarah. When he reached Syria he halted in the shade of a tree near a monk's cell. The monk went up to Maysarah and said, "Who is this man who has halted beneath this tree?" Maysarah replied, "He is a man of Quraysh, one of the people of the sacred precinct (Haram)." "No one has halted beneath this tree but a prophet," said the monk.

The Messenger of God sold the goods which he had brought with him, bought what he wanted to buy, and then set off back to Mecca accompanied by Maysarah. They assert that whenever the noonday heat grew intense Maysarah saw two angles shading him from the sun as he rode his camel. When he arrived in Mecca, he brought Khadijah her property, which she sold for twice the price or nearly so.<sup>38</sup>

The journey proved Muhammad to be a successful businessman with the ability to double profit by making two sales in one trip. The first trade was selling the goods from Mecca in Syria, and the second one was selling merchandise from Syria in Mecca. For merchants at the time, this kind of transaction was unorthodox.

Khadyja was impressed by the profit he made and amazed by his enterprising work. This deepened her respect of him, and brought them into a closer relationship:

... in his twenty-fifth year [i.e., 595 A.D.] he [Muhammad] entered into the service of Cadijah, a rich and noble widow of Mecca, who soon rewarded his fidelity with the gift of her hand and fortune.<sup>39</sup>

Impressed by Muhammad, and curious as to his personality, Khadyja called her slave, Maysarah, to ask about him. Maysarah told her about his experience with Muhammad on a journey, which encouraged her to act on her desire to marry him. Al-Ṭabari recounts:

Then Maysarah informed her of what the monk had said and how he himself had seen the two angels shading him. Khadijah was a resolute, intelligent and noble woman, and in addition to this God wished to ennoble her, so when Maysarah told her these things she sent for the Messenger of God and, it is reported, said to him, "Cousin, your kinship to me, your standing among your people, your reliability, your character and your truthfulness make you a desirable match." Then she offered herself to him

in marriage. Khadijah was then the most distinguished of the women of Quraysh in lineage, the most highly honored, and the wealthiest, and all the men of her tribe would have been eager to accept this proposal had it been made to them. When she made this offer to the Messenger of God he told his uncles about it, and Hamzah b. [bin] 'Abd al-Muṭṭalib went with him to Khuwaylid b. Asad and asked for (his daughter) Khadijah's hand on Muhammad's behalf. Khuwaylid married Khadijah to the Messenger of God, and she bore all his children except for Ibrāhīm.<sup>40</sup>

Their relationship grew from trust and blossomed into love, resulting in a successful union, beneficial to both husband and wife:

The marriage contract, in the simple style of antiquity, recites the mutual love of Mohammed and Cadijah, describes him as the most accomplished of the tribe of Koreish, and stipulates a dowry of twelve ounces of gold and twenty camels, which was supplied by the liberality of his uncle [Abū Ṭalib]. By this alliance, the son of Abdallah was restored to the station of his ancestors; and the judicious matron was content with his domestic virtues. . . .<sup>41</sup>

Their marriage also was a distinctive one.

First, the proposal in this marriage came from Khadyja, which is different from most marriages in the Arab tradition. It is not typical in Arab culture for a woman to issue a marriage proposal, but Khadyja offers a healthy counter-example. More generally, their marriage, and her equality of footing, suggests that Islam gives, or ought to give, women a high personal status and community standing. Many *hadīths* of the Prophet discuss the treatment of women, including his *Khutbat Alwada'* (Farewell Sermon).

Second, the Prophet himself was a role model in every respect. He was a model husband to Khadyja, faithful and kind. After their marriage, he continued his successful career in commerce, though he did not leave Mecca on any merchant caravans. He cared for the property of Khadyja, and was known for his great integrity.

Third, the relationship between the Prophet and Khadyja was a highly effective working partnership. She was not only a wife of Muhammad but also was the principal advisor and companion of the Muhammad. In sum, given these distinctive features, it is not surprising Khadyja plays an exceptionally prominent role in the minds of Muslims.

## [B] Children

Muhammad and Khadyja lived together in Mecca for many years. Khadyja was the mother to all the children of Muhammad, except for Ibrahim. All of their children were born before the first Revelation. They had four daughters and two sons in all:

<sup>37</sup> AL-ṬABARĪ, *supra*, vol. VI at 47.

<sup>38</sup> AL-ṬABARĪ, *supra*, vol. VI at 47–48.

<sup>39</sup> GIBBON, *supra*, at 651.

<sup>40</sup> AL-ṬABARĪ, *supra*, vol. VI at 48.

<sup>41</sup> GIBBON, *supra*, at 651.

They were Zaynab, Ruqayyah, Umm Kulthūm, Fātimah, al-Qāsim from whom he received his kunyah [nickname] Abū al-Qāsim — al-Tāhir [Abdullah], and al-Tayyib. Al-Qāsim — al-Tāhir, and al-Tayyib died during the Jāhiliyyah, while all of his daughters lived until Islam, became Muslims and emigrated with him to al-Madinah.<sup>42</sup>

The dates of birth of the children are the subject of debate among Muslim historians. No confirmed reliable sources give definitive dates.

Both Al-Qasim and Abdullah died before they reached the age of two. Then, Zaynab was born when Muhammad was about 30 years old and died in 630 A.D. Her husband is Abū Al 'Aṣṣ. Following Zaynab, the second daughter was Ruqayyah. Her first husband was her cousin Utbah Ibn Abū Lahab. His father Abū Lahab, had two sons: Utbah and Utaibah. Abū Lahab himself was an uncle of Muhammad, and loved Muhammad until the revelations, at which point he opposed Muhammad and the Message that was being revealed to him. Thus, Abū Lahab forced Utbah to divorce Ruqayyah, because of this hostility. Subsequently, Ruqayyah married 'Uthman Ibn 'Affan, the third of the Four Rightly Guided Caliphs (*Rashidun*). Ruqayyah died in 624.

The third daughter, Umm Kulthum, was born in 604. Her first husband was Utaibah Ibn Abū Lahab, the younger of the two sons of Abū Lahab. Once again, Abū Lahab forced his son, Utaibah, to divorce Umm Kulthum out of opposition to Muhammad and his Prophecy. Thereafter, Umm Kulthum married 'Uthman Ibn 'Affan after the death of her sister, Ruqayyah. Umm Kulthum died in 630.<sup>43</sup>

Fātimah is the youngest child of Muhammad and Khadyja. She was born 5 years before the First Revelation, in 605, and died in 632. Her husband was 'Alī ibn Abū Talib, the fourth Caliph, and leader of the *Shī'ite* movement. Fātimah and 'Alī together had five children. Abū Talib, of course, was the uncle who protected the Prophet, and who raised both 'Alī and Muhammad. Their children are Hasan, Hussein (also spelled "Husayn"), Zaynab, Umm Kulthum, and Muhsin, who died in his infancy. Fātimah was the only child of Muhammad to die after her father.

The last child of Muhammad, who was not from his marriage to Khadyja, was Ibrahim. Ibrahim was born in 630 to Mary Al-Qibṭiyyah, a Coptic Christian:

All of the Prophet's sons had died. Ibrahim, his last son born to his Coptic wife Mary, also died in infancy [at age 2]. [ . . . ] When Ibrahim died, the Prophet took him on his lap again, embraced him, and described his sorrow while on the brink of tears. Some were surprised. He gave them this answer: "Eyes may water and hearts may be broken, but we do not say anything except what God will be pleased with." He pointed to his tongue and said: "God will ask us about this."<sup>44</sup>

Muhammad was a caring father and grandfather. He is renowned for having loved all children, smiling when he saw any child. Like many fathers, he enjoyed carrying

and walking around with his children on his shoulders:

He carried his grandsons Hasan and Husayn [Hussein] on his back. Despite his unique status, he did this without hesitation to herald the honor that they would attain later. One time when they were on his back, Umar [the second Caliph] came into the Prophets house and, seeing them, exclaimed "What a beautiful mount you have!" The Messenger added immediately: "What beautiful riders they are!"<sup>45</sup>

However, his love for his children and grandchildren did not become an unhealthy indulgence. Rather, Muhammad endeavored to teach them right from wrong:

For example, once Hasan or Husayn wanted to eat a date that had been given to distribute among the poor as alms. The Messenger immediately took it from his hand and said: "Anything given as alms is forbidden to us."<sup>46</sup>

This moral pedagogy, which Muhammad hoped to implant in the hearts of his children and grandchildren, extended to situations small and large.

Notably, the care and love Muhammad showed for young persons extended beyond his family circle:

Whenever he returned to Madina, he would carry children on his mount. On such occasions, the Messenger embraced not only his grandchildren but also those in his house and those nearby. He conquered their hearts through his compassion. He loved all children.

He loved his granddaughter Umama as much as he loved Hasan and Husayn [Hussein]. He often went out with her on his shoulder, and even placed her on his back while praying. When he prostrated, he put her down; when he had finished, he placed her on his back again. He showed this degree of love to Umama to teach his male followers how to treat girls. This was a vital necessity, for only a decade earlier it had been social norm to bury infant or young girls alive. Such public paternal affection for a grand-daughter had never been seen before in Arabia.

The Messenger proclaimed that Islam allows no discrimination between son and daughter. How could there be? One is Muhammad, the other is Khadija; one is Adam, the other is Eve; one is Ali, the other is Fatima. For every great man there is a great woman.

Fatima, the daughter of the Messenger, is the mother of all members of his household. She is our mother, too. As soon as Fatima entered, the Messenger would stand, take her hands and make her sit where he had been sitting. He would ask about her health and family, show his paternal love for her, and compliment her.<sup>47</sup>

<sup>42</sup> AL TABARĪ, *supra*, vol. VI at 48-49 (emphasis added).

<sup>43</sup> See *Muhammad*, WIKIPEDIA, posted at <http://en.wikipedia.org/wiki/Muhammad>.

<sup>44</sup> M. FETHULLAH GÜLEN, M. FETHULLAH GÜLEN, PROPHET MUHAMMAD: ASPECTS OF HIS LIFE vol. 1, 197 (Fairfax, Virginia: The Fountain, 2000). (Hereinafter, GÜLEN.)

<sup>45</sup> GÜLEN, *supra*, vol. 1 at 197 (emphasis added).

<sup>46</sup> GÜLEN, *supra*, vol. 1 at 198.

<sup>47</sup> GÜLEN, *supra*, vol. 1 at 198-99.



In sum, Muhammad served as father not only to his own household, but also to all his community. His words and deeds evinced an equal concern for men and women, and demonstrated how his people might better care for and love each other.

## Chapter 2

### MUHAMMAD (PBUH) AS PROPHET (610–632 A.D.)

Love never fails. Prophecies will cease, tongues will be silent, knowledge will pass away. Our knowledge is imperfect and our prophesying is imperfect. There are in the end three things that last: faith, hope, and love, and the greatest of these is love.

*The First Letter of Saint Paul to the Corinthians, 13:8-9, 13*

#### SYNOPSIS

##### § 2.01 PROPHET IN MECCA

- [A] First Revelation
- [B] Reaction of Meccans
- [C] Boycott of Clan of Prophet
- [D] Death of Abū Ṭalib, Khadyja and Trip to Ṭa'if
- [E] Isra' and Mi'raj
- [F] Assassination Attempt

##### § 2.02 ESTABLISHMENT OF ISLAMIC STATE

- [A] *Hijra* (622 A.D.)
- [B] Constitution of Medina and Battle of Badr (624 A.D.)
- [C] Battle of 'Uḥud (625 A.D.)
- [D] Battle of Trench (*Ghazwat Alkhandaq*) or Confederates (*Alaḥzab*) (627 A.D.)
- [E] Truce of Ḥudaybiyah between Prophet and Mecca (628 A.D.)
- [F] Breaking the Truce and Glorious Victory (*Fatah Al Mubeen*) (630 A.D.)

##### § 2.03 PROPHET RETURNS TO MECCA AS LEADER (632 A.D.)

- [A] Farewell Pilgrimage (*Ḥajjat Alwada'*) and Farewell Sermon (*Khuṭbat Alwada'*)
- [B] Themes in *Khuṭbat Alwada'* (Farewell Sermon)

##### § 2.04 WIVES OF THE PROPHET

##### § 2.05 DEATH OF PROPHET (632 A.D.)

##### § 2.06 ISLAMIC LUNAR CALENDAR

- [A] "A.D." versus "A.H."
- [B] Lunar versus Solar Calendars
- [C] Formulas to Convert between "A.D." and "A.H."

## [D] Mathematical versus Physical Determinations

## § 2.01 PROPHET IN MECCA

## [A] First Revelation

The Prophet Muhammad began receiving the Revelations that began the religion of Islam in 610 A.D., which continued until he died in 632. In that time, he gathered a following, unified a people, established a peaceful social framework, and spread his Message throughout Arabia. A few decades after his death, Islamic influence stretched east from the border of China through North Africa and the Iberian Peninsula in the west.

Yet, Muhammad was keenly interested in religion long before then. In his *tour de force*, *The Decline and Fall of the Roman Empire* (1776), English historian and Member of Parliament, Edward Gibbon (1737-1794) writes:

From his earliest youth Mohammed was addicted to religious contemplation; each year, during the month of Ramadan, he withdrew from the world and from the arms of Cadijah; in the cave of Hera, three miles from Mecca, he consulted the spirit of fraud or enthusiasm whose abode is not in the heavens but in the mind of the prophet.<sup>1</sup>

It is uncertain whether his early solitary meditation was beset with an unsavory, earth-bound spirit, as Gibbon speculates. What is certain according to the Qur'an, is God (Allāh) chose Muhammad to carry an authentic message because of his excellence:

The Messenger of God is an excellent model for those of you who put your hope in God and the Last Day and remember Him often.<sup>2</sup>

The life of Muhammad was not only a story of a Prophet but also of a father, husband, teacher, merchant, leader, warrior, and more.

The turning point in his life, and a seminal event in world history, occurred in 610. Muhammad received the first revelation at the age of 40. He spent considerable time in a cave, *Ghar Hirā'*, atop *Jabal An-nur* (the Mountain of Light), near Mecca. There, one day, the Archangel Gabriel (Jibreel) appeared to Muhammad, grasped him, and ordered him to "Recite!" three times. Muhammad answered "No" each time, saying he could not read or write. Gabriel refused to accept this answer and squeezed Muhammad so hard Muhammad felt he would die. Thereby persuaded, Muhammad asked the Archangel what he was to read. Gabriel replied: "Recite in the name of the Lord who creates!"

<sup>1</sup> EDWARD GIBBON, *THE DECLINE AND FALL OF THE ROMAN EMPIRE* 653 (1776) (New York, New York: Penguin Books, abridged version, 1980). [Hereinafter, GIBBON.] The 6 volumes of this work originally were published between 1776 and 1788.

<sup>2</sup> *THE QUR'AN — A New Translation by M.A.S. Abdel Haleem* 30:21 at 268 (Oxford, England: Oxford University Press, 2004). [Hereinafter, QUR'AN.]

The dramatic story is told by the Persian, Abū Ja'far Muhammad ibn Jarir al-Tabari (838-923), the most famous biographer of the Prophet, in his opus *Tarikh al-Tabari (History of the Prophets and Kings)*:

The Messenger of God said, "Gabriel came to me as I was sleeping with a brocade cloth in which was writing. He said, 'Recite!' and I said, 'I cannot recite.' He pressed me tight and almost stifled me, until I thought that I should die. Then he let me go, and said, 'Recite!' I said, 'What shall I recite?' only saying that in order to free myself from him, fearing that he might repeat what he had done to me. He said:

'Recite in the name of your Lord who creates! He creates man from a clot of blood. Recite: And your Lord is the Most Bountiful, He who teaches by the pen, teaches man what he knew not.'

I recited it, and then he desisted and departed.<sup>3</sup>

This response of Muhammad to the Archangel is the starting point of Islam.

Muhammad, despite his initial hesitation over his illiteracy, becomes the Messenger (*Rasūl*) of God. Frightened by the experience, the Prophet fled from the cave and ran to Mecca. Every time he turned to glance back, Gabriel filled the sky and repeated Muhammad was the Messenger of God:

I was halfway up the mountain I heard a voice from heaven saying, "O Muhammad, you are the Messenger of God, and I am Gabriel," I raised my head to heaven, and there was Gabriel in the form of a man with his feet set on the horizon, saying, "O Muhammad, you are the Messenger of God and I am Gabriel."<sup>4</sup>

A shaken Muhammad returned and said to his wife, Khadyja, "cover me, cover me." Concerned for her husband, Khadyja sought advice from Waraqa Ibn Nawfal, her learned Christian cousin. Waraqa recognized Muhammad as the next Prophet, but warned her Muhammad would experience great hardship in this role. The Prophet recalled:

Then she rose up, gathered her garments around her, and went to Waraqa b. Nawfal b. Asad, who was her paternal cousin. He had become a Christian, read the Scriptures, and learned from the people of the Torah and Gospel. She told him what the Messenger of God had told her that he had seen and heard. Waraqa said, "Holy, Holy! By Him in whose hand is the soul of Waraqa, if what you say is true, Khadijah, there has come him the greatest Nāmūs — meaning by Nāmūs, Gabriel — he who came to Moses (that means that) Muhammad is the prophet of this community. Tell him to stand firm."<sup>5</sup>

<sup>3</sup> *THE HISTORY OF AL-TABARI (TARİKH AL-RUSUL WA'L-MULUK)* vol. VI at 71 (Albany, New York: State of New York Press, 1988) (W. MONTGOMERY WATT & M. V. McDONALD, trans. & annotat.) (footnote omitted). [Hereinafter, AL TABARI.]

<sup>4</sup> AL TABARI, *supra*, vol. VI at 71.

<sup>5</sup> AL TABARI, *supra*, vol. VI at 72.



Khadyja repeated the words of Waraqa to Muhammad, easing his mind. When Muhammad returned to Mecca, he encountered Waraqa while walking around the *Ka'ba*. Waraqa asked and Muhammad answered questions about the experience. After hearing the entire tale from Muhammad, Waraqa said:

By Him in whose hand is my soul, you are the prophet of this community, and there has come to you the greatest Nāmūs, he who came to Moses. They will call you a liar, molest you, drive you out, and fight you. If I live to see that, I will come to God's assistance in a way which he knows.<sup>6</sup>

Waraqa then grasped Muhammad, bestowing a kiss on his brow, strengthening the resolve of the Prophet for the trials to come.<sup>7</sup>

The fact Muhammad sought advice first from Khadyja demonstrates his respect for her; he did not go to his uncle Abū Ṭālib or his close friend Abū Bakr. He trusted Khadyja's opinion, showing that both men and women are worthy of intellectual merit. It also illustrates how women need not be only mothers and wives, but can also be supportive and sincere consultants.

### [B] Reaction of Meccans

Muhammad was reluctant share the Revelations with anyone until he received one commanding him to spread the Message of God. He called the people of Mecca to the mountain, *Jabal Al-Ṣafā*, to ask them if they would believe if he told them something incredible. They replied he had never given them a reason to doubt his word. Thus encouraged, Muhammad told them of his Revelations and his role as the Prophet. The entire crowd rebuked him, save one: 'Alī, the young nephew of Muhammad.

When God revealed the verse, "and warn your tribe of near kindred," the Messenger of God went out, mounted al-Ṣafā, and called out, "Beware this morning!" some said, "Who is that calling out?" and others said, "It is Muhammad." Then he said, "Banū so-and-so, Banū 'Abd al-Muṭṭalib, Banū 'Abd Manāf!" They gathered round him, and he said, "If I were to tell you that horsemen were coming out at the foot of that mountain, would you believe me?" They replied, "We have never known you to tell a lie." Then he said, "I am 'a warner to you in the face of a terrible doom." Abū Lahab [an Uncle of the Prophet] said, "May you perish! Did you only bring us together for this?" Then the following *sūrah* was revealed: "The power of Abū Lahab will perish, and he will be perish . . ." reciting to the end of the *sūrah*.<sup>8</sup>

Muhammad faced discrimination in the wake of his pronouncement, especially from his uncle, Abū Lahab. Despite the opposition, Khadyja, 'Alī, and Abū Bakr believed Muhammad, and gradually more people followed suit.

<sup>6</sup> AL ṬABARĪ, *supra*, vol. VI at 72-73.

<sup>7</sup> AL ṬABARĪ, *supra*, vol. VI at 72-73.

<sup>8</sup> AL ṬABARĪ, *supra*, vol. VI at 89.

As more Revelations came to Muhammad, he recited them to his loyal followers to be recorded, as he himself was illiterate. The beautiful language of the Revelations bespeaks their Divine source. The eloquence of the Arabic itself converted many when they realized not even the Prophet could compose something so wonderful.

Perhaps faith comes easier to the downtrodden than the mighty. The weakest citizens in Mecca (the poor, slaves, and women who lacked protectors) became the first Muslims. Women often were treated as second class citizens and regarded as property of men. Khadyja, a woman with power and status, was a rare exception. Muhammad received many revelations on the status of women that assure their legal right to inheritance, divorce, and equality. The Qur'ān has a *sūrah* called "Al-Nisaa" (Women).

As the Muslim following grew, so did hostility toward Muhammad. Abū Ṭālib, uncle of Muhammad and civic leader in Mecca, protected Muhammad despite being a pagan, and never believing Muhammad was the Prophet. Abū Ṭālib protected his family honor rather than take bribes by those in Mecca who wanted to remove Muhammad.

. . . a number of the nobles of Quraysh, went to Abū Ṭālib and said, "Abū Ṭālib, your nephew has reviled our gods, denounced our religion, derided our traditional values and told us that our forefathers were misguided. Either curb his attacks on us or give us a free hand to deal with him, for you are just as opposed to him as we are, and we will deal with him for you." Abū Ṭālib gave them a mild answer and declined courteously, and they left him. The Messenger of God continued as before, proclaiming the faith of God and summoning people to it.<sup>9</sup>

At the insistence of the *Quraysh*, Abū Ṭālib once asked Muhammad to cease his mission to spare himself and his family abuse. Muhammad despaired over the request and replied:

"Uncle, if they were to place the sun in my right hand and the moon in my left, on condition that I should abandon (carrying on) my preaching before God gave victory or I died in the attempt, I should not abandon it." Then the Messenger of God burst into tears and wept, and rose up. When he turned away, Abū Ṭālib called him back and said, "Come here, nephew." The Messenger of God came up to him, and said, "Go, nephew, and say what you like. By God, I will never hand you over for any reason."<sup>10</sup>

Without protection, Muhammad likely would have faced even harsher treatment. Muslims caught practicing their faith were persecuted or killed outright by Meccans. Thus, the religion spread in secrecy, though the Prophet, convinced of his Divine mandate to spread the Message of Allāh, taught and practiced in public.

<sup>9</sup> AL ṬABARĪ, *supra*, vol. VI at 93-94.

<sup>10</sup> AL ṬABARĪ, *supra*, vol. VI at 96-97.

### [C] Boycott of Clan of Prophet

After seven years of preaching, the *Quraysh* regarded Muhammad and Islam as a credible threat to business and their pagan beliefs. They feared his faith would drive traders from Mecca and pagan pilgrims from the *Ka'ba*. Muhammad himself, protected by Abū Ṭalib, and his growing flock were difficult to quash. Thus, the *Quraysh* leaders imposed a boycott on the *Hashim* clan. They forbade trading with the *Hashimites*, and banned visiting, talking, and marriage with it members. Aghast at such treatment, Abū Ṭalib moved his family to the arid *Alshi'b* Valley, where they lived for three years with minimal food and water. Abū Ṭalib, still fearful for Muhammad, asked him to sleep in the same tent each night for protection.

Still, Islam spread among the clans, further threatening the *status quo*. In response, the *Quraysh* leaders ostracized the Banū Hāshim and the Banū al-Muṭṭalib clans. After a document attesting to their ostracism was posted inside the *Ka'ba*, both clans joined Abū Ṭalib in the desert valley. Abū Lahab, however, chose to support the *Quraysh* leaders rather than Muhammad.

The clans spent three years in the desert, living in desperate conditions, before several Meccan leaders saw the folly of this division.<sup>11</sup> Hashim Bin Lou'ī, Zohair Bin Ummaiah, Abū Albukhtri Bin Hisham, Zom'ah Bin Al'swad, and Almuṭ'im Bin 'Udai gathered the Meccans around the *Ka'ba*. They announced an end to all sanctions. Not everyone agreed, but the outcast clans were allowed to return to their homes in Mecca.

### [D] Death of Abū Ṭalib, Khadyja and Trip to Ṭa'if

In 619, just six months after returning to Mecca, Abū Ṭalib died, leaving Muhammad without a protector. Khadyja, his beloved wife and best friend, died a short time later. Grieving and suddenly alone, Muhammad came under further attack from the Meccan Establishment:

[. . .] This was three years before his emigration to al-Madinah. Their death was a great affliction to the messenger of God. This is because after the death of Abū Ṭalib, Quraysh went to greater lengths in molesting him than they had ever done during his lifetime. One of them even poured dust upon his head.

[. . .] When that foolish person poured dust upon the Messenger of God's head, he went into his house with the dust still on his head. One of his daughters stood next to him washing off the dust and weeping, while the Messenger of God said to her, "Do not weep, daughter, for God will protect your father." The Messenger of God used to say, "Quraysh never did anything unpleasant to me until Abū Ṭalib died."<sup>12</sup>

Muhammad traveled south down the *Sarawat* Mountains, to *Ta'if*, to escape Mecca and search for followers. He found more hostility. The people of *Ta'if* chased him out

from their city, assailing him with stones and curses, until he bled on the road. Before arriving back at Mecca, Muhammad approached Almuṭ'im Bin 'Udai, seeking his protection. As a matter of honor, Almuṭ'im called upon his clan to keep Muhammad safe. Under the aegis of this clan, Muhammad was able to re-enter Mecca peacefully.

### [E] Isra' and Mi'raj

One evening in 621, the Prophet woke while sleeping near the *Ka'ba* to meet the Archangel Gabriel. The winged steed, *Buraq*, stood nearby waiting to bear Muhammad on a journey. The first leg of this famous trip, *Isra'*, took him from Mecca to Jerusalem. The second, *Mi'raj*, bore Muhammad from Jerusalem to the Heavens where he met his Prophetic ancestors and received instruction regarding daily prayer from Allāh himself:

Then he was taken up to the earthly heaven. Gabriel asked for admittance, and they said, "Who is it?" "Gabriel," he said. "Who is with you?" they said. "Muhammad," he answered. "Has his mission commenced?" they asked. "Yes," he said. "Welcome," they said, and called down God's blessings on him. When he went in, he saw before him a huge and handsome man. "Who is this, Gabriel?" he asked. "This is your father, Adam," he replied. Then they took him to the second heaven. Gabriel asked for admission, and they said the same as before. Indeed, the same questions were asked and the same answers given in all the heavens. When Muhammad went in to the second heaven he saw before him two men. "Who are these, Gabriel?" He asked. "John and Jesus, the two maternal cousins," he replied. Then he was taken to the third heaven, and when he went in he saw before him a man. "Who is this, Gabriel?" he asked. He replied, "Your brother Joseph who was given preeminence in beauty over other men as is the full moon over the stars at night." Then he was taken to the fourth heaven, and he saw before him a man and said, "Who is this, Gabriel?" "This is Idris," he said, and recited:

And we raised him high station. [Surah 19, *ayah* 57.]

Then he was taken to the fifth heaven, and saw before him a man and said, "Who is this, Gabriel?" "This is Aaron," he said. Then he was taken to the sixth heaven, and he saw before him a man and said, "Who is this, Gabriel?" "This is Moses," he said. Then he was taken to the seventh heaven, and he saw before him a man and said, "Who is this, Gabriel?" "This is your father Abraham," he said.

Then he took him to Paradise, and there before him was a river whiter than milk and sweeter than honey, with pearly domes on either side of it. "What is this, Gabriel?" he asked. Gabriel replied, "This is al-Kawther, which your lord has given to you, and these are your dwellings." Then Gabriel took a handful of its earth and lo! It was fragrant musk. Then he went out to the Sidrat al-Muntahā, which was a lote tree bearing fruits the largest of which were like earthenware jars and the smallest like eggs. Then his Lord drew nigh.

<sup>11</sup> Al-TABARĪ, *supra*, vol. VI at 105-106.

<sup>12</sup> Al-TABARĪ, *supra*, vol. VI at 115.



"Till he distant two bows' length or nearer." Because of the nearness of its Lord the lote tree [a mystical Islamic metaphor for the uppermost boundary of knowledge that a human can reach] became covered by the like of such jewels as pearls, rubies, chrysolites, and colored pearls. God made Revelation to his servant, cause him to understand and know, and prescribed for him fifty prayers (daily).

Then he went back past Moses, who said to him, "What did he impose your community?" "Fifty prayers," he said. "Go back to your Lord," said Moses, "and ask him to lighten the burden for your community, for your community is the weakest in strength and the shortest-live." Then he told Muhammad what he himself had suffered at hands of the Children of Israel. The Messenger of God went back, and God reduced the number by ten. Then he passed Moses again, who said, "Go back to your Lord and ask him to lighten the burden further." This continued until he had gone back five times. Once more Moses said, "Go back to your Lord and ask him to lighten the burden," but the Messenger of God said, "I am not going back, although I do not wish to disobey you," for it had been put into his heart that he should not go back. God said, "My speech is not to be changed, and my decision and precept is not to be reversed, but he (Muhammad) lightened the burden of prayer on my community to a tenth of what it was first."<sup>13</sup>

The Prophet told the Meccans about this journey, who unsurprisingly did not believe it and thought him mad. To prove his madness, they asked him to describe Jerusalem, knowing he had never seen the city. To their surprise, he described Jerusalem in detail. Yet, even after this test, only Abū Bakr, close friend and Companion (*ṣaḥābiy*) of Muhammad, believed the tale. Abū Bakr told the crowd: "I believe that Muhammad receives messages from Allāh and that is more extraordinary than a trip to Jerusalem and if Muhammad said that, and then it is truthful."<sup>14</sup>

### [F] Assassination Attempt

The Meccans resorted to drastic action when the Prophet reached people outside of Mecca with his Message. The *Quraysh* leaders gathered in the *Dar al-Nadwah* (House of Assembly), whereupon they decided killing Muhammad was the only way to stop him, his followers, and the threats they posed to the Meccan Establishment. They elected to have a young man from each clan surprise Muhammad in his bed. Each youth was told to strike the Prophet once with a sword to share his blood among all the clans, which would make it impossible for the family of Muhammad to seek retribution:

They gathered together for this purpose and at the fixed time went into the House of Assembly to deliberate there about the Messenger of God. On the morning of the day fixed (the day called al-Zaḥmah) they went there, and the Devil met them in the form of a venerable old man wearing a coarse garment and stood at the door of the house. When they saw him standing

<sup>13</sup> AL-TABARĪ, *supra*, vol. VI at 78-80.

<sup>14</sup> AL-TABARĪ, *supra*, vol. VI at 78-80.

at the door they said, "Who is this old man?" He said, "I am an old man from Najd who has heard what you have arranged to meet for and has come to be with you to hear what say; perhaps you will not lack judgment and good advice from him." They replied, "Certainly, come in," so he went in with them. All the nobles of *Quraysh*, of every clan, had gathered there; [ . . . ] In addition there were others, some from *Quraysh* and others who were not counted as *Quraysh*.

They said to one another, "This man has done what he has done, and you have seen it for yourselves. We cannot be sure that he will not fall upon us with his followers who are not of us; so come to a decision about him." When they began to deliberate, one of them said, "keep him in fetters, lock him up, and wait for the same kind of death to overtake him which overtook other poets of his sort before him, Zuhayr, al-Nābighah and others." The old man from Najd said, "No, by God, this is not judicious; if you were to imprison him as you say, news of what had happened to him would leak out to his companions from behind the door which you had shut upon him, and in no time at all they would fall upon you and snatch him away from your hands. Then their numbers would grow against you and they would seize power from you. This is not judicious, so consider something else."

They consulted again, and one of them said, "Let us expel him from among us and banish him from our land; when he has left us, by God, we will not care where goes or where he settles. Then harm which he has been doing will disappear, we shall be rid of him and we shall be able to put our affairs in order again and restore our social harmony to what it was before." The old man from Najd said, "By God, this is not judicious; do you not see the beauty of his discourse, the sweetness of his speech and how dominates hearts of men with the message which he brings? By God, if you expel him, I think it not unlikely that he will descend upon some tribe of the Arabs and win them over with this speech and discourse of his so that they follow him in his plans; then he will lead them against you, crush you with them, seize power from your hands and do with you what he wants. Come to some other decision about him."

Abū Jahl b. Hishām said, "By God, I have an idea about him, which I do not think you have hit upon yet." "What is it, Abū al-Ḥakam?" they asked. He said, "I think that you should take one young, strong, well-born, noble young man from each clan; then we should give each young man a sharp sword; then they should make for him and strike him with their swords as one man and kill him. Thus we shall be relieved of him, and if they do this, the responsibility for shedding his blood will be divided upon among all the clans, and the Banū 'Abd Manaf will not be able to wage war against the whole of their tribe, and will be content to take money from us, which we can pay them." The old man from Najd was saying, "What this man says is right. This is the correct decision; you have no other." Thereupon they dispersed, having agreed upon this.<sup>15</sup>

<sup>15</sup> AL-TABARĪ, *supra*, vol. VI at 140-142.

On the night of the assassination attempt, the Archangel Gabriel warned the Prophet of the plot and bid him to sleep somewhere else. 'Ali took his place, knowing the *Quraysh* would strike the Prophet, to give Muhammad and Abū Bakr time to escape to *Jabal Thaur* (Bull Mountain), south of Mecca. When they discovered Muhammad had fled, the leaders sent search parties north to capture the Prophet. The pair stayed in the southern mountains for three days to confuse those who anticipated Muhammad would flee to Medina.

## § 2.02 ESTABLISHMENT OF ISLAMIC STATE

### [A] *Hijra* (622 A.D.)

On the third day at *Jabal Thaur*, Gabriel appeared and told Muhammad to leave Mecca. Thirteen years after the first Revelation, the Prophet fled from Mecca to Medina. Descending the mountain, the tearful Prophet said, "Allāh knows that I love you Mecca but your people are chasing me out."<sup>16</sup>

Medina, an agricultural town, was home to two rival tribes, the Alaoose and Alkhazraj, plus Jews, Christians, and newly converted Muslims. Many in Medina knew of the Prophet's flight from Mecca and waited for him on the south side of town. His failure to appear caused his followers to fear he may have been captured or killed. When he did appear, the people of Medina greeted him, singing a famous poem:

O' the White Moon rose over us  
from the valley of Wada'  
and we owe it to show gratefulness  
where the call is to Allāh

O you who were raised amongst us  
coming with a work to be obeyed  
You have brought to this city nobleness  
Welcome, best caller to God's way

Muhammad began his leadership in Medina by unifying the rival tribes and uniting them with his followers under the banner of Islam, creating peace and prosperity in the city.

The day the Prophet arrived in Medina, 20 September 622 (*Rabi' Alawwal* 1 A.H.), marks the beginning of the Islamic calendar. The *Hijra* (migration) from Mecca to Medina signifies the creation of a new Islamic state. The leader of that state, after Muhammad and the first of the Four Rightly Guided Caliphs (*Rashidun*), Abū Bakr, was 'Umar, who established the official Islamic calendar based on the *Hijra*:

A money order was brought before 'Umar which fell due in (the money of) Sha'bān. 'Umar said, "Which Sha'bān? The one which is coming or the one we are in now?" Then he said to the Messenger of God's Companions, "Contrive something for the people which they can recognize." Some said,

<sup>16</sup> AL ṬABARĪ, *supra*, vol. VI at 140-142.

"Write according to the chronology of the Greeks; it is said that they date their letters from the time of Alexander, but that was a long time ago." Others said, "Write according to the chronology of the Persian; it is said that wherever a king rises up amongst them he discards the era of his predecessors." In the end they agreed that they would see how long the Messenger of God had remained in al-Madinah. They found this to be ten years, and the era was reckoned from the Messenger of God's emigration.<sup>17</sup>

The people of Medina promised Muhammad a home and support within the city. He assumed authority shortly after his arrival, establishing peace among tribes and tolerance for non-Muslims. Those who chose not to convert to Islam freely practiced their own faith. The Islamic community (*ummah*), made up of Meccan immigrants (*Al-muhajirun*), and Medinan supporters (*Al-Anṣar*), flourished under the guidance of the Prophet.

### [B] Constitution of *Medina* and Battle of Badr (624 A.D.)

As the new leader of Medina, Muhammad gathered the heads of each tribe, including the Jewish tribe, to draft a constitution for the city. A compelling piece of statecraft, this treaty provided for the common defense against external attacks, calling on each tribe to defend one another. These terms guaranteed protection to all the people of Medina, regardless of their race or religion. A modern-day analog might be Article 5 of the April 1949 *North Atlantic Treaty*, which is a mutual defense commitment among members of the North Atlantic Treaty Organization (NATO) that deems an attack on any NATO member an attack on all of them.

Muhammad also began building the first mosque (*masjid*), personally helping with construction by carrying bricks. The *masjid* served as a conference hall, school, and community center, as well as a house of worship. At Medina, Muhammad relayed Messages from Allāh brought by Gabriel to his followers, men and women alike. The Prophet used the *masjid* as a hub for messengers sent to surrounding tribes with invitations to convert to Islam.

As for Muslims still living in Mecca, they endured continued persecution after Muhammad fled. They were banned from carrying weapons in the city and eventually removed from their homes. Though Islam gained strength and power in Medina, the Prophet eschewed revenge on Mecca. Indeed, one specific revelation allows the use of force only for self-defense, prohibiting initial aggression.<sup>18</sup>

On 13 March 624 (17 *Ramādān* 2 A.H.), Muhammad fought his first battle against a substantially larger Meccan force. Muhammad led a small contingent of 300 men to intercept a *Quraysh* caravan near the Badr Well. The Meccans heard of his plans and sent 1,000 knights to eliminate the Muslim forces. Acting as a general on the battlefield, the Prophet made it clear to his soldiers they were not fighting for revenge and were not to kill any women, children, or other non-combatants. The Geneva Convention, which entered into force in 1949, contains similar

<sup>17</sup> AL ṬABARĪ, *supra*, vol. VI at 158.

<sup>18</sup> See QUR'AN, *supra*, 2:190-93 at 21-22.



provisions.<sup>19</sup>

These rules of war, enumerated by the Prophet, bind the entire Islamic nation. Before sending troops to meet Romans forces to the north, Abū Bakr ordered General Usama ibn Zaid:

Do not drown nor burn date orchards. Do not hamstring livestock nor cut down fruit trees nor destroy churches. Do not kill children nor elders nor women. Do not slaughter any sheep or cows or camels except for food. You will find people who secluded themselves from society in monasteries. Leave them to their seclusion.<sup>20</sup>

In brief, Muslims cite these points (*inter alia*) to make the case Islam counseled against violence from its earliest days.

As for the Battle of Badr, the Prophet acted on the advice of Habbab ibn Munthir in choosing the site of the well:

O Messenger of God, do you consider that this is a position in which God has placed you, and that it is not for us to move it forward or back, or do you consider that it is a matter of judgment, tactics and stratagem?" He replied, "Certainly not; it is a matter of judgment, tactics and stratagem." Then al-Habbab b. Munthir b. al-Jamūh said, "O Messenger of God, this is not the proper position for you. Arise with your men and go to the nearest well to the enemy. Halt there and then fill in the other wells. Then build a cistern next to it and fill it with water. Then we will fight the enemy and have water to drink while they do not." The messenger of God said, "You have given judicious advice." Then the Messenger of God and the men who were with him arose and went to the well nearest to the enemy and halted there. Then he gave orders to fill in the other wells, and to build a cistern next to the well at which he had halted. This was filled with water and then they drew water from it in their drinking vessels.<sup>21</sup>

This example is an instance of a trait of Muhammad championed by Muslims, namely, he valued the counsel of his Companions (*Ṣaḥābah*).

The Meccans suffered a swift defeat at Badr. The battle, fought in two stages, began with a traditional clash of champions. 'Alī Ḥamza, Uncle of the Prophet, and 'Ubaydah Ibn Al-Ḥārith, a Companion of the Prophet (*Ṣaḥābah*), quickly dispatched the *Quraysh* knight he faced. After this fight, the two armies met on the desert sand. The battle ended before noon. Said to be aided by angels from Allāh, the Muslims won:

<sup>123</sup>God helped you at Badr when you were very weak. Be mindful of God, so that you may be grateful. <sup>124</sup>Remember when you said to the believers, 'Will you be satisfied if your Lord reinforces you by sending down three

thousand angels? <sup>125</sup>Well, if you are steadfast and mindful of God, your Lord will reinforce you with five thousand swooping angels if the enemy should suddenly attack you!" and God arranged it so, <sup>126</sup>as a message of hope for you [believers] to put your hearts at rest — help comes only from God, the mighty, the Wise — <sup>127</sup>and in order to cut off the flanks of disbelievers' army and frustrate them, to make them withdraw in total defeat.<sup>22</sup>

This first battle under command of the Prophet, sometimes referred to as the "Separation between the Just and Unjust," shocked and angered the Meccans.

Muhammad brought the prisoners of Badr to Medina, yet ensured most of them were treated well. To be sure, he ordered some prisoners to be executed for their earlier crimes in Mecca, thereby enforcing *surah* 2, *ayah* 194 and *surah* 16, *ayah* 126 of the Qur'ān. But, to all other prisoners he also offered three options. They could win their freedom by: (1) converting to Islam, as *surah* 8, *ayah* 70 suggests; (2) paying ransom, as *surah* 47, *ayah* 4 suggests; or (3) teaching ten Muslims to read and write. Muslims cite the third option for the proposition Muhammad cherished education and literacy.

### [C] Battle of 'Uḥud (625 A.D.)

Resentment festered in the hearts and minds of Meccan leaders after the defeat at Badr. A year later they marshaled a force of 3,000 troops to attack Muhammad directly. Muhammad, gathering an army of his own, asked his followers where they should fight the brewing battle:

[A]lthough the Messenger of God had not wanted to go out of Medina, some men of the Muslims [ . . . ] said, O Messenger of God, lead us out to our enemies so that they may not think that we are too cowardly and weak to face them." [ . . . ] Those who were eager to meet the enemy, however, continued to press the Messenger of God until he went into his house and put on his coat of mail.<sup>23</sup>

Again acting on the advice of his peers, Muhammad led his army out of Medina to meet the Meccans at the base of Mount 'Uḥud.

The two armies faced one another on 23 March 625 (7 Shawwal 3 A.H.), the Muslims led by the Prophet and the Meccans commanded by Abū Sufyan (leader of the *Umayyad* Family, namesake of the *Umayyad* Caliphate, and father of Muawiyah I, the first *Umayyad* Caliph). Though outnumbered 3-to-1, the Muslim army controlled the battlefield. But, Muslim archers grew arrogant and left their positions, despite direct orders from the Prophet:

If you see us victorious over them, do not leave your position, and if you see them victorious over us, do not come to our assistance.<sup>24</sup>

<sup>19</sup> Geneva Convention (No. 4) Relative to the Protection of Civilian Persons in Time of War, Part III, § I, Art. 27, Aug. 12, 1949.

<sup>20</sup> Shaykh G. F. Haddad, *Abu Bakr and International Law*, living Islam — Islamic Tradition (11 April 2004), posted at [www.livingislam.org/abahil\\_e.html](http://www.livingislam.org/abahil_e.html).

<sup>21</sup> AL-TABARĪ, *supra*, vol. VI at 47.

<sup>22</sup> QUR'AN, *supra*, 3:123-27 at 43-44.

<sup>23</sup> AL-TABARĪ, *supra*, vol. VII at 108.

<sup>24</sup> AL-TABARĪ, *supra*, vol. VII at 113.

This prideful error exposed the entire Muslim army, and the tide of battle turned against it. Khalid ibn Alwalid, a Meccan leader and grizzled veteran, took part of his army around the mountain to surprise the Muslims on their unprotected flank. Many Muslim soldiers were slain. The Prophet himself was wounded, and he lost his uncle and champion, Ḥamzah, plus many *Ṣaḥābah*.

Pain and grief spread throughout the young Muslim community (*ummah*). Shortly after this defeat, the Prophet related a Revelation:

God fulfilled his promise to you: you were routing them, with His permission, but then you flattered, disputed the order, and disobeyed, once He had brought you within sight of your goal — some of you desire the gains of this world and others desire the world to come — and then He prevented you from [defeating] them as a punishment. He has now forgiven you: God is most gracious to the believer.<sup>153</sup> You fled without looking back while the Messenger was calling out to you from behind, and God rewarded you with sorrow for sorrow. [He has now forgiven you] so that you may not grieve for what you missed or for what happened to you. God is well aware of everything you do.<sup>154</sup> After sorrow, He caused calm to descend upon you, a sleep that overtook some of you.

Another group, caring only for themselves, entertained false thoughts about God, thoughts more appropriate to pagan ignorance, and said, 'Do we get a say in any of this?' [Prophet], tell them, 'everything to do with this affair is in God's hand.' They conceal in their hearts things they will not reveal to you. They say, 'If we had had our say in this, none of us would have been killed here.' Tell them, 'even if you had resolved to stay at home, those who were destined to be killed would still have gone out to meet their deaths.' God did this in order to test everything within you and order to prove what is in your hearts. God knows your innermost thoughts very well.<sup>155</sup> As for those of you who turned away on the day the two armies met in battle, it was Satan who caused them to slip, through some of their actions. God has now pardoned them: God is most forgiving and forbearing.<sup>25</sup>

The defeat at Uhud is still used today to teach Muslims the consequences of disobedience and pride.

#### [D] Battle of Trench (*Ghazwat Alkhandaq*) or Confederates (*Alaḥzab*) (627 A.D.)

The Meccan victory at the Battle of Uhud emboldened *Quraysh* leaders to launch another attack to put an end to their Muslim problem once and for all. On 31 March 627 (8 *Dhu Al-Q'ada* 5 A.H.), Meccan General Abū Sufyan assembled an army of over 10,000 men, one of the largest armies Arabia had ever seen. This Army of Confederates (*Alaḥzab*), so called because its troops hailed from multiple tribes in and around Mecca, included the largest Jewish tribe, the *Banū Quraydah*, which was a signatory to the mutual defense and protection treaty of Medina.

Abū Sufyan planned to attack Medina from the north, while the *Banū Quraydah* would approach the city from the south. Muhammad had only 3,000 troops to defend Medina, so he needed a clever strategy to have any chance of success. One of his soldiers, Salman Alfarisi (Salman the Persian), suggested digging a trench north of the city in between the mountains surrounding Medina to the east and west. When they came upon the trench, the Meccans were stymied by it. Abū Sufyan could not move his grand army across it, and had to settle by laying siege on the far side. During the siege, the Meccans sent an emissary from the Jewish Khaybar tribe to encourage the *Banū Quraydah* to break from the treaty and attack Medina.

Muhammad, trusting in his treaty, left the southern flank of the city unguarded. However, he perceived something strange in the movements of the Meccan army and feared the *Banū Quraydah* may have been switched allegiance. Muhammad immediately sent three men south to ascertain the loyalty of the *Banū Quraydah*. The ambassadors were to cheer openly if the tribe remained loyal, but quietly hint to Muhammad if the *Banū Quraydah* broke the treaty. When his men returned from the south with a quiet hint, Muhammad dispatched a portion of the army to guard against the *Banū Quraydah*.

The broken treaty was an ominous portent, but a glimmer of hope presented itself. A respected Arab leader of the Meccan army, Nu'aym Ibn Mas'ud, secretly converted to Islam. His defection, and subsequent advice to Muhammad, ended the siege and thereby part of the threat from the Confederate Army. Still, the Muslims were so outnumbered their chance for victory hinged on fomenting dissension among Meccan forces.

Nu'aym rapidly devised a way to pit the *Banū Quraydah* against the larger Meccan force. First, he told *Banū Quraydah* the Meccans were deserting the battle, leaving them to fight Muhammad alone. He suggested they demand a few Meccan leaders as collateral for their continued cooperation. If Abū Sufyan refused them, then they would know the Meccans surely are abandoning the battlefield. Nu'aym then reported to Abū Sufyan that the *Banū Quraydah* regretted breaking the treaty with Muhammad and were prepared to offer Meccan leaders as prisoners to Muhammad to prove their loyalty. Nu'aym led the Meccans to suspect the *Banū Quraydah* either would kill them or send them to Muhammad.

Thus, the groundwork for mutual suspicion was laid. The *Banū Quraydah* sent a messenger to Abū Sufyan asking for a few leaders to solidify dealings between them. Doubtful of their motives, Abū Sufyan refused, leading the *Banū Quraydah* to believe the Meccans were ready to retreat. Subsequent communications could not achieve positive results, as the trust of the Confederates was broken.

Just as Nu'aym drove a wedge in between the two main factions in the Confederate Army, the seasons changed, and the weather turned cold, windy and wet. Many tribes with no real stake in the conflict simply packed up and returned home. Others signed covert peace treaties with Muhammad and then departed. With their forces disintegrating, the Meccans abandoned their siege just 2 weeks after beginning it.

The Qur'an itself provides an account of the battle:

<sup>25</sup> Qur'an, *supra*, 3:152-155 at 45-46.



<sup>9</sup>You who believe, remember God's goodness to you when mighty armies massed against you: We sent a violent wind and invisible forces against them. God sees all that you do. <sup>10</sup>They massed against you from above and below; your eye rolled [with fear], your hearts rose into your throats, and you thought [ill] thoughts of God. <sup>11</sup>There the believers were sorely tested and deeply shaken: <sup>12</sup>the hypocrites and the sick at heart said, "God and His messenger promised us nothing but delusions!" <sup>13</sup>Some of them said, "People of Yathrib [Medina], you will not be able to withstand [the attack], so go back!" Some of them asked the Prophet's permission to leave, saying, "Our houses are exposed," even though they were not — they just wanted to run away: <sup>14</sup>had the city been invaded from all sides, and the enemy invited them to rebel, they would have done so almost with — out hesitation. <sup>15</sup>Yet they had already promised God that they would not turn tail and flee, and a promise to God will be answered for. <sup>16</sup>[Prophet], say, "Running away will not benefit you. If you managed to escape death or slaughter, you will only be permitted to enjoy [life] for a short while." <sup>17</sup>Say, "If God wishes to harm you, who can protect you? If God wishes to show you mercy, who can prevent Him?" They will find no one but God to protect or help them.

<sup>18</sup>God knows exactly who among you hinder others, who [secretly] say to their brothers, "Come and join us," who hardly ever come out to fight. <sup>19</sup>who begrudge you [believers] any help. When fear comes, you [Prophet] see them looking at you with eyes rolling like someone in their death throes; when fear has passed, they attack you with sharp tongues and begrudge you any good. Such men do not believe any God brings their deeds nothing — that is all too easy for God. <sup>20</sup>They think the joint forces have not gone, and if the joint forces did come again they would wish they were in the desert, wandering among the Bedouin and seeking news about you [from a safe distance]. Even if they were with you [believers], they would hardly fight at all. <sup>21</sup>The messenger of God is an excellent model for those of you who put your hope in God and the last Day and remember Him after.

<sup>22</sup>When the believers saw the joint forces, they said, "This is what God and His Messenger promised us: the promise of God and His Messenger is true," and this only served to increase their faith and submission to God. <sup>23</sup>There are men among the believers who honored their pledge to God: some of them have fulfilled it by death, and some are still waiting. They have not changed in the least. <sup>24</sup>[Such trials are ordained] so that God may reward the truthful for their honesty and punish the hypocrites, if He so wills, or He may relent towards them, for God is forgiving and merciful. <sup>25</sup>God sent back the disbelievers along with their rage — they gained no benefit — and spare the believers from fighting. <sup>26</sup>

Once the Meccans withdrew, Muhammad marched his army into the territory of the *Banā Quraydah*, where he stayed for 25 days. The tribe surrendered under the condition that Muhammad would not be the judge to decide their future. Instead, the *Banā Quraydah* chose Sa'ad Ibn Mu'adh, a leader in Medina and of the

*Banā Aus* (allies of the *Banā Quraydah*), as the judge. Sa'ad, who fought and was injured in the battle, sentenced all the *Banā Quraydah* men to death, but ordered all non-combatants left alone.

By some accounts, in respect of parties who broke the treaty, an arbitrator decided to kill the combatants, but spare the rest of the town. <sup>27</sup> Effectively, that decision meant the execution of men and enslavement of women. In such accounts, it is unclear whether Muhammad advocated that decision, or possibly even made it himself.

In any event, it is an error to view the harshness of the punishment as related to the religion of the *Banā Quraydah* tribe, Judaism. Rather, the sanction was severe because the tribe betrayed the treaty of mutual defense and put the lives of Median citizens in mortal danger. Thus, it is an abuse of the episode to cite it in an accusation of anti-Semitism against the Prophet. It is more accurate to appreciate Muhammad respected the Jewish people and held them in high regard. Muhammad knew and befriended several Jews, wed one, and displayed concern upon hearing a Jewish neighbor fell ill and died:

A funeral procession passed in front of the Prophet . . . and he stood up. When he was told that it was the coffin of a Jew, he said, "Is it not a living being (soul)?" <sup>28</sup>

The Prophet left his armor with another Jewish neighbor as collateral in a business transaction to set an example of equality. Moreover, several Qur'anic passages insist Muslims honor other Peoples of the Book (*ahl al kitāb*), i.e., Jews and Christians.

The Muslim victory at the Battle of Trench turned the tide in the Arab world. Other tribes knew they could not defeat the Muslim army, causing many of them to convert to Islam or sign peace treaties with Muhammad.

### [E] Truce of Ḥudaybiyah between Prophet and Mecca (628 A.D.)

Once the leaders of Mecca and most of the Arabian Peninsula were unified under the banner of Islam, they ceased overt hostilities. In 628 A.D., Muhammad embarked on his own pilgrimage (*Hajj*) to the *Ka'ba* in Mecca, with 1,400 unarmed men and women. Before reaching it, they waited a few miles north at Ḥudaybiyah, for permission to enter.

The large movement of people put the *Quraysh* in a difficult position. The Establishment chafed at the idea of letting Muhammad back into Mecca. But, as guardians of the Holy City, the Meccan leaders were duty-bound to allow pilgrims in to worship. Ultimately, the leaders sent Suhayl Ibn 'Amr to negotiate a peace treaty, the first between Meccans and Muslims, with Muhammad:

<sup>27</sup> See KAREN ARMSTRONG, *MUHAMMAD 270* (New York, New York: HarperCollins, 1992).

<sup>28</sup> THE TRANSLATION OF THE MEANINGS OF SAHIH AL-BUKHARI, ARABIC-ENGLISH by Dr. Muhammad Muhsin Khan, vol. II, book XXIII (The Book of Funerals — *Al-Jana'iz*), p. 224, *hadith* no. 399 (Dar Ahyā Us-Sunnah, Al Nabawiya, March 1978). [Hereinafter, *BUKHARI*.]

When the Prophet . . . was checked from going to the Ka'ba, the people of Mecca made peace with him on the condition that he would (be allowed to) enter Mecca (next year) and stay there for three days, that he would not enter (the city) except with swords in their sheaths and arms encased in their covers, that he would not take away with him anyone from its dwellers, nor would he prevent anyone from those with him to stay on in Mecca (if he so desired). He said to 'Ali: Write down the terms settled between us. (So, 'Ali wrote): In the name of Allāh. . . . This is what Muhammad, the Messenger of Allāh, has settled (with the Meccans). The polytheists said to him: If we knew that thou art the Messenger of Allāh, we would follow you. But write: Muhammad b. 'Abdullah. So he told 'Ali to strike out these words. 'Ali said: No, By Allāh, I will not strike them out. The Messenger of Allāh. . . said: Show me their place (on the parchment). So he ('Ali) showed him their place and he (the Holy Prophet) stuck them out; and 'Ali wrote: Ibn 'Abdullah. (According to the terms of the treaty, next year) the Holy Prophet . . . stayed there for three days. When it was the third day, they said to 'Ali: This is the last day according to the terms of your companion. So tell him to leave. 'Ali informed the Prophet . . . accordingly, He said: Yes, and left (the city).<sup>29</sup>

Most Muslims were upset at the wording and terms of the agreement. Those words and terms were disrespectful to the Prophet, and to be denied admittance to Mecca for 1 year was an insult. Nevertheless, Muhammad secured the release of many Muslims in Meccan custody as his part of the bargain.

Muhammad and his followers had brought several animals to be sacrificed at the end of their anticipated *Hajj*. Although the pilgrims were not allowed into Mecca for 1 year, Muhammad ordered them to make the sacrifices. They refused in protest over the terms of the treaty. Muhammad responded by asked his wife, Um Salamah, for advice, trusting her opinion on resolving internal conflicts. She told him to begin the sacrifices himself, and surely the others would follow. Um Salamah was correct, and the other Muslims sacrificed their animals with the Prophet.

Though the Prophet and his followers returned to Medina without entering Mecca, his power and influence steadily grew, in part because of his widening reputation as an effective diplomat. The requisite year passed, and in 629 A.D. Muslims preformed the *Hajj*, remaining in Mecca for 3 days, as stipulated in the treaty. The *Quraysh* departed the city for the surrounding mountains, where they watched the Prophet circle the *Ka'ba* and saw a black man atop the Holy edifice. Bilal ibn Ribah, an African and former slave, was ordered by the Prophet to ascend the *Ka'ba* and call all Muslims to prayer on account of his beautiful voice and

<sup>29</sup> SAHĪḤ MUṢLIM — BEING TRADITIONS OF THE SAYINGS AND DOINGS OF THE PROPHET MUHAMMAD AS NARRATED BY HIS COMPANIONS AND COMPILED UNDER THE TITLE *AL-JAM'-US-SAHĪḤ* BY IMAM MUṢLIM, RENDERED INTO ENGLISH BY ABDUL HAMID SIDDIQI, WITH EXPLANATORY NOTES AND BRIEF BIOGRAPHICAL SKETCHES OF MAJOR NARRATORS, CORRECTED AND REVISED BY DR. HASSAN VOL. IIIA, p. 204-205, *hadith* no. 1783R2 (Lahore, Pakistan: Sh. Muhammad Ashraf Booksellers and Exporters, 1960) (footnotes omitted). [Hereinafter, MUSLIM.] Dr. Hassan comments that the fact Muhammad asked 'Ali to show him where on the parchment the words "the Messenger of Allāh" appeared is proof Muhammad "was unlettered and he could not read any writing." *Id.* at fn. (1). His willingness to strike these words is indicative of his humility.

unwavering conviction in the Islamic faith. Out went the call of "Allāh *hu Akbar!*" (God is the Greatest), and the Prophet later honored Bilal with the title "Caller of Prayers," and the event is testament to the proposition that Islam and racial discrimination are supposed to be strangers.

### [F] Breaking the Truce and Glorious Victory (*Fatah Al Mubeen*) (630 A.D.)

Peace is more than the absence of war. The Meccans embodied this insight: despite the peace treaty, they still resented the Muslims. In response to a Meccan attack against a Muslim ally, Muhammad marched 10,000 troops toward Mecca in January 630 A.D. (10 *Ramādān* 8 A.H.). The Meccans realized they could not defeat such an army. Thus, they allowed the Prophet to enter the city without resistance. Many of them converted to Islam.

Muhammad, with head bowed as a sign of respect, entered Mecca proclaiming victory without bloodshed as the plan of Allāh. As the Prophet lifted his head, looking from face to face and remembering the abuses he suffered at the hands of many in his gaze, he asked the Meccans what they would do if they had the upper hand. He sensed their fear, but spoke comforting words. He proclaimed a general pardon for all citizens of Mecca. The sudden reprieve shocked everyone. Amnesty is unusual, or at least unexpected, during wartime. The amnesty bespoke the commitment of Muhammad to peaceful resolution of conflicts, and the use of reason to cultivate respect from adversaries.

The bloodless capture of Mecca in 630 by the Muslims spoke volumes about the power the Prophet wielded. Many tribes, which had held out against Islam, took this Glorious Victory (*Fatah Al Mubeen*) as a sign from Allāh and converted. After the victory, the Prophet returned to his home in Medina, sending Abū Bakr to lead the *Hajj* the next year. Abū Bakr led a diverse group of pilgrims to Mecca in the footsteps of the Prophet, returning to Medina upon completion of this journey.

### § 2.03 PROPHET RETURNS TO MECCA AS LEADER (632 A.D.)

#### [A] Farewell Pilgrimage (*Hajjat Alwada'*) and Farewell Sermon (*Khuṭbat Alwada'*)

In 632 A.D., Muhammad performed his final *Hajj*, entering Mecca as the leader rather than enemy of its inhabitants. Tens of thousands of Muslims traveled with the Prophet on this *Hajjat Alwada'* (Farewell Pilgrimage). On 9 *Dhul-Hijjah*, 10 A.H. in the 'Uranah valley of Mount Arafat, Muhammad delivered the *Khuṭbat Alwada'* (Farewell Sermon). Significantly, this speech is recorded in every collection of *hadiths*. After beginning with praise and thanks to Allāh, the Prophet continued:

"O People! Lend me an attentive ear, for I know not whether after this year I shall ever be amongst you again. Therefore, listen carefully to what



I am saying and Take These Words to Those Who Could Not Be Present Here Today.

"O People! Just as you regard this month, this day, this city as Sacred, so regard the life and property of every Muslim as a sacred trust. Return the goods entrusted to you to their rightful owners. Hurt no one so that no one may hurt you. Remember that you will indeed meet your LORD, and that he will indeed reckon your deeds.

"Allāh has forbidden you to take usury (interest), therefore all interest obligations shall henceforth be waived. Your capital is yours to keep. You will neither inflict nor suffer any inequity. Allāh has judged that there shall be no interest and that all the interest due to Abbas ibn 'Abd al-Muṭṭalib (Prophet's Uncle) be waived.

"Every right arising out of homicide in pre-Islamic days is henceforth waived and the first such right that I waive is that arising from the murder of Rabi'ah ibn al-Harithiah.

"O Men! The unbelievers indulge in tampering with the calendar in order to make permissible that which Allāh forbade, and to prohibit which Allāh has made permissible. With Allāh the months are twelve in number. Four of them are holy, three of these are successive and one occurs singly between the months of *Jumada* and *Shaban*.

"Beware of Satan, for the safety of your religion. He has lost all hope of that he will be able to lead you astray in big things, so beware of following him in small things.

"O People! it is true that you have certain rights with regard to your women but they also have rights over you. Remember that you have taken them as your wives only under Allāh's trust and with His permission. If they abide by your right then to them belongs the right to be fed and clothed in kindness. Do treat your women well and be kind to them for they are your partners and committed helpers. And it is your right that they do not make friends with anyone of whom you do not approve, as well as never to be unchaste.

"O People! Listen to me in earnest, worship Allāh, say your five daily prayers, fast during month of *Ramādān*, and give your wealth in *Zakāt* (obligatory charity). Perform *Hajj* if you can afford to.

"All mankind is from Adam and Eve, an Arab has no superiority over a non-Arab nor a non-Arab has any superiority over an Arab; also a white has no superiority over black nor a black has any superiority over white except by piety and good action. Learn that every Muslim is a brother to every Muslim and that the Muslims constitute one brotherhood. Nothing shall be legitimate to a Muslim which belongs to a fellow Muslim unless it was given freely and willingly.

"Do not therefore do injustice to yourselves. Remember one day you will meet Allāh and answer your deeds. So beware, do not stray from the path of righteousness after I am gone.

"O People! No Prophet or Apostle Will Come after Me and No New Faith Will Be Born. Reason well, therefore, O People! And understand words which I convey to you. I leave behind me two things, the Qur'an and my *Sunnah* and if you follow these you will never go astray.

"All those who listen to me shall pass on my words to others and those to others again; and may the last ones understand my words better than those who listen to me directly.

"Be my witness O Allāh, that I have conveyed your message to your people."

As part of this sermon, the Prophet recited [to] them a Revelation from Allāh which he had just received and which completed the Qur'an, for it was the last passage of the entire sacred text to be revealed:

This day the disbelievers despair of prevailing against your religion, so fear them not, but fear Me (Allāh)! This day have I perfected for you your religion and fulfilled My favor unto you, and it hath been My good pleasure to choose Islam for you as your religion (*Surah* 5, *Ayah* 3).

The sermon was repeated sentence by sentence by Safwan's brother Rabi'ah [*Radia Allāhu* (May God Be Pleased With Him)], who had a powerful voice, at the request of the Prophet and he faithfully proclaimed to over ten thousand gathered on the occasion. Toward the end of his Farewell Sermon, the Prophet asked:

"O people, have I faithfully delivered unto you my message?" A powerful murmur of assent "O Allāh, yes!" arose from thousands of pilgrims and the vibrant words "*Allahumma na'm*" rolled like thunder throughout the valley. The Prophet raised his forefinger and said: "Be my witness O Allāh, that I have conveyed your message to your people."<sup>30</sup>

## [B] Themes in *Khuṭbat Alwada'* (Farewell Sermon)

The *Khuṭbat Alwada'* marks a maturation point for the Islamic community (*ummah*). It is an *ummah* under God: the beginning of the sermon reminds listeners Allāh, the one and only true God, is the one issuing commands. Moreover, *Khuṭbat Alwada'* lays out basic principles for Muslims to follow in their daily private and public lives. Faith and obedience are paramount and should shape the way a Muslim behaves.

The Farewell Sermon also is significant because in it, the Prophet addresses legal issues, such as the proper sources of law, proscriptions against certain practices, and individual rights and responsibilities. The *ummah* should first look to the Qur'an and *Sunnah* to set acceptable standards for their society. These sources include guidelines on how to practice the faith and value others in society. Specifically, Muhammad rejects usury (*ribā*), the practice of lending with interest. Abū Talib, uncle and protector of Muhammad, became wealthy as a lender, making

<sup>30</sup> Dr. Z. Haq, The Last Sermon of Prophet Muhammad, Books and E-Books on Muslim History and Civilization (1990), posted at [www.cyberistan.org/islamic/sermon.html](http://www.cyberistan.org/islamic/sermon.html).

the ban on the practice by the Prophet even more significant, as it had adverse consequences for his direct family. Yet, no one, including the Prophet and his family, is above the law.

Additionally, fundamental rights and universal respect pervade the *Khuṭbat Alwada'*. Every person has the right to life and property. Mutual respect and non-discrimination (racial, gender, or class-based) are key values, as everyone is equal to Allāh. People should not judge one another, because Allāh will preside over everyone on Judgment Day. No person has the right to harm another, and the dignity of all people (including women) is entitled to respect.

## § 2.04 WIVES OF THE PROPHET

The Qur'ānic passage embodies the "No More Than Four Wives Rule"; it was revealed when the Prophet had more than four wives simultaneously. Reportedly, Muhammad had nine wives at the time of its revelation. However, aside from the temporal sequence — that the revelation came after these marriages — there is a different Qur'ānic passage understood as a special exemption for the Prophet from the limitation to four wives.<sup>31</sup>

The passage, one of the "Prophet's Special Rules," was revealed to Muhammad at age 60, three years before his death:

<sup>30</sup>Prophet, We have made lawful for you the wives whose dowries you have a paid, and any slaves God has assigned to you through war, and the daughters of your uncles and aunts on your father's and mother's sides, who migrated with you. Also any believing woman who offers herself [without dowry] to the Prophet and whom the Prophet wishes to wed — *this only applies to you* [Prophet] and not the rest of the believers: We know exactly what We have made obligatory for them concerning their wives and slave-girls — so you should not be blamed: God is most forgiving, most merciful. <sup>31</sup>You may make any of [your women] wait and receive any of them as you wish, but you will not be at fault if you invite one whose turn you have previously set aside: this way it is more likely that they will be satisfied and will not be distressed. All will be content with what you have given them. God knows what is in your hearts: God is all knowing, forbearing. <sup>32</sup>You [Prophet] are *not permitted to take any further wives*, nor to exchange the wives you have for others, even if these attract you with their beauty. But this does not apply to your slave-girls: God is watchful over all. <sup>32</sup>

This passage ratifies the more-than-four marriages of Muhammad, and thus is a *sui generis* Divine dispensation.

But, the passage also regulates any further marriages: the Prophet cannot take on additional wives, even if he divorces one of them. This stricture applies to his wives too, according to *surah* 33, *ayat* 28-29 and 53: they cannot re-marry to other

<sup>31</sup> See Qur'AN, *supra*, 33:50 at 270.

<sup>32</sup> Qur'AN, *supra*, 33:50-52 at 270 (emphasis added). See also *id.*, 33:37 at 269.

men. Muslims regard these Qur'ānic passages as matters of faith, not as permission for lustful behavior. Likewise, *surah* 33, *ayat* 30-33 set higher moral standards for the wives of the Prophet than other Muslim wives. Thus, one *ḥadīth* records that when Muhammad had nine wives, he thought perhaps he ought to divorce two of them. He did not, apparently on this revelation from Allāh.<sup>33</sup> In any event, the wives of the Prophet were only for him, meaning none remarried after his death in 632 A.D.<sup>34</sup>

Muhammad had 11 (or, possibly, 13) wives over the course of his life, including more than four at once. While the wives of Muhammad are not revered by Muslims like the Virgin Mary is in Catholic Christianity, they are very special and highly respected in their own right. Their names are popular for baby girls — Khadyja and 'Āisha being prominent examples. Indeed, all of the wives of the Prophet occupy a distinguished place in the history of Islam. After all, Khadyja comforted Muhammad after the first Revelation, and assured him he was not mad, but rather had heard an authentic message from Allāh. And 'Āisha related many important *ḥadīths* — over 2,000 in total. Thus, all of the wives of Muhammad are given the title "Mothers of Believers" (*Umm al-Mominin*):

The Prophet is more caring towards the believers than they are themselves, while *his wives are their mothers*.<sup>35</sup>

This title is redolent of the appellations given by Catholic Christians to Mary, such as "Our Mother," and bespeaks the exceptional esteem accorded by Muslims to his wives.

Several of the marriages of Muhammad were arranged to stop wars between tribes. For a losing tribe to avoid being enslaved, Muhammad sometimes married a woman from that tribe, including a Jewish woman from a defeated Jewish tribe. He then declared all members of the losing tribe free, on the ground that as the Prophet he could not have slaves related to him.

Events in the individual biographies are necessary to appreciate the social significance of the wives of Muhammad, and their extraordinary contribution of the Mothers to Islam. The women in Muhammad's life are (in chronological order):

- Khadyjah bint Khuwaylid
- Sawda bint Zama
- 'Āisha bint Abi Bakr

<sup>33</sup> See Qur'AN, *supra*, 33:52 at 270.

The circumstances surrounding the Revelation of the first *ayah* in *surah* 66 have to do with an event (either the revealing of a confidence, Muhammad's relations with Mary the Copt, the "honey" incident, or the wife's habit of back-talking) that appear to have led to speculation that Muhammad would divorce his wives. See *id.*, 66:3. The speculation centered on the month-long separation of Muhammad from his wives. At the end of the month he gave his wives the choice of divorce, or to remain with him. See *id.*, 33:28-29. His wives chose to remain with him. The *ḥadīth* that references this event is found in the *Book of Injānīn*, by Imām Bukhari (specifically chapter 49, *ḥadīth* no. 2336). This *ḥadīth* concerns a general grievance Muhammad may have had as to the habit of Hafsa of back-talking.

<sup>34</sup> See Qur'AN, *supra*, 33:53 at 270.

<sup>35</sup> Qur'AN, *supra*, fn. c to 33:6 at 266 (emphasis added). See also *id.*, fn. c to 33:6.



- Hafsa bint 'Umar
- Zaynab bint Khuzayma
- Umm Salama Hind
- Zaynab bint Jahsh
- Juwayriya bint Al Harith
- Ramlah bint Abi Sufyan (Umm Habiba)
- Safiyah bint Huyeyi ibn Akhtab
- Barra bint Al Harith (Maymuna bint Al Harith)
- Maria Al Qibtiyya (Maria the Copt)
- Raihana bint Zayd

There is no question the first 11 of these women were wives of the Prophet. The status of the last two, Maria, and Raihana, is in dispute. It is not clear whether they were wives or concubines of Muhammad. In either case, both Maria and Raihana represent important persons in early Islam, and along with all the wives of Muhammad are honored with the title "*Umm Al Momineen*" ("Mother of the Believers").

#### (1) Khadyja bint Khuwaylid

One of the most significant women in the life of Muhammad was his first wife, Khadyja. Khadyja, born in 555, was about 15 years older than Muhammad,<sup>36</sup> and was a businesswoman whose family managed trade caravans in pre-Islamic Arabia. She inherited her family business, and met Muhammad when she hired him to manage a commercial caravan to Syria.<sup>37</sup> The caravan Muhammad oversaw was successful, and his relationship with Khadyja bloomed. The two were married in 595,<sup>38</sup> when Muhammad was about 25 years old, 15 years before he began to receive revelations from Allah through the Archangel Gabriel.<sup>39</sup>

The marriage of Muhammad and Khadyja is important for many reasons, not least of which is the emotional and financial support she provided to her husband, and to proselytization of the young faith. Also significant, and befitting her role in the genesis of Islam, is that Khadyja never took part in the idol worship common in pre-Islamic Arabia.<sup>40</sup> Unsullied by paganism, Khadyja was the loyal wife and

<sup>36</sup> See Khadijah bint Khuwaylid, Wikipedia, posted at [http://en.wikipedia.org/wiki/Khadijah\\_bint\\_Khuwaylid](http://en.wikipedia.org/wiki/Khadijah_bint_Khuwaylid). [Hereinafter, Khadijah.]

<sup>37</sup> See E. van Donzel, B. Lewis & Ch. Pellat eds., *The Encyclopedia of Islam*, vol. 4-5 at 898-899 (Leiden, the Netherlands: E.J. Brill, new ed., 1978) (entry on Khadijah by W. Montgomery Watt). [Hereinafter, Donzel.]

<sup>38</sup> See Ronen Yitzhak, *Muhammad's Jewish Wives: Rayhana bint Zayd and Safiyya bint Bughayy in the Classic Islamic Tradition*, 9 JOURNAL OF RELIGION & SOCIETY (2007), posted at <http://mores.creighton.edu/JRS/2007/2007-29.html>. [Hereinafter, Yitzhak.] But see Donzel, *supra*, vol. 4-5 at 898-899.

<sup>39</sup> See Khadijah, *supra*.

<sup>40</sup> See Khadijah, *supra*.

companion Muhammad needed when Gabriel first visited him in 610. She stood by him during this dramatic event in his life, and was one of the first, if not the first, to convert to Islam.<sup>41</sup>

The marriage between Muhammad and Khadyja was fruitful but tragic. Although some sources claim only one son was born, many claim they had two sons: Qasim and Abd-Allah, neither surviving past early childhood. They also had four daughters: Fatimah, Zainab, Umm Kulthum, and Ruqqayah.<sup>42</sup> Of them, Umm Kulthum and Ruqqayah predeceased Muhammad. Both had been married to the famous Companion, and third Rightly Guided Caliph, 'Uthman. 'Uthman was married first to Ruqqayah, until her death, and then to Umm Kulthum, until her death.<sup>43</sup> Fatimah, the most famous of Muhammad's children, married his young cousin 'Ali ibn Abi Talib, the fourth of the four *Rashidun* Caliphs.

It is understood Muhammad practiced polygamy. But, his marriage with Khadyja was monogamous. Khadyja passed away in 619, after they were married for 24 years.<sup>44</sup>

#### (2) Sawda bint Zama

After the death of Khadyja, Muhammad began a progression of marriages that would lead to his vilification by historical and contemporary opponents. Following the death of her first husband, Sawda bint Zama migrated to Mecca from Abyssinia (now Ethiopia).<sup>45</sup> Muhammad next married this older widow, Sawda, though there is some question as to whether this marriage, or his marriage with 'Aisha came first.<sup>46</sup> Muhammad's marriage with Sawda probably took place in 620, before the *Hijra* of 622.<sup>47</sup> Sawda was an early convert to Islam, and when Muslims faced persecution in Mecca, she became the first Muslim woman to immigrate to Abyssinia.<sup>48</sup>

Muhammad had seen and appreciated her suffering during her journey to Mecca on account of her faith in Islam, which led to her betrothal and marriage to him.<sup>49</sup> Shortly after their marriage, Sawda started taking care of the children and home of Muhammad. This marriage was the first of several Muhammad shared with Muslim widows.

<sup>41</sup> See Khadijah, *supra*.

<sup>42</sup> See Wikipedia, posted at [http://en.wikipedia.org/wiki/Muhammad#Wives\\_and\\_children](http://en.wikipedia.org/wiki/Muhammad#Wives_and_children).

<sup>43</sup> See Wikipedia, posted at [http://en.wikipedia.org/wiki/Uthman\\_ibn\\_Affan#After\\_his\\_conversion\\_to\\_Islam](http://en.wikipedia.org/wiki/Uthman_ibn_Affan#After_his_conversion_to_Islam).

<sup>44</sup> See Donzel, *supra*, vol. 4-5 at 898-899.

<sup>45</sup> See Bosworth, *supra*, vol. VIII FASCICLES 143-144 at 89-90, which also states that while in Abyssinia, her first husband converted to Christianity causing their divorce, and died.

<sup>46</sup> See C.E. Bosworth, E. Van Donzel, W.P. Heinrichs & G. Lecomte eds., *The Encyclopedia of Islam* vol. 8, 89-90 (Leiden, The Netherlands: E.J. Brill, new ed., 1965), which states it is not certain whether Muhammad first married Sawda or 'Aisha. [Hereinafter, Bosworth.]

<sup>47</sup> See <http://forum.e-dz.com/index.php?topic=3841-women-around-the-prophet-sawda-bint-zama-r>; Bosworth, *supra*, vol. 8 at 89-90 (entry for Sawda bt. Zam'a, by V. Vacca-Ruth Roded).

<sup>48</sup> See [www.2muslims.com/cgi-bin/links/detail\\_page.cgi?ID=218759](http://www.2muslims.com/cgi-bin/links/detail_page.cgi?ID=218759).

<sup>49</sup> See [http://islam.wikia.com/wiki/Sawda\\_bint\\_Zama](http://islam.wikia.com/wiki/Sawda_bint_Zama).

Sawda was an older woman when she married Muhammad. Yet, her precise birth date is unknown, making her age at the time of her marriage uncertain. Many sources claim she was older than Muhammad, who was about 50 years old at the time. If this is true, then it is unlikely she died in 674 (as she would have been at least 104 years old by then).<sup>50</sup> No children were born to Sawda and Muhammad.

Sawda is best known for two events. First, Sawda was the catalyst for the revelation of *surah* 4, *ayah* 127, when she implored Muhammad not to divorce her.<sup>51</sup> Sawda, desiring only to remain married to Muhammad, on account of her age relinquished her time with the Prophet to 'Ā'isha.<sup>52</sup> Second, the *ḥadīth* of the *ḥijāb* is directly related to her. Upon seeing Sawda one night, as she went to the latrine, 'Umar, who would become the second *Rashidun* Caliph, recognized her. Preferring *ḥijābs* be worn, he told Muhammad of the encounter.<sup>53</sup> Five *ḥadīths* can be traced to Sawda.<sup>54</sup>

### (3) 'Ā'isha bint Abū Bakr

Many historians believe the third wife of the Prophet, 'Ā'isha, was his favorite. Perhaps her beauty won her this high regard. Or, perhaps it was because her father was Abū Bakr, the best friend of Muhammad, and having a close connection to his family was desirable.<sup>55</sup> The marriage to 'Ā'isha has attracted controversy due to her young age at both marriage and consummation. Many histories record her age at 9 years old at the time of marriage, when she first went to live with Muhammad, and when the marriage was consummated. Some modern day historians record her age at consummation as 14, but the vast majority of records indicate she was indeed 9.

Notwithstanding this controversy, 'Ā'isha probably was born around 614, and died in 678.<sup>56</sup> As the daughter of Abū Bakr, her betrothal to Muhammad perhaps was intended to strengthen the ties between the two men.<sup>57</sup> As a young girl, or possibly as a baby, she migrated to Abyssinia with her family. Upon their return to Mecca, a previously betrothal was set aside, and 'Ā'isha was married to Muhammad. She lived with her parents for several years before going to Muhammad.<sup>58</sup> This marriage likely took place just after that of Muhammad and Sawda, but sources disagree as to which one came first. Though the marriage of Muhammad and 'Ā'isha was happy and loving, it was barren of children.

<sup>50</sup> See H.A.R. Gibb, J.H. KRAMERS, E. LEVI-PROVENCAL & J. SCHACHT EDS., *THE ENCYCLOPEDIA OF ISLAM* Vol. I, 307-308 (Leiden, Netherlands: E.J. Brill, new ed., 1960) (reporting Sawda was 30 when she married Muhammad). [Hereinafter, Gibb.]

<sup>51</sup> See [www.search.com/reference/Sawda\\_bint\\_Zama](http://www.search.com/reference/Sawda_bint_Zama). But see [www.scribd.com/doc/7090987/2Sauda-Bint-Zama](http://www.scribd.com/doc/7090987/2Sauda-Bint-Zama) (stating *surah* 4, *ayah* 148 was revealed).

<sup>52</sup> See BOSWORTH, *supra*, vol. VIII FASCICLES 143-144 at 89-90.

<sup>53</sup> See BUKHARI, *supra*, vol. I, book IV (The Book of Wudu' (Ablution)), p. 107, *ḥadīth* nos. 147-148.

<sup>54</sup> See [www.scribd.com/doc/7090987/2Sauda-Bint-Zama](http://www.scribd.com/doc/7090987/2Sauda-Bint-Zama).

<sup>55</sup> See Gibb, *supra*, vol. I at 307-308.

<sup>56</sup> See Gibb, *supra*, vol. I at 307-308.

<sup>57</sup> See Gibb, *supra*, vol. I at 307-308.

<sup>58</sup> See [www.viewwiki.com/en/Aisha](http://www.viewwiki.com/en/Aisha).

It is hard to overstate the important place the wives of the Prophet occupy in the Muslim psyche, and 'Ā'isha, along with Khadyja, is the quintessential example. 'Ā'isha was a highly intelligent woman, who memorized the Qur'an as it was revealed, and who related many *ḥadīths* after the death of the Prophet in 632. She is one of only four people who personally related over 2,000 *ḥadīths*,<sup>59</sup> including the *ḥadīth* of the *ḥijāb* involving Sawda.<sup>60</sup> Of the 2,210 *ḥadīths* she narrated, *Imāms* Bukhari and Muslim record 316 of them. 'Ā'isha is also closely connected to many *āyat* in the Qur'an.

It was an event involving 'Ā'isha for which *surah* 24, *ayah* 4 was revealed.<sup>61</sup> This *ayah* mandates four witnesses must accompany accusations of unlawful sexual intercourse (*kadhif*). The setting prior to this revelation was a caravan with which 'Ā'isha was traveling. The caravan accidentally left 'Ā'isha behind after she went to look for a favorite necklace she had dropped. (Evidently, she was so light that her bearers were unaware that she was not on the caravan.<sup>62</sup>) Luckily, a young man rescued 'Ā'isha and returned her to the caravan. The circumstances of her return (in the company of a young soldier, after an unexpected absence) led some people to speculate she committed adultery with her rescuer.<sup>63</sup> She did not. In addition to *surah* 24, *ayah* 4, and *ayah* 11-19 were also revealed, chastising the accusers of 'Ā'isha.

The revelation of *surah* 66, *ayah* 1-6 also related to 'Ā'isha (as well as to Hafsa, Zaynab bint Jahsh, and Maria). Different transmitters report the incident leading to this revelation differently. Though the Qur'an is silent as to the reason for this revelation, it is said Hafsa and 'Ā'isha were jealous about the amount of time Muhammad spent with Zaynab bint Jahsh (or about his relationship with Maria the Copt).

One version states Muhammad devoted more time to Zaynab than to either 'Ā'isha or Hafsa. It was said Zaynab shared a honey flavored drink with Muhammad during his visits, and because of his love for sweets, Muhammad was often late to visit his other wives.<sup>64</sup> 'Ā'isha and Hafsa became jealous and decided each would tell Muhammad separately that the drink gave him bad breath. Muhammad forbid himself honey, after hearing the tale from more than one wife. Another version of this story proposes the "honey" is actually Maria the Copt. Upon discovering Muhammad with Maria one night, Hafsa grew jealous.<sup>65</sup> Whatever the truth, whether the thing Muhammad forbade himself was food, or a woman, God had declared it lawful for him (*surah* 66, *ayah* 1).

Following this incident, and as a capstone, *ayah* 3-5 encourage the wives of the Prophet to support Muhammad. Accordingly, 'Ā'isha took care of Muhammad

<sup>59</sup> See [www.viewwiki.com/en/Aisha](http://www.viewwiki.com/en/Aisha).

<sup>60</sup> This *ḥadīth* is recounted in BUKHARI, *supra*, vol. I, book 4, *ḥadīth* nos. 147-148 at 107.

<sup>61</sup> See Aisha, WIKIPEDIA, posted at <http://en.wikipedia.org/wiki/Aisha>.

<sup>62</sup> See <http://southernmuslimah.wordpress.com/2007/09/06/great-women-in-islam-aisha-bint-abu-bakr/>.

<sup>63</sup> See Gibb, *supra*, vol. I at 307-308.

<sup>64</sup> See [www.quranenglish.com/tafheem\\_quran/966.htm](http://www.quranenglish.com/tafheem_quran/966.htm). [Hereinafter, Quran English.]

<sup>65</sup> See Quran English, *supra*.



during his fatal illness. After his death, he was buried within her chambers.<sup>66</sup>

#### (4) Hafsa bint Omar

Two or three years after the *Hijra*, Muhammad married Hafsa bint Omar (*circa* 609–665/666).<sup>67</sup> She was the daughter of Omar, a loyal companion and trusted advisor to Muhammad, and second of the *Rashidun* Caliphs. Hafsa was married previously, but her first husband died of wounds sustained in the Battle of 'Uḥud.<sup>68</sup> Therefore, although Hafsa was not the first widow to whom the Prophet was wed, she was his first war widow — but, not the last. Following the examples Muhammad provided, many Muslim men in the early days of Islam married widows of slain soldiers. This practice might have been intended to assure soldiers and society that the families of the faithful who died in combat would be taken care of after their deaths.

Muhammad might have divorced Hafsa at one point. If so, then he took her back after the Archangel Gabriel pointed out her virtuous and pious nature.<sup>69</sup> She is said to have been involved in the incident leading to the revelation of the beginning of *surah* 66 (the incident involving either the honey or Maria the Copt), either with or without 'Ā'isha. *Surah* 66, *ayah* 3 might have been revealed after Muhammad told something to Hafsa in confidence, but instead of keeping a secret, Hafsa shared the news with 'Ā'isha.<sup>70</sup>

#### (5) Zaynab bint Khuzayma

The next wife of Muhammad was Zaynab bint Khuzayma. Born in 595, she was a war widow whose previous husband had been killed at the Battle of Badr.<sup>71</sup> She was known for her charity and love of the poor. These virtues earned her the title "*Umm Al Masakin*" ("Mother of the Destitute," or "Mother of the Poor").<sup>72</sup> Other than Khadyjah, she is the only wife of Muhammad certain to have predeceased him.<sup>73</sup> She died after just 8 months of marriage, in 625 or 626.

#### (6) Umm Salama Hind bint Abi Umayya

In 625, Muhammad married Umm Salama Hind (*circa* 580–680), another war widow, as her husband was killed at the Battle of 'Uḥud.<sup>74</sup> Not much is known of her

life. While married to her first husband, she made two migrations to Abyssinia.<sup>75</sup> She had one son and two daughters. She narrated several hundred *hadiths*, and is second only to 'Ā'isha among the wives as a transmitter of his non-Prophetic statements.<sup>76</sup>

#### (7) Zaynab bint Jahsh

The Prophet then married Zaynab bint Jahsh (born *circa* 593), a first cousin of Muhammad. This marriage was the first in a series of unions in which Muhammad sought social peace among different groups through matrimonial ties. Zaynab played an instrumental role on behalf of Islam during her first marriage to Zayd ibn Harithah (sometimes referred to as Zayd ibn Muhammad). Zayd had been the slave of Muhammad. While the Qur'an does not prohibit slavery, it repeatedly encourages the manumission of slaves, and the *Sunnah* of the Prophet forbids treatment of any category of persons as second class citizens. Muhammad sought to elevate the status of former slaves to one equal with other members of the Muslim community.

These factors, plus a sense of injustice of slavery, caused Muhammad freed to free Zayd. He adopted Zayd as a son, and when Zayd was old enough, Muhammad arranged for Zayd's marriage to Zaynab. She was from an upper-class background. The marriage was meant to underscore to the *ummah* the fact former slaves were Muslims, and regardless of their previous status as slaves, they were full members of the *ummah* and deserved respect.<sup>77</sup>

After initial resistance due to the disparity between their socioeconomic backgrounds, Zaynab agreed to marry Zayd. The relationship ended in divorce, regrettably owing to their inability to adapt to their inter-social class marriage.<sup>78</sup> There is some dispute regarding the circumstances of this divorce. Some historians contend Muhammad asked Zayd to divorce Zaynab so that he himself could marry her.<sup>79</sup>

After the divorce of Zayd and Zaynab, Muhammad challenged (following a revelation) another aspect of pre-Islamic Arabian life. Through his marriage to Zaynab, Muhammad struck against the practice that adopted children had equal familial status with biological children. The marriage of Muhammad and Zaynab would have been "taboo" under former social norms.<sup>80</sup> That is, the marriage would have been forbidden as one between two people united in a family as father-in-law and daughter-in-law. However, the marriage showed the *ummah* that adoptive children are not equal to biological children within a family unit, and that marriage to the former spouses of adoptive children is not forbidden. *Surah* 33, *ayah* 4–5 and 37–38 of the Qur'an speak about these events and the status of adoptive children.

<sup>66</sup> See Gibb, *supra*, vol. I at 307–308.

<sup>67</sup> See Wikipedia, posted at [http://en.wikipedia.org/wiki/Hafsa\\_bint\\_Umar](http://en.wikipedia.org/wiki/Hafsa_bint_Umar); www.islamweb.net/ver2/archive/article.php?lang=E&id=134222.

<sup>68</sup> See www.themuslimwoman.com/HafsahbintUmar.htm.

<sup>69</sup> See [http://islam.wikia.com/wiki/Hafsa\\_bint\\_Umar](http://islam.wikia.com/wiki/Hafsa_bint_Umar).

<sup>70</sup> See www.islamswomen.com/articles/hafsah\_bint\_umar.php.

<sup>71</sup> See P.J. BEARMAN, TH. BIANQUIS, C.E. BOSWORTH, E. VAN DONZEL & W.P. HEINRICHS EDS., THE ENCYCLOPEDIA OF ISLAM VOL. XI, FASCICULES 187–188, 485 (Leiden, The Netherlands: Brill, new ed., 2002). [Hereinafter, BEARMAN.]

<sup>72</sup> See BEARMAN, *supra*, vol. XI, Fascicules 187–188, at 485.

<sup>73</sup> See BEARMAN, *supra*, vol. XI, Fascicules 187–188, at 485.

<sup>74</sup> See BEARMAN, *supra*, vol. XI, Fascicules 177–178, at 856; Umm Salama Hind bint Abi Umayya, Wikipedia, posted at [http://en.wikipedia.org/wiki/Umm\\_Salama\\_Hind\\_bint\\_Abi\\_Umayya](http://en.wikipedia.org/wiki/Umm_Salama_Hind_bint_Abi_Umayya).

<sup>75</sup> See www.jannah.org/sisters/salamah.html.

<sup>76</sup> See www.questionsonislam.com/subpage.php?s=article&id=5812.

<sup>77</sup> See Zaynab bint Jahsh, Wikipedia, posted at [http://en.wikipedia.org/wiki/Zaynab\\_bint\\_Jahsh](http://en.wikipedia.org/wiki/Zaynab_bint_Jahsh) [Hereinafter, Zaynab (1)]; www.islamswomen.com/articles/zaynab\_bint\_jahsh.php [Hereinafter, Zaynab (2)].

<sup>78</sup> See Zaynab (2), *supra*.

<sup>79</sup> See BEARMAN, *supra*, vol. XI, Fascicules 187–188, at 484–485.

<sup>80</sup> See Zaynab (1), *supra*.

Additionally, these verses stand for the proposition the Prophet could have more than four wives. Finally, the marriage of Muhammad and Zaynab illustrates that a divorcée is permitted to re-marry later in life.<sup>81</sup>

The marriage occurred in 627. It is unclear whether there was an earthly ceremony to celebrate it. Possibly, the revelation of *surah* 33, *ayat* 37-38, or some other revelation concerning their marriage, represented a Heavenly ceremony, negating the need for an earthly one.<sup>82</sup> What is clear is *surah* 33, *ayat* 37-38 (as well as *ayah* 53) were revealed at the time of the marriage.

Notwithstanding her affluence, it is said Zaynab was extremely generous to the poor. Her generosity was so great that when Muhammad told his wives that the first to join him in Paradise after his death would be the one with "the longest arms,"<sup>83</sup> (referring to the most generous) he was referring to her. Zaynab died in 642. She was the first of Muhammad's widows to pass after his death.<sup>84</sup>

#### (8) Juwayriya (Barra) bint Al Harith

Muhammad married Juwayriya bint Al Harith (born *circa* 608), a member of the Jewish clan Banu Mustaliq, and daughter of a tribal chief. Muslim soldiers captured and imprisoned her after her people had been defeated, and her husband killed in battle. Unhappy at the prospect of living as a slave, she approached Muhammad to ask for relief. In response, Muhammad embraced her father and proposed marriage to her. Muhammad and Juwayriya were married in 628. This marriage helped repair the fracture and feuds between her people and the Muslims, and helped win Jewish converts to Islam.<sup>85</sup>

#### (9) Ramlah bint Abi Sufyan (Umm Habiba)

Ramlah bint Abi Sufyan (*circa* 589-666) was one of the first Muslims, as well as a migrant to Abyssinia. Her first husband, whom she divorced when he became a Christian, was the brother of Zaynab bint Jahsh, and her cousin was 'Uthman, later the third *Rashidun* Caliph. The marriage between Ramlah, who became widowed, and the Prophet occurred in 629, while she was in Abyssinia and he was in Medina.<sup>86</sup> Her father, Abi Sufyan, was an enemy of Islam for many years, encouraging tribes to fight against Muslims. But, upon his conversion, *surah* 60, *ayah* 7 was revealed.<sup>87</sup>

<sup>81</sup> See [www.islamonline.net/servlet/Satellite?pagename=IslamOnline-English-Ask\\_Scholar/FatwaE/FatwaE&cid=1119503545070](http://www.islamonline.net/servlet/Satellite?pagename=IslamOnline-English-Ask_Scholar/FatwaE/FatwaE&cid=1119503545070).

<sup>82</sup> See Zaynab (2), *supra*.

<sup>83</sup> See Zaynab (2), *supra*.

<sup>84</sup> See [www.angelfire.com/om/ummaly1/wives3.html](http://www.angelfire.com/om/ummaly1/wives3.html).

<sup>85</sup> See Juwayriya bint al-Harith, WIKIPEDIA, posted at [http://en.wikipedia.org/wiki/Juwayriya\\_bint\\_al-Harith](http://en.wikipedia.org/wiki/Juwayriya_bint_al-Harith); [http://islam.wikia.com/wiki/Juwayriya\\_bint\\_al-Harith](http://islam.wikia.com/wiki/Juwayriya_bint_al-Harith).

<sup>86</sup> See Ramlah bint Abi Sufyan, WIKIPEDIA, posted at [http://en.wikipedia.org/wiki/Ramlah\\_bint\\_Abi\\_Sufyan](http://en.wikipedia.org/wiki/Ramlah_bint_Abi_Sufyan).

<sup>87</sup> See [www.islamawomen.com/articles/ramlah\\_bint\\_abi\\_sufyan.php](http://www.islamawomen.com/articles/ramlah_bint_abi_sufyan.php).

#### (10) Safiyah bint Huyeyi ibn Akhtab

The tenth wife of Muhammad was Safiyah bint Huyeyi ibn Akhtab (*circa* 610-670 or 672), a Jewish widow of the Banu Nadir tribe, which the Muslims defeated at the Battle of Khaybar.<sup>88</sup> Her first husband was executed for hiding treasure in violation of the peace treaty between Muslim forces and the Banu Nadir.<sup>89</sup> Muhammad chose Safiyah from the captive women. To compensate the man to whom she originally belonged, Muhammad freed her as a dowry, and married her.<sup>90</sup> This marriage might have been intended to cement an alliance with the Banu Nadir, and emphasize that Jews are not to be persecuted.<sup>91</sup>

Safiyah is said to have been especially beautiful. Perhaps because of her beauty, and the fact she had been a Jew, the other wives taunted her. Yet, Muhammad always stood by her, reminding his wives that Safiyah had converted, and was a good Muslim.<sup>92</sup>

#### (11) Maymuna bint Al Harith (Burrah bint Al Harith)

According to some sources, Maymuna (*circa* 594-674, or 681) was the last woman whom the Prophet married.<sup>93</sup> His marriage to Maymuna occurred in 630, while he was visiting Mecca during a truce between Muslims and the Meccan tribes.<sup>94</sup> The wedding ceremony took place on the borders of Mecca, to encourage Meccans to participate and thereby enhance relations between them and Muslims.

The sister of Maymuna married Ja'far Abi ibn Talib, who was the son of Abi Talib, as well as the brother of 'Ali. Thus, Maymuna was related to Muhammad before their marriage. That is, she was a member of the People of the House (*Ahl Al Bayt*), i.e., the family. She sought marriage to Muhammad in accordance with *surah* 33, *ayah* 50.

#### (12) Maria Al Qibtiyya (Maria the Copt)

It is not clear whether Muhammad married the Egyptian Maria, commonly called "Maria the Copt," or whether she was his slave. Initially, she was a gift to Muhammad from Al Muqwaqis, a Byzantine noble, Egyptian Christian, and leader of the Copts, who sent her to him during the year of deputations, perhaps in thanks for the Message of Islam.<sup>95</sup> Some sources suggest Maria was the servant of Hafsa. Maria was the mother of the only child of Muhammad apart from those he had with

<sup>88</sup> See Bosworth, *supra*, vol. VIII, Fascicules 143-144, at 817.

<sup>89</sup> See Yitzhak, *supra*, 9 (stating her husband had been killed during the fighting, rather than after its cessation).

<sup>90</sup> See Bosworth, *supra*, vol. VIII, Fascicules 143-144, at 817.

<sup>91</sup> See Yitzhak, *supra*, at 9.

<sup>92</sup> See Yitzhak, *supra*, at 9.

<sup>93</sup> See Bosworth, *supra*, vol. VI, Fascicules 113-114, at 918.

<sup>94</sup> See Maymuna bint al-Harith, WIKIPEDIA, posted at [http://en.wikipedia.org/wiki/Maymuna\\_bint\\_al-Harith](http://en.wikipedia.org/wiki/Maymuna_bint_al-Harith).

<sup>95</sup> See Maria al-Qibtiyya, WIKIPEDIA, posted at [http://en.wikipedia.org/wiki/Maria\\_al-Qibtiyya](http://en.wikipedia.org/wiki/Maria_al-Qibtiyya). [Hereinafter, *Maria* (1).]



Khadyja. The child was a son named Ibrahim, who sadly died in infancy.<sup>96</sup> On the assumption that Muhammad did marry Maria, he did so to demonstrate that a Muslim male may wed a non-Muslim woman who is from the Peoples of the Book (*Ahl Al Kitāb*).

Maria had been a Christian, but converted to Islam after traveling to Muslim lands. Maria did not live in the same compound as the wives of Muhammad, which suggests she was a concubine rather than a wife.<sup>97</sup> It is possible Hafsa caught Muhammad having relations with Maria, which in turn triggered the controversy mentioned at the beginning of *surah* 66 of the Qur'an.<sup>98</sup> Maria died in 637.

### (13) Raihana bint Zayd

The status of Raihana bint Zayd, between wife and concubine, is unclear as well. She was a Jewish woman of the *Banu Qurayza* tribe. Her tribe, which did not honor a mutual defense agreement with the Muslims, surrendered to Muhammad after the Battle of the Trench. The men of the tribe, including her husband, were executed. The women and children were taken as slaves. If the two were married, then Muhammad might not have waited the requisite period of time before marrying a widow. Notwithstanding the controversy over the status of Raihana, it seems clear she was treated no differently than the other wives of Muhammad. It also appears Muhammad sought to demonstrate via his relationship to this Jewish widow that Jews were not to be persecuted. Disagreement exists as to the time Raihana died, namely, it is uncertain whether she died before Muhammad or became his widow when he passed away in 632.<sup>99</sup>

## § 2.05 DEATH OF PROPHET (632 A.D.)

After finishing the *Hajj* in 632, Muhammad returned to Medina. In this year, the Prophet knew his time had come, telling his daughter, Fātimah, he will die soon. He told her the Archangel Gabriel asked him to recite the Qur'an twice, whereas Gabriel usually asked him to recite it once every year:

The Messenger of God said to Fātimah, (Gabriel) has reviewed the Qur'an with me once a year, but this year he has reviewed it with me twice, and I fancy that my time has come.<sup>100</sup>

The cause of death is a controversial issue among Muslim and non-Muslim biographers.

Some relate the sickness to meat the Prophet ate after the Battle of Khaybar in 629. A Jewish woman cooked a meal for Muhammad and his Companions in appreciation for letting them remain in Khaybar:

<sup>96</sup> See [www.spiritual-temple.com/maria-al-qibtiyya/maria-in-muhammad-s-household.html](http://www.spiritual-temple.com/maria-al-qibtiyya/maria-in-muhammad-s-household.html). [Hereinafter, *Maria* (2).]

<sup>97</sup> See *Maria* (1), *supra*.

<sup>98</sup> See *Maria* (2), *supra*.

<sup>99</sup> See Yitzhak, *supra*, at 9.

<sup>100</sup> AL-TABARI, *supra*, vol. VI at 61.

[A] Jewess came to Allah's Messenger with poisoned mutton and he took of that what had been brought to him (Allah's Messenger). (When the effect of this poison were felt by him) he called for her and asked her about that, whereupon she said: I had determined to kill you. Thereupon he said: Allah will never give you the power to do it. He (the narrator) said that they (the Companions of the Holy Prophet) said: Should not we kill her? Thereupon he said: No. He (Anas-narrator) said: I felt (the effects of this poison) on the uvula of Allah's Messenger.<sup>101</sup>

Further, speculative evidence of the poisoning theory comes from *surah* 5, *ayah* 3, the last verse of the Qur'an revealed to Muhammad. Much of it concerns dietary restrictions. But, the last sentence of that verse is relevant to the issue of how Muhammad died:

Today I [Allah] have perfected your religion for you, completed My blessing upon you, and chosen as your religion *Islam*: total devotion to God. . . .<sup>102</sup>

The inference some *ulema* draw from this verse is it indicates Muhammad had fulfilled his role as Messenger. There was no more to be revealed, hence the phrases associated with Muhammad and his faith "seal of the Prophet" and "finality of Islam."<sup>103</sup> Arguably, the passage is a harbinger it was time for Muhammad to go on to the next life.

It is vital to add many Muslims do not accept this account. Indeed, in Saudi Arabia, many if not most standard schools do not teach this account. Moreover, there is a problem of causation: the poisoning of the mutton appears to have occurred 3 years before the death of the Prophet, *i.e.*, in 629 not 632. As to the fate of the Jewish woman, *Imām* Muslim clearly records that the Prophet forgave her. Apparently, other sources — some of which are on the internet and are of dubious credibility — suggest the *Sahābah* felt her fate should depend on what happens to the Prophet or the other Companions who ate the poisoned mutton: if either or both die, then an offense under the *Shari'a* has occurred, and she should be killed for the murder or murders she committed. One of Companions did succumb; hence these sources indicate she was executed.

Other biographers of the Prophet report he died a natural death. This version of the story is more reliable due to the authenticity of the sources. A few months after his return to Medina, he felt ill and suffered headaches and weakness. Several days later, on 8 June 632 (12 *Rabi' Al-Awwal* 11 A.H.), he died.

The news of his death was hard to believe. The *ummah* was shocked by his passing, even if owing to his illness it was not entirely unanticipated. Some of his Companions did not believe the traumatic news:

Allah's Apostle . . . died while Abū Bakr was at a place called As-Sunah (Al-Āliya). 'Umar stood up and said, "By Allah! Allah's Apostle . . . is not dead!" 'Umar (later on) said, "By Allah! Nothing occurred to my mind

<sup>101</sup> MUSLIM, *supra*, vol. III.B at 450, *hadith* no. 2190.

<sup>102</sup> QUR'AN, *supra*, 5:3 at 68.

<sup>103</sup> KENNETH CRAGG, THE EVENT OF THE QUR'AN: ISLAM IN ITS SCRIPTURE (Oxford, England: Oneworld Publications, 1994).

except that." He said, "Verily! Allāh will resurrect him and he will cut the hands and legs of some men." Then Abū Bakr came and uncovered the face of Allāh's Apostle . . . , kissed him and said, "Let my mother and father be sacrificed for you, (O Allāh's Apostle), you are good in life and in death. By Allāh in Whose Hands my life is, Allāh will never make you taste death twice." . . . When Abū Bakr spoke, 'Umar sat down. Abū Bakr praised and glorified Allāh and said, No doubt! Whoever worshipped Muḥammad, then Muḥammad is dead, but whoever worshipped Allāh, then Allāh is Alive and shall never die." Then he recited Allāh's Statement [from the Qur'an]: —

(O Muḥammad) Verily you will  
die, and they also will die. (39:30)

He also recited: —

Muḥammad . . . is no more  
than an Apostle; and indeed many  
Apostles have passed away,  
before him, If he dies  
Or is killed, will you then  
Turn back on your heels?  
And he who turns back  
On his heels, not the least  
Harm will he do to Allāh  
And Allāh will give reward to those  
Who are grateful.' (3:144)

The people wept loudly, and the Anṣār were assembled with Sa'd bin 'Uḥāda in the shed of Bani Sā'ida. They said (to the emigrants). "There should be one 'Amīr from us and one from you." Then Abū Bakr, 'Umar bin Al-Ḥaṭṭāb and Abū 'Uḥāda bin Al-Jarrāh went to them. 'Umar wanted to speak but Abū Bakr stopped him. 'Umar later on used to say, "By Allāh, I intended only to say something that appealed to me and I was afraid that Abū Bakr would not speak so well. Then Abū Bakr spoke and his speech was very eloquent. He said in his statement, "We are the rulers and you (Anṣār) are the ministers (i.e., advisers)," Ḥubāb bin Al-Mundhir said, "No, by Allāh we won't accept this. But there must be a ruler from us and a ruler from you." Abū Bakr said, "No, we will be the rulers and you will be the ministers, for they (i.e., Quraysh) are the best family amongst the Arabs and of best origin. So you should elect either 'Umar or Abū 'Uḥāda bin Al-Jarrāh as your ruler." 'Umar said (to Abū Bakr), "No but we elect you, for you are our chief and the best amongst us and the most beloved of all of us to Allāh's Apostle. . . . So 'Umar took Abū Bakr's hand and gave the pledge of allegiance and the people too gave the pledge of allegiance to Abū Bakr.<sup>104</sup> . . .

Upon his death, the Uncle of the Prophet, Alabbas (father of the *Abbasid* family, and namesake of the *Abbasid* Caliphate), supervised the preparation of his burial.

<sup>104</sup> BUḤĀRI, *supra*, vol. V, book LVII (The Virtues and the Merits of the Companions of the Prophet), pp. 14-15, *hadith* no. 19.

The body of Muḥammad was washed interred in the house of his beloved wife, 'Āisha. Shortly thereafter, a constitutional assembly unanimously elected Abū Bakr as the first Caliph.

## § 2.06 ISLAMIC LUNAR CALENDAR

### [A] "A.D." versus "A.H."

When studying events in Islamic History students, non-Muslims find themselves faced with an unfamiliar system of dating. For instance, when reading about the year in which the Prophet Muḥammad, a non-Muslim might be puzzled by several different dates: 632 A.D., 632 C.E., 11 A.H. or 11. The reason for these different dates is the Muslim Calendar is not the equivalent of the calendar used in the United States, other Western countries, or most of Asia and Africa. There are several differences between Muslim and non-Muslim calendars of which non-Muslims should be aware.

First, the calendar commonly used throughout the non-Muslim world is based on the life of Jesus Christ. This calendar is known as the *Gregorian* calendar, as it is named for Pope Gregory XIII. Pope Gregory instituted the use of this calendar in 1582 A.D. by issuing an order known as a *Papal Bull*.<sup>105</sup> The *Gregorian* calendar is based on the earlier *Julian* calendar, which was first officially instituted by Julius Caesar.<sup>106</sup>

The *Gregorian* calendar indicates the two eras recognized by the Christian Church by inserting one of two abbreviations: B.C., or A.D. The first abbreviation, B.C., indicates that the specified year, for instance 332 B.C., was 332 years *before the birth of Jesus Christ*. (That year happens to be the one in which Alexander the Great conquered Palestine.) The second abbreviation, A.D., indicates that the specified year, for instance 632 A.D. was 632 years after the birth of Jesus. "A.D." stands for the Latin words "*Anno Domini*" (sometimes spelled "*Anno Domine*") which means the "year of our Lord." (That year happens to be the one in which Muḥammad died.)

For many years some scholars have been de-Christianizing historical dates by using a different, secular set of abbreviations: they seek to replace "B.C." with "B.C.E.," and to replace "A.D." with "C.E." They use these abbreviations in the same manner, and indicate the same respective years and eras as indicated by the *Gregorian* calendar. The only difference is the substitute abbreviations do not indicate the life of Jesus specifically, and therefore intimate a diminution of the role of Christ. In the case of these newer abbreviations, "B.C.E." stands for *Before the Common Era*; and "C.E." stands for *Common Era*. "Common" is an obvious effort to supplant the word "Christian."

In contrast to the *Gregorian* calendar, the Muslim calendar began dating years when Muḥammad and his Companions (*Ṣaḥābah*) emigrated from Mecca to

<sup>105</sup> See *Gregorian Calendar*, WIKIPEDIA, posted at [http://en.wikipedia.org/wiki/Gregorian\\_calendar](http://en.wikipedia.org/wiki/Gregorian_calendar).

<sup>106</sup> See *Julian Calendar*, WIKIPEDIA, posted at [http://en.wikipedia.org/wiki/Julian\\_calendar](http://en.wikipedia.org/wiki/Julian_calendar).



Medina:

"The *Hijra*," as this emigration is called, marked the beginning of the Muslim community as an autonomous political community, and the year in which it took place — 622 C.E. — was subsequently adopted by Muslims as the year 1 of the Islamic calendar (A.H. 1).<sup>107</sup>

The Muslim Calendar uses the *lunar* cycle in determining the length of years and months, whereas the *Gregorian* (and also *Julian*) calendar is a *solar tropical* calendar.

### [B] Lunar versus Solar Calendars

A lunar year is approximately 11 days shorter than a year as calculated using the *Gregorian* calendar.<sup>108</sup> The Muslim year is about 354 days in length, in contrast with the traditional non-Muslim 365 day-long year, which is based on *solar tropical* calendars. Therefore, the Holy Month of *Ramādān* is about 11 days earlier each year, when cast in terms of the *Gregorian* calendar.

Another difference between lunar and solar calendars is that the solar-based *Gregorian* calendar indicates the season, i.e., spring, summer, fall, and winter). The lunar-based Muslim calendar does not do so.<sup>109</sup> That is to say, "December" connotes a winter month in the northern hemisphere, and a summer month in the southern hemisphere. But, the month of *Ramādān* could occur in any season, depending on the year in question. When the Muslim Calendar is in *Ramādān*, there is no indication of what season it is. Overall, the cycle is about 30 years.

There are 12 months in the Muslim Calendar. They are set out in Table 2-1:

Table 2-1:  
Months of the Muslim Calendar

Month Number	Month Name
1 <sup>st</sup>	<i>Muharram (Moharram)</i>
2 <sup>nd</sup>	<i>Safar (Safar)</i>
3 <sup>rd</sup>	<i>Rabi' Al-Awwal</i>
4 <sup>th</sup>	<i>Rabi' Al-Thani</i>
5 <sup>th</sup>	<i>Jumadi Al-Awwal</i>
6 <sup>th</sup>	<i>Jumadi Al-Thani</i>
7 <sup>th</sup>	<i>Rajab</i>
8 <sup>th</sup>	<i>Sha'ban</i>
9 <sup>th</sup>	<i>Ramādān (Ramadan)</i>
10 <sup>th</sup>	<i>Shawwāl</i>
11 <sup>th</sup>	<i>Dhu Al-Q'ada</i>
12 <sup>th</sup>	<i>Dhu Al-Hijja</i>

<sup>107</sup> Fred M. Donner, *The Historical Context*, in *THE CAMBRIDGE COMPANION TO THE QUR'AN* 26 (Jane Dammen McAuliffe ed., New York, New York: Cambridge University Press, 2006).

<sup>108</sup> See *Islamic Calendar*, WIKIPEDIA, posted at [http://en.wikipedia.org/wiki/Islamic\\_calendar](http://en.wikipedia.org/wiki/Islamic_calendar). [Hereinafter, *Islamic Calendar*.]

<sup>109</sup> See *Solar Calendar*, WIKIPEDIA, posted at [http://en.wikipedia.org/wiki/Solar\\_calendar](http://en.wikipedia.org/wiki/Solar_calendar).

### [C] Formulas to Convert between "A.D." and "A.H."

Determining the equivalent year when working from either the *Gregorian*, or Muslim calendar can be a difficult task. Calendars, by their nature, are complex. When considering the *Gregorian* and Muslim calendars, as indicated, it must be remembered that one is a *solar tropical* calendar, while the other is a *lunar* calendar. The distinct types of calendars require a complex system of adding days at predetermined intervals to maintain its accuracy with the corresponding astronomical cycle. Under the *Gregorian* calendar this system periodically adds one day to the month of February in periodically spaced years that are known as "leap years." That day, of course, is the 29th of February.

Any year that is not a leap year is called a "common year." Leap years generally occur every four years. For example, 2008 and 2012 are leap years. However, when centuries change, a leap year only occurs if the year is divisible by 400, regardless of its divisibility by 4. Therefore, the year 2000 was a leap year as will be 2400, 2800, and 3200, while 1500, 1700, 1800 and 1900 are not. However, if a millennia year is divisible by 4000, then a leap year does not occur, even if the year is perfectly divisible by both 4 and 400. So, the years 4000, 8000, 16,000, 24,000 are not leap years even though these years are perfectly divisible by both 4 and 400.<sup>110</sup>

There is a similar system used with the Muslim calendar, which is called "*kabisha*."<sup>111</sup> This system adds one day to every third year. This day is added as the last day of the last month of the Muslim year, *Dhu al-Hijja*. In a normal year, this month has 29 days. In a "*kabisha*" year, *Dhu al-Hijja* has 30 days.

Converting from one calendar to another is a less complicated task than figuring out leap or *kabisha* years. There are a number of useful resources available both in the library and on-line.<sup>112</sup> One such resource gives the following formulas:<sup>113</sup>

- To convert a *Gregorian* (A.D. or C.E.) year to its counterpart *Hijra* year:

$$\text{Year A.H.} = 1.030684 \times (\text{Year A.D.} - 621.5643)$$

- To convert a *Hijrah* year (A.H.) to a *Gregorian* year:

$$\text{Year A.D.} = 0.970229 \times \text{Year A.H.} + 621.5643$$

Because of the complexities mentioned below these formulas are not quite accurate. However, they are very nearly correct, and can be used in converting *Gregorian* years to *Hijra* years and *vice versa*.

Using the first conversion formula, consider the year the University of Kansas was founded, 1865 A.D. It can be converted into its *Hijrah* year counterpart:

$$1.030684 \times (1865 - 621.5643) = 1281 \text{ to } 1282 \text{ A.H.}$$

<sup>110</sup> See <http://www.britannica.com>.

<sup>111</sup> <http://www.classicalislam.com/pages/history/dating.htm>. [Hereinafter, *Classical Islam*.]

<sup>112</sup> See, e.g., [www.calendarhome.com/convert](http://www.calendarhome.com/convert).

<sup>113</sup> See *Classical Islam*, *supra*.

Consider the second conversion formula by plugging the *Hijra* year of 1430 A.H. into it. The result is a calculation of the approximate value of the *Gregorian* counterpart of 1430 A.H. This *Hijra* year corresponds to 2009:

$$0.970229 \times 1430 + 621.5643 = 2008.99$$

This value does not quite equal the *Gregorian* year of 2009. But, the year 1430 A.H. overlaps 2008 and 2009, and accounts for some of the variation. Fortunately, to facilitate conversions from one calendar to another, several internet websites are available.<sup>114</sup>

It is easy to assume all cultures use the same calendars. However, there are many calendars in use throughout the world. The *Gregorian* and Muslim calendars are just two of these. There also are Jewish, Hindu, and Buddhist calendars. Although business meetings typically are marked by the *Gregorian* date, lawyers should be aware that not all cultures measure time the same way. An Internet search can mean the difference between complementing and insulting a prospective client or business partner, or between attending and missing (by years!) an important meeting.

#### [D] Mathematical versus Physical Determinations

A final point about the Islamic lunar calendar concerns astronomical calculations. Knowing when — with precision — key dates or times occur is important in practicing the Five Pillars. It matters not only to establish the starting and ending points of the fasting month of *Ramādān*, and for the *Hajj* season, but also every day in respect of the times to pray. How do Muslims know when a particular date begins or ends?

In a practical sense, Muslims can and do find the right times and dates via a newspaper, the internet, iPhone applications, announcement at a mosque, or simply word-of-mouth. But, this response begs a question: how is the right time or date calculated in the first place? There are two answers: mathematical calculations or physical determinations.<sup>115</sup> Each answer has its proponents. For example, Zulfikar Ali Shah of the Fiqh Council of North America favors the use of math to make astronomical calculations, and explains why in his book *The Astronomical Calculations and Ramādān* (2009). Hamza Yusuf of the Zaytuna Institute prefers physical observation — that is, use of the human eye — to render the necessary determinations. He defends this method in his book, *Caesarian Moon Births* (2006). The debate is a lively one, and is a testament to the use by Muslim scholars of careful analysis on a topic that inherently blends faith and science.

Both Zulfikar Ali Shah and Hamza Yusuf agree that the Qur'ān and *Sunnah* are the top two sources of Islamic Law, followed by consensus (*ijma'*) among legal scholars (*fukahā*), and finally, analogical reasoning (*qiyās*) applied by those

scholars. Shah's argument in favor of mathematical calculations starts with a textual analysis of *surah* 2 of the Qur'ān, which calls for a witnessing of the month of *Ramādān* as the trigger to commence fasting. The relevant Arabic verb is "*shahida*." Nothing in *surah* 2 (or in any other part of the Qur'ān) mandates physical sighting of the moon, nor compels a restrictive linguistic interpretation of this verb to mean eye witness. Shah finds a restrictive approach outdated, as it is based on the traditional culture in which jurists centuries ago lived. Thus, Shah infers that physical sighting is one, but not the only, method to make necessary astronomical calculations. Shah also suggests that mathematical calculations are used for prayer times and the *qibla*, based on the *Sunnah*, so they ought to be permissible for identifying the start and end of *Ramādān*. Put simply, just because physical sighting of the moon was the only method available at the time of the Prophet does not mean Muslims should restrict themselves to that method today, especially when it imposes practical burdens. No longer do they live in an era of mass illiteracy, or in one in which accurate astronomical calculations are impossible.

In contrast, Yusuf points to Qur'ānic passages in *surah* 2 concerning the *Ramādān* and *Hajj*. He argues their specificity in identifying the moon as a clock, i.e., as a device to time the fast and pilgrimage, suggests physical sighting is the proper methodology to identify "start" and "stop" points. As for the *Sunnah*, Yusuf says inconsistency that Shah criticizes makes sense: nothing in the *Sunnah* bars the use of mathematical calculations for prayer times and the *qibla* (the proper direction to face for prayer), but the *Sunnah* does reference sighting the moon to begin and break the fast. Moreover, Yusuf notes that consensus (*ijma'*) historically favors sighting of the moon with the physical eye as a mandatory condition for starting and ending *Ramādān*. Shah concedes that point, but urges the consensus should not be a stricture that undermines the original intent of the Qur'ān, nor should new scholarship in favor of a different consensus be precluded or ignored. Yusuf retorts with both pride and scorn: pride in the observational astronomy of Muslims, such as during the *Abbasid* Caliphate, and scorn for abstract, theoretical mathematics of modern times.

<sup>114</sup> See, e.g., <http://islamicfinder.com>.

<sup>115</sup> This discussion draws in part on an unpublished Book Review by Mr. Faisal Ali, University of Kansas School of Law J.D. Class of 2010, dated 1 December 2009, of *The Astronomical Calculations and Ramādān — A Fiqh Discourse*, by Zulfikar Ali Shah (Herdon, Virginia: International Institute of Islamic Thought, 2009).



## Chapter 3

### HOLY QUR'ĀN (610–650 A.D.): REVELATION, COMPILATION, AND TENETS

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1. Faith and reason are both gifts of God to mankind.
2. Faith and reason do not contradict each other, but faith might in some cases be above reason, but never against it.
3. Faith and reason are intrinsically non-violent. Neither reason nor faith should be used for violence; unfortunately, both of them have been sometimes misused to perpetrate violence. In any case, these events cannot question either reason or faith.
- ...
5. Christians and Muslims should go beyond tolerance, accepting differences, while remaining aware of commonalities and thanking God for them. They are called to mutual respect, thereby condemning derision of religious beliefs.
- ...
7. Religious traditions cannot be judged on the basis of a single verse or a passage present in their respective holy Books. A holistic vision as well as an adequate hermeneutical method is necessary for a fair understanding of them.

Pontifical Council for Inter-Religious Dialogue, Sixth Colloquium, *Faith and Reason in Christianity and Islam*, Rome, 28-30 April 2008, posted at [www.vatican.va](http://www.vatican.va)

#### SYNOPSIS

##### § 3.01 PROGRESSIVE REVELATION AND ORIGINS

- [A] Theory of *Umm Al Kitāb*
- [B] Staged Revelation

##### § 3.02 FIVE BASIC FEATURES

- [A] Pattern
- [B] Timing
- [C] Timelessness
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- [E] Living Reality

##### § 3.03 COMPILATION AND ORGANIZATION

- [A] Literalism, Faith, and Orientalist Scholarship
- [B] Revelation Writers
- [C] Four Types of Compilation
- [D] Abū Bakr, Zaid bin Thabit, and *Muṣḥaf*
- [E] 'Uthmān and Canonical Text
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#### § 3.04 COMPARISONS TO BIBLE

- [A] Overview
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#### § 3.05 CONTROVERSIES ABOUT READINGS AND LANGUAGE

- [A] Debate about Variant Readings (*Qirā'āt*)
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- [A] Tenet #1: Monotheism
- [B] Tenet #2: First and Final Judgment
- [C] An Islamic Purgatory?
- [D] Conceptions of Heaven and Hell
- [E] Tenet #3: Intervention

#### § 3.07 NO APPEAL

#### § 3.08 NO INTERCESSION

### § 3.01 PROGRESSIVE REVELATION AND ORIGINS

#### [A] Theory of *Umm Al Kitāb*

A fascinating question in Islamic thought concerns the origins of the Qur'ān. A sinister possibility is noted and rejected by British historian and Member of Parliament Edward Gibbon (1737–1794):

... the enemies of Mohammed have named the Jew, the Persian, and the Syrian monk, whom they accuse of lending their secret aid to the composition of the Koran. Conversation enriches the understanding, but solitude is the school of genius; and the uniformity of a work denotes the hand of a single artist.<sup>1</sup>

In other words, the sacred scripture of Islam was not the product of human minds, nor from the mind of the Prophet. To the contrary, the sacred text is a gift from Allāh.

<sup>1</sup> EDWARD GIBBON, *THE DECLINE AND FALL OF THE ROMAN EMPIRE* 653 (1776) (New York, New York: Penguin Books, abridged version, 1980). [Hereinafter, GIBBON.] The 6 volumes of this work originally were published between 1776 and 1788.

How might Allāh have sent down this text? Some *ulema* believe an *Umm Al Kitāb* (Mother of the Book) exists. This Book also is called the “Guarded Tablet” or “Tablet Preserved.” The Book includes all the sacred texts sent to the prophets before Muhammad, such as the Old Testament prophecies, and even the Gospels of the New Testament. It also includes the final revelation, namely, the Qur'ān. The *ulema* are not clear as to whether the *Umm Al Kitāb* always existed, even before the creation of the universe and thus before time, or whether it came into existence with the origin of the world. Indeed, *Sunni* and *Shi'ite* scholars disagree on this point.

Did Allāh transmit the Qur'ān, out of the *Umm Al Kitāb*, from the highest to lowest Heaven? Some *ulema* expound on this question:

Abū Ameenah Bilal Philips noting some *hadīth* with admittedly weak *isnads* (narrative chains in the *Hadīths*) explains: “Allāh caused the Qur'aan to descend from the Protected Tablet . . . on which it was written to the lowest heaven. In this revelation all of the Qur'aan was sent down at one time to a station in the lowest heaven referred to as '*Bayt al-Izzah*' (the House of Honor or Power). The blessed night on which this descent took place is called '*Laylatul Qadr*' (Night of Decree), one of the odd numbered nights in the last ten days of *Ramadaan*.” Whenever the Mother of the Book came into existence, it is the source for the books given the messengers in pre-Islamic times that were superseded by the fullest revelation from God given to and through Muhammad. Another way to express the same point is that the Mother of the Book contains all the books or teachings revealed by earlier prophets and messengers in their uncorrupted forms, as well as the Qur'an revealed to Muhammad. The Qur'an is in full agreement and harmony with the other books.<sup>2</sup>

Does the *Umm Al Kitāb* contain the Qur'ān exactly as revealed to Muhammad? Or does it differ from the Qur'ān and previous sacred texts, because it includes hidden meanings not set out in that revelation? Muslim scholars are uncertain, and admit both as possibilities. According to standard Islamic understanding, once the entirety of the Qur'ān was in the lowest Heaven, the Archangel Gabriel (Jibreel) transmitted it in progressive states to the Prophet, and the last revelation to him is the completion of revelations from God — hence the common expression “Seal of the Prophet.”<sup>3</sup>

#### [B] Staged Revelation

One Orientalist fallacy is the Qur'ān sprang from the mind of Muhammad. To the contrary, the Muslims view the theory of the *Umm Al Kitāb*:

<sup>2</sup> WALTER H. WAGNER, *OPENING THE QUR'AN — INTRODUCING ISLAM'S HOLY BOOK* 147 (Notre Dame, Indiana: University of Notre Dame Press, 2008).

<sup>3</sup> See THE QUR'AN — *A New Translation* by M.A.S. Abdel Haleem (Oxford, England: Oxford University Press, 2004), 5:3 at 67. [Hereinafter QUR'AN.] *Surah* 5, *ayah* 3 is said by Muslim scholars to be the last one revealed to the Prophet, 81 days before he died, and Muhammad mentions it in his Farewell Sermon.



But Mohammed was content with a character more humble, yet more sublime, of a simple editor: the substance of the Koran, according to himself or his disciples, is uncreated and eternal, subsisting in the essence of the Deity and inscribed with a pen of light on the table of his everlasting decrees. A paper copy, in a volume of silk and gems, was brought down to the lowest heaven by the angel Gabriel . . . and this trusty messenger successively revealed the chapters and verses to the Arabian prophet.<sup>4</sup>

The period of this staged revelation to Muhammad was 22 years, from 610 A.D. when he was about 40 years old, until 632, the year of his death.

The Qur'ân itself refers to its staged revelation:

In truth, We have sent it, and in truth, it descended. And, what We sent to You is to make things clear, and to warn — a Koran, which We have divided into parts, so that You might recite it to mankind at intervals. For We have revealed it by stages.<sup>5</sup>

The end result was a sacred text, the Qur'ân, which contains 6,236 *ayat* (verses). (Detractors from Islam sometimes misstate the figure, 6,666, hoping to associate the text with the devil.) These *ayat* are organized into 114 *surahs* (chapters): 86 are Meccan *surahs* revealed from 610-622, and 23 are Medinan *surahs* revealed from 622-632.

Why did Allâh reveal the message to Muhammad in stages over the last 22 years of the life of Muhammad? Why not transmit it all at once? The human mind cannot possibly know the purpose of Allâh for the progressive revelation, but one possible explanation may be Allâh sent the revelations in bits to allow mankind to comprehend it rather than overwhelming everyone all at once. Perhaps there is an analogy with studying the *Shar'ia*: comprehending its scale and profundity takes time.

### § 3.02 FIVE BASIC FEATURES

Muslims believe the Qur'ân has the following features:

- (1) There is a grand pattern in the way in which the Qur'ân was revealed.
- (2) Each *ayah* was revealed to Muhammad at an appropriate time.
- (3) The Qur'ân is timeless.
- (4) The Qur'ân was revealed and is recited in an oral manner.
- (5) The Qur'ân is a living reality.

These features reflect, in part, the staged manner in which the Qur'ân was revealed.

<sup>4</sup> Gibbon, *supra*, at 656-657.

<sup>5</sup> Qur'ân, *supra*, 17:105-106 at 181-82.

#### [A] Pattern

Perusing the Qur'ân is not like reading the Bible. The Old and New Testaments are largely chronological (across and within books), they yield a panoramic history of the relationship between God and humankind, and contain countless didactic stories. In contrast, the Qur'ân is not chronological, and the *surahs* and *ayat* are not organized in the exact order they were revealed to the Prophet. It is not uncommon for the first-time non-Muslim western reader, steeped in the linear narrative of Judeo-Christian culture, to find the Qur'ân scattered. Verses next to each other deal with entirely different issues, and the overall reading experience becomes frustrating, perhaps especially for a legal mind, which demands a transparent order and purpose. Gibbon thus writes:

The harmony and copiousness of style [of the Qur'ân] will not reach, in a version, the European infidel; he will peruse with impatience the endless incoherent rhapsody of fable and precept and declamation, which seldom excites a sentiment or an idea, which sometimes crawls in the dust, and is sometimes lost in the clouds. The divine attributes exalt the fancy of the Arabian missionary; but his loftiest strains must yield to the sublime simplicity of the book of Job [in the Old Testament], composed in a remote age, in the same country, and in the same language. If the composition of the Koran exceeds the faculties of a man, to what superior intelligence should we ascribe the *Illiad* of Homer or the *Philippics* of Demosthenes?<sup>6</sup>

Aside from its gratuitous and judgmental sarcasm, there are at least two problems with this approach to the Qur'ân.

First, this approach understates the difficulty of reading the Bible, particularly the Old Testament. First timers to this text often are advised, rightly, to read the New Testament, and then its predecessor. By reading how the story ends, it is easier to understand the beginning and middle. The New Testament is shorter, and frequently more direct, than the Old Testament. Moreover, neither the Old nor New Testament is organized by topic. On almost any issue, multiple parts of the Bible will be relevant.

Second, this approach is impatient. There is a grand pattern in the way the Qur'ân was revealed. Just because passages are not arranged along a linear time line does not mean they bear no pattern. Rather, only God knows the nature and purpose of the pattern. Glimmerings are possible for a devout, contemplative, meditative reader. For instance, by focusing on a particular *surah*, a sense of commonality in that chapter emerges.

#### [B] Timing

Muslims believe the Qur'ân is a seamless document. But, they also believe each verse was revealed at the appropriate moment. That is, each verse was revealed when it was time for that revelation to take place. The verses were appropriate for informing some feature of the life of the Prophet, or of the community (*ummah*)

<sup>6</sup> Gibbon, *supra*, at 657-658.

that the Prophet led. Muslims say a particular verse was revealed at a specific moment because the meaning of that verse would be clear in that moment, in the context of that moment.

Theoretically, the revelation was made clear because it was done in stages. If the Qur'ān had been given all at once, then it would have been too overwhelming. The first Muslim community could not possibly have assimilated it all at once. It had to be given in stages, and in Arabic, so the first *ummah* could assimilate it properly.

### [C] Timelessness

When searching for a grand pattern, history shows how the order of revelation reflected the circumstances of the moment. But, the revelations bespeak the timeless nature of the Qur'ān. That is, the progressive revelation of the Qur'ān interacted with circumstances in the life of the Prophet and his community. Nevertheless, the Message of the Qur'ān is timeless.

Because the Qur'ān reflects the Will of Allāh, His Will applies to all times and circumstances. Muslims prefer not to suggest a verse, or the order of revelation of verses, were designed to resolve a specific problem at the time. A particular verse may have helped to resolve a problem in the life of the Prophet or his community. But, it did so precisely because of the timeless nature of the verse: it resolves that problem at any time.

### [D] Oral Revelation

Many times throughout the Qur'ān Allāh addresses the Prophet using the word "Recite." The Qur'ān often refers to itself as a recitation, thereby clearly conveying that the words were delivered orally to him by Allāh via the Archangel Gabriel, and that Muslims should hear it orally. Oral exposure remains significant. Muslims may read the Qur'ān to comprehend it, and ask scholars about its meaning. But, Muslims believe that truly to understand the Qur'ān, it is necessary to hear it recited, especially in Arabic.

### [E] Living Reality

The revelation of the Qur'ān to and through the Prophet is a living reality, not just an historical event, for Muslims. A Muslim lives within the "system:" always aware of the presence of the Qur'ān as the essence of Allāh expressed therein, of the need to respond to the Will of Allāh, of the extent to which he is (or is not) responding to the Will of Allāh. Muslims see Islam as a powerful living force that informs everything they do. This means Muslims have sought to find in the Qur'ān everything they need — all of the information — to lead their life in accordance with the Will of Allāh.

## § 3.03 COMPILATION AND ORGANIZATION

### [A] Literalism, Faith, and Orientalist Scholarship

A fascinating and controversial historical question is how and when the revelations to the Prophet Muhammad became the written document that has come to be known as the Qur'ān. How, when, and through whose efforts did the Islamic community (*ummah*) arrive at a canonical text of the Qur'ān? Many scholars, both Muslims and non-Muslims, have studied the origin of this sacred scripture. Western scholars specializing in Qur'ānic studies are known as "Orientalists." Because of the place of honor the Qur'ān occupies in Islam and Islamic culture, its study by Orientalists is a sensitive subject in some Muslim quarters for two reasons.

The first reason is literalism. Muslims believe the Qur'ān contains the *verbatim* Word of God as spoken to Muhammad through the Archangel Gabriel. Based on faith, it is a text to be accepted literally, one that declares itself to be inerrant. A literalist approach can, though it need not, become an unthinking one. In contrast, Orientalists study the Qur'ān from an academic perspective, which by nature is skeptical and critical. Consequently, some Muslims see the Orientalist approach to Qur'ānic study, relying on documents and records, or generating scholarly conferences and papers, which do not conform to orthodox Islamic belief, disparages their faith. That is so even if Orientalist scholars, despite their academic bent, have no intention whatsoever of disrespect.

Source documents can be particularly contentious. Often, documents used by Orientalists to piece together the early days of Islam were written several generations after the events they chronicle took place. Through some of these documents, conflicts between *Sunni* and *Shī'ite* Islam sometimes are apparent, and show different pictures of historical events and people. Using such documents to uncover the past can put an Orientalist scholar in conflict with a sectarian Muslim whose faith alone guides belief about the origins of the written Qur'ān, Muhammad, and early Muslim history.

Second, there is a common presumption not only among Orientalists, but throughout the secular academy, that faith and reason are incompatible. That presumption implies skepticism, even cynicism, about any explanation based on revealed truth as distinct from reasoned truth. Put bluntly, the response to an inquiry of "because the Qur'ān says so" simply is insufficient to the conventional academic mind. Surely, more inquiry will produce a "better" explanation? Perhaps, but for some Muslims, the response is more than sufficient, and pushing beyond it is futile at best and insulting at worst.

Neither literalism nor a tension between faith and reason plague Catholic Christianity. Hence, Biblical archaeology and hermeneutics are long-standing, widely-accepted, and widely-respected fields of study in Catholic theology. Catholic Christians do not regard the Bible in a literal sense: what it contains is true, but not every account in it happened exactly as it states. Moreover, faith and reason cannot contradict each other, but rather complement and reinforce each other. Thus, for example, how the world came into being, which is set out *The Book of*



*Genesis*, the start of the Old Testament, offers some accounts, but creation may not have occurred precisely as *Genesis* says. The Catholic Church accepts the scientific theory of evolution, and here is an example of faith and reason: reason discovered evolution; and faith teaches that evolution was the mechanism God chose and set in motion.

### [B] Revelation Writers

It is generally believed that Muhammad was illiterate.<sup>7</sup> Or, as politely expressed in Muslim circles, by tradition the Prophet was illiterate. However, he was in the habit of employing many secretaries, who with the help of other faithful Muslims wrote down many of the revelations he received before he died. The use by Muhammad of secretaries, and their duty to record the revelations, is supported by *hadith*.<sup>8</sup>

These secretaries, or scribes, are known as "Revelation Writers," many of whom were among his Companions (*Ṣaḥābah*). So, while the revelations were not collected into one official compendium during the life of the Prophet, every revelation had been memorialized in written form before his death.<sup>9</sup> This process was supported by some of his wives, including Khadyja, and many of his *Ṣaḥābah*, including the first four Caliphs (*Rashidun*), not to mention other faithful Muslims whose names are lost to history.

### [C] Four Types of Compilation

The term "compilation" in respect of the Qur'ān carries four distinct meanings:

- (1) Memorizing the entire Qur'ān by heart.
- (2) Arranging the *surat* (chapters) of the Qur'ān in correct order.
- (3) Arranging the *ayat* (verses) in each *surah* of the Qur'ān in correct order.
- (4) Writing down the entire Qur'ān as a definitive text.

The first task was accomplished by the Prophet during his lifetime, and by many *Ṣaḥābah*. To the present, some Muslims memorize the Qur'ān, and a "*hafiz*" is a person who has done so. Some Islamic schools (*mederis* or *madrasas*) emphasize rote memorization of the Qur'ān, to the consternation of many Muslim and non-Muslim authorities, who are concerned this education occurs at the cost of teaching skills needed for economic growth and development, and renders students vulnerable to manipulation by extremists. In the time of the Prophet, however, the

<sup>7</sup> See M.M. AL-AZAMI, *THE HISTORY OF THE QUR'ANIC TEXT FROM REVELATION TO COMPILATION: A COMPARATIVE STUDY WITH THE OLD AND NEW TESTAMENTS* 55 (Leicester, United Kingdom: U.K. Islamic Academy, 2003). [Hereinafter, AL AZAMI.] Professor Al Azami is a *Sunni* scholar of *hadith* at King Saud University in Riyadh, Kingdom of Saudi Arabia. But see W. MONTGOMERY WATT & RICHARD BELL, *INTRODUCTION TO THE QUR'AN* 34 (Edinburgh, United Kingdom: Edinburgh University Press, 1970). [Hereinafter, WATT.]

<sup>8</sup> See AL AZAMI, *supra*, at 68-69.

<sup>9</sup> See AL AZAMI, *supra*, at 77.

culture was an oral one. Memorizing and re-telling was the common way to convey information and knowledge.

As to arrangement of the *surat*, that occurred after the death of Muhammad, during the Caliphate of 'Uthman. However, scholars disagree as to whether Muhammad told his Companions the correct order of the chapters before he died. The *ayat* were put in the correct order during the lifetime of the Prophet. In particular, the Archangel Gabriel instructed Muhammad as to the correct order. Each year (around *Ramadhān*), Gabriel asked Muhammad to recite the entirety of what had been revealed to him up to that point. Muhammad was able to check that he had memorized each verse accurately, put the verses in the proper order, and correct any mistakes. In the year of his death, 632 A.D., two checks were made, and the fact Gabriel asked Muhammad twice in one year was a harbinger of his impending demise. Note, then, the order of the verses was set by the time the Prophet died, as was their division into chapters. But, whether the order of the chapters was set before his passing is uncertain.

What about the fourth aspect of compilation? Gibbon summarizes the efforts at writing down the Qur'ān as follows:

... the fragments of the Koran were produced at the discretion of Mohammed; each revelation is suited to the emergencies of his policy or passion; and all contradiction is removed by the saving maxim that any text of Scripture is abrogated or modified by any subsequent passage. The word of God and of the apostle was diligently recorded by his disciples on palm-leaves and the shoulder-bones of mutton; and the pages, without order or connection, were cast into a domestic chest in the custody of one of his wives. Two years after the death of Mohammed the sacred volume was collected and published by his friend and successor Abubeker [i.e., the First of the *Rashidun*]; the work was revised by the caliph Othman [the Second of the *Rashidun*], in the thirtieth year of the Hegira; and the various editions of the Koran assert the same miraculous privilege of a uniform and incorruptible text.<sup>10</sup>

The actual process was both more involved and interesting than Gibbon's summary might suggest. The first two of the *Rashidun* played a major role: Abū Bakr and 'Uthman.

### [D] Abū Bakr, Zaid bin Thabit, and Muṣṣḥaf

Abū Bakr, the first of the *Rashidun*, who reigned from 632-634, gathered the revelations received by Muhammad into one central, but unofficial volume. He did so in the first year after Muhammad died, in 633, for two reasons. First, with the death of the Prophet, the revelations were sealed — the last of them had been received in 632. Second, many *hafiz* (i.e., people who had memorized the Qur'ān) died in the campaigns of the Wars of Apostasy (*Riddah* Wars). The Battle of Yamamah,<sup>11</sup> in 632 (12 A.H.),<sup>12</sup> was particularly bloody, and many *hafiz*, who

<sup>10</sup> GIBBON, *supra*, at 657.

<sup>11</sup> See AL AZAMI, *supra*, at 77; but see WATT, *supra*, at 41 (explaining that the death lists available for

doubled as soldiers, were killed. Abū Bakr knew the deaths of so many *ḥafīz* created the potential for some revelations to be lost forever. Thus, in 633, with prompting from 'Umar, the Caliph began to collect, compile, and transcribe the revelations.<sup>12</sup> He ordered nothing of the Word of Allāh was to be lost.

Abū Bakr chose Zaid ibn Thabit to lead these efforts.<sup>14</sup> That was for good reason. Zaid, one of the Revelation Writers, was the personal scribe of Muhammad. Muhammad selected him to write down verses of the Qur'ān. Moreover, Zaid witnessed the last recitation of the Qur'ān by the Prophet in the presence of the Archangel Gabriel.

Zaid set about his task by locating Qur'ānic material all over the Arabian Peninsula, and according to him:

started locating the Quranic material and collecting it from parchments, scapula, leafstalks of date palms and from the memories of men (who knew it by heart).<sup>15</sup>

Devout Muslims brought to Zaid any evidence, be it writings or memories, of the revelations. Zaid used a system of witnesses to authenticate each revelation to ensure no illegitimate material found its way into the compilation.<sup>16</sup> This system was exacting. A purported revelation had to meet the highest standards to be judged veritable, namely:

- (1) There had to be two Muslim witnesses to testify written material was genuine as recorded *verbatim* in the presence of the Prophet.<sup>17</sup> Thus, Zaid would not accept memorization of a text alone; there had to be at least two corroborating witnesses that it was written down with Muhammad himself present.
- (2) The written material had to be from the last recitation to the Prophet as supervised by, and in the presence of, the Archangel Gabriel. Earlier recitations, for example, from 610 or 620, were discounted, as the last one was the full, complete, and accurate rendition of the Message sent by Allāh. To be sure, those earlier recitations were not irrelevant; rather, they had been repeated and refined over the years, culminating in the final one. An imperfect analogy might be the earlier versions, while authentic in themselves, were akin to a draft manuscript that goes through editing to yield a final form.

the battles in Yamamah generally contain the names of new converts to Islam who would likely not have known the revelations by heart).

<sup>12</sup> See Arthur Jeffery, *Materials for the History of the Text of the Koran* (1902), in *THE ORIGINS OF THE KORAN* 117 (Ibn Warraq ed., Amherst, New York: Prometheus Books, 1998).

<sup>13</sup> See AL AZAMI, *supra*, at 78.

<sup>14</sup> AL AZAMI, *supra*, at 78.

<sup>15</sup> Quoted in Zaid ibn Thabit, Wikipedia, posted at [http://en.wikipedia.org/wiki/Zaid\\_ibn\\_Thabit](http://en.wikipedia.org/wiki/Zaid_ibn_Thabit). [Hereinafter, Zaid ibn Thabit.]

<sup>16</sup> See AL AZAMI, *supra*, at 83-84.

<sup>17</sup> AL AZAMI, *supra*, at 80.

Assuming these two criteria were met, Zaid insisted authentic written material be placed in the same order as the Prophet had commanded, as commanded by Gabriel.

Then, with *bona fide* primary source material in hand, Zaid prepared sheets, or written pages (*suhuf*, or singular, sheet, or written page, *sahifa*) containing all of the verses. (The pages were comprised of leather, particularly from goats or sheep, or other materials, and sometimes rolled up as scrolls.) From the *suhuf*, he compiled a version of the Qur'ān, known as "*Mushaf*," which he presented to Abū Bakr.<sup>18</sup> It is worth pausing to appreciate that Zaid and his colleagues wrestled with issues that are central in modern-day American Evidence Law, namely, relevancy and authentication.

The *Mushaf* (plural, *masahif*) refers to the collected bundle of *suhuf*, and into a particular order, and in a single volume. Literally, "*Mushaf*" means "collection of pages," or "manuscript bound between two boards." In this context, it refers to the collected, written pages of the Qur'ān. Thus, Muslim scholars distinguish between the "Qur'ān," which is the revelation to Muhammad (because "Al Qur'ān" means "The Recitation") and the "*Mushaf*," which is the written expression of that revelation. Among Orientalists, the *Mushaf* also is referred to as the Codex, or more specifically, the Abū Bakr Codex. Note, too, that sometimes this text is dubbed the "*Suhuf*," connoting many sheets of parchment that technically not, but are identical to, the Qur'ān.<sup>19</sup>

Abū Bakr kept the *Mushaf* in his house. Significantly, he did not order the destruction of other versions of Qur'ānic passages, thus at the time there remained alternative fragmentary evidence that might, or might not, have borne differences from the *Mushaf* in respect of included or excluded verses, or the ordering of verses. It would be the Caliph 'Uthmān who would expunge this record.

Before dying in 634, Abū Bakr passed on the *Mushaf* to 'Umar, the second of the *Rashidun* Caliphs. 'Umar spread the Message contained in the Qur'ān around the Muslim world by sending teachers to its near and far reaches, and by expanding Muslim-controlled territory.<sup>20</sup> When 'Umar died in 644, the *Mushaf* passed to Ḥafṣa bint 'Umar, the daughter of 'Umar and a wife (and widow) of the Prophet.<sup>21</sup> Like two other wives ('Āisha and Umm Salamah Hind), Ḥafṣa memorized the entire Qur'ān. Until the second gathering, under the Caliphate of 'Uthmān, the *Mushaf* remained in the home of Ḥafṣa.

<sup>18</sup> See Zaid ibn Thabit, *supra*.

<sup>19</sup> See AL AZAMI, *supra*, at 84.

<sup>20</sup> See AL AZAMI, *supra*, at 85.

<sup>21</sup> See B. LEWIS, V.L. MENAGE, CH. PELLAT & J. SCHAACHT EDs., *THE ENCYCLOPEDIA OF ISLAM* vol. 3 at 63-65 (Leiden, Netherlands: E.J. Brill, new ed., 1971) (entry on Ḥafṣa by L. Vecchia Vaglieri). [Hereinafter, *ENCYCLOPEDIA OF ISLAM*.]



### [E] 'Uthmān and Canonical Text

The official compilation of the Qur'ān, and the version used ever since — the canonical text — was completed by the third *Rashīdun* Caliph, 'Uthmān, who reigned from 644–656, the successor to 'Umar. The motivation of 'Uthmān to compile a definitive Qur'ān also was found on the field of battle. His expeditionary forces, some of whom were Companions of the Prophet (*Ṣaḥābah*), came from different linguistic backgrounds, and could not agree on the proper recitation of the revelations.<sup>22</sup> The root cause of the problem is believed to have been the practice of Muhammad of teaching Muslim soldiers in their native dialects, rather than in the ritual dialect of the Qur'ān. Indeed, seven different ways of reciting the Qur'ān, called "*Qirā'āt*," emerged. ("*Qirā'āt*" refers to a method of reading or recitation.) The differences were on matters of style and grammar, such as the use of pronouns (e.g., the correct person, "you" versus "they," "he" versus "we," etc.), adjectives (e.g., "mighty" versus "multitudinous"), and verbs (with slightly different connotations).<sup>23</sup> As the great Arab-Islamic Empire expanded, and the efforts of the Caliph to spread the faith to new subjects were undermined not only by these quarrels, but also by the logical demand of prospective converts to Islam for a single, unified message recited in a consistent manner. The *Qirā'āt* generated controversies among the apostles of Islam, and created confusion among their sought-after flock.

'Uthmān put an end to the infighting associated with different vernaculars by compiling the revelations into an official text, the 'Uthman Codex. This Codex uses the *Qurayshī* dialect of Arabic, the dialect in which Muhammad, a member of the *Quraysh* tribe, received the revelations from Gabriel.<sup>24</sup> To assist in his undertaking, 'Uthmān used the *Mushaf* that had come into the possession of Ḥafṣa, though the extent to which it played a role in his compilation is debated.<sup>25</sup> He may have copied the *Mushaf verbatim*. Or, 'Uthmān may have used it as a reference, while contemporaneously collecting written and oral recollections from believers, and then checking his final compilation against the *Mushaf* to ensure its accuracy.

Whichever is the case, the newly collected Qur'ān is believed to have been identical with the previously collected *Sukuf*. It is not thought that there are differences between the Abū Bakr text and the 'Uthmān text of the Qur'ān, meaning specifically that 'Uthman is not thought to have changed the work done under Abū Bakr. Seeing no continued need "for the numerous fragments of the Qur'ān circulating in people's hands" 'Uthman ordered them burned, to which the

<sup>22</sup> See AL AZAMI, *supra*, at 87.

<sup>23</sup> See *Qir'at*, WIKIPEDIA, posted at <http://en.wikipedia.org/wiki/Qir'at>.

The term "*qirā'āt*" is closely related to the term "*akraf*," which refers to the seven different ways in which the Qur'ān is said to have been revealed, that is, the seven Arabic dialects in which it was recited. As explained above, they were standardized into a single dialect, *Qurayshī*, during the Caliphate of 'Uthman. The difference is that "*qirā'āt*" concerns pronunciation. See *id.*

<sup>24</sup> See AL AZAMI, *supra*, at 87–88.

<sup>25</sup> See AL AZAMI, *supra*, at 88; but see Watt, *supra*, at 40–42 (expressing doubt that Abū Bakr ever compiled an official composite document of the revelations to Muhammad).

people gave "unanimous approval."<sup>26</sup> Evidently, 'Uthman also was motivated to destroy all other Qur'ānic versions and fragments to ensure nothing incompatible with the text he prepared would survive and cause confusion about the Message as to its substantive content (i.e., included or excluded passages), or the precise order of *surat* and *ayat*. 'Uthman then sent copies of the Official Codex to teachers in several Muslim cities throughout the Empire, instructing them to teach from this Qur'ān.<sup>27</sup> Along with these copies, he sent guidebooks to ensure all differences among the seven *Qirā'āt* were eliminated.

The burning of the *Mushaf* and whatever other fragments were in existence at the time is, in retrospect, a tragedy. Ideally, the Abū Bakr Codex and all extant documentation would have been stored in a secure location. Subsequent generations of scholars then could have a clear, linear record of how the canonical text of the Qur'ān evolved. In any event, Muslims believe the Qur'ān compiled by 'Uthmān, when read in its proper language, contains the *verbatim* revelations to Muhammad, just as they were revealed by God through the Archangel Gabriel.

### [F] Meccan Surahs (610–622 A.D.) and Medinan Surahs (622–632 A.D.)

With respect to patterns in the Qur'ān, it is possible to see two basic categories that correspond with the two periods of the "ministry" of the Prophet. Muhammad received the first revelation in 610 and soon began sharing the revelations with his small following. The verses revealed while he was living in Mecca, where he endured persecution and abuse from city leaders, are collected into what are called the "Meccan *surahs*." The Prophet fled to Medina in 622, where his Message was welcomed. The verses revealed during this time until his death are organized in the "Medinan *surahs*." Generally speaking, the Medinan *surahs* tend to come first, and the Meccan *surahs* tend to occupy much of the end of the Qur'ān. Table 3-1 summarizes the names, origin, and placement of the 114 Qur'ānic chapters.

Table 3-1:  
Chapters (*Surat*) of the Qur'ān — Place of Revelation

Surah Number	English (Arabic) Title	Place of Revelation <sup>28</sup>
1	The Opening ( <i>Al-Fatiha</i> )	Revealed twice, once in Mecca and once in Medina. <sup>29</sup>
2	The Cow ( <i>Al-Baqara</i> )	Medina
3	The Family of 'Imran ( <i>Al-Imran</i> )	Medina

<sup>26</sup> AL AZAMI, *supra*, at 94; but see P.J. BEARMAN, T.H. BIANQUIS, C.E. BOWWORTH, E. VAN DONGEL & W.P. HEINRICHS EDS., THE ENCYCLOPEDIA OF ISLAM, vol. 10 at 946–949 (Leiden, The Netherlands: Brill, new ed., 1999) (offering a different account in the entry on 'Uthman b. 'Affān by G. Levi Della Vida and R.G. Khoury).

<sup>27</sup> See AL AZAMI, *supra*, at 94.

<sup>28</sup> See QUR'AN, *supra* (presenting the place of revelation at the start of each *surah*).

<sup>29</sup> See 100 Concepts in *Al-Fatiha* (The Opening Chapter of the Quran), posted at [http://ourgodis1.com/Tafseer/ElFatha\\_100\\_concepts.doc](http://ourgodis1.com/Tafseer/ElFatha_100_concepts.doc).

Surah Number	English (Arabic) Title	Place of Revelation <sup>28</sup>
4	Women ( <i>Al-Nisa'</i> )	Medina
5	The Feast ( <i>Al-Ma'idah</i> )	Medina
6	Livestock ( <i>Al-An'am</i> )	Mecca
7	The Heights ( <i>Al-A'raf</i> )	Mecca
8	Battle Gains ( <i>Al-Anfal</i> ) <sup>30</sup>	Medina
9	Repentance ( <i>Al-Tawba</i> )	Medina
10	Jonah ( <i>Yunus</i> )	Mecca
11	Hud ( <i>Hud</i> )	Mecca
12	Joseph ( <i>Yusuf</i> )	Mecca
13	Thunder ( <i>Al-Ra'd</i> )	Medina
14	Abraham ( <i>Ibrahim</i> )	Mecca
15	Al-Hijr ( <i>Al-Hijr</i> )	Mecca
16	The Bee ( <i>Al-Nahl</i> )	Mecca
17	The Night Journey ( <i>Al-Isra'</i> )	Mecca
18	The Cave ( <i>Al-Kahf</i> )	Mecca
19	Mary ( <i>Marjam</i> )	Mecca
20	Ta Ha ( <i>Ta Ha</i> )	Mecca
21	The Prophets ( <i>Al-Anbiya'</i> )	Mecca
22	The Pilgrimage ( <i>Al-Hajj</i> )	Medina
23	The Believers ( <i>Al-Mu'minun</i> )	Mecca
24	Light ( <i>Al-Nur</i> )	Medina
25	The Differentiator ( <i>Al-Furqan</i> )	Mecca
26	The Poets ( <i>Al-Shu'ara'</i> )	Mecca
27	The Ants ( <i>Al-Naml</i> )	Mecca
28	The Story ( <i>Al-Qasas</i> )	Mecca
29	The Spider ( <i>Al-Ankabut</i> )	Mecca
30	The Byzantines ( <i>Al-Rum</i> )	Mecca
31	Luqman ( <i>Luqman</i> )	Mecca
32	Bowing Down in Worship ( <i>Al-Sajdah</i> )	Mecca
33	The Joint Forces ( <i>Al-Ahzab</i> )	Medina
34	Sheba ( <i>Saba'</i> )	Mecca
34	The Creator ( <i>Fatir</i> )	Mecca
36	Ya Sin ( <i>Ya Sin</i> )	Mecca
37	Ranged in Rows ( <i>Al-Saffat</i> )	Mecca
38	Sad ( <i>Sad</i> )	Mecca
39	The Throngs ( <i>Al-Zumar</i> )	Mecca
40	The Forgiver ( <i>Ghafir</i> )	Mecca

<sup>30</sup> In his opening statement to the ninth *surah* (Repentance), Professor Abdel Haleem notes that "this is the only *Surah* not to begin with the formula 'In the name of God, the Lord of Mercy, The Giver of Mercy' [the *Bismillah al-Rahman al-Rahim*]; there is an opinion that *Surat* 8 and 9 are in fact just one *Surah*." Qur'an, *supra*, at 116.

Surah Number	English (Arabic) Title	Place of Revelation <sup>28</sup>
41	Made Distinct ( <i>Fussilat</i> )	Mecca
42	Consultation ( <i>Al-Shura</i> )	Mecca
43	Ornaments of Gold ( <i>Al-Zukhruf</i> )	Mecca
44	Smoke ( <i>Al-Dhukhan</i> )	Mecca
45	Kneeling ( <i>Al-Fathiya</i> )	Mecca
46	The Sand Dunes ( <i>Al-Ahqaf</i> )	Mecca
47	Muhammad ( <i>Muhammad</i> )	Medina
48	Triumph ( <i>Al-Fath</i> )	Medina
49	The Private Rooms ( <i>Al-Hujurat</i> )	Medina
50	Qaf ( <i>Qaf</i> )	Mecca
51	Scattering ( <i>Al-Dhariyat</i> )	Mecca
52	The Mountain ( <i>Al-Tur</i> )	Mecca
53	The Star ( <i>Al-Najm</i> )	Mecca
54	The Moon ( <i>Al-Qamar</i> )	Mecca
55	The Lord of Mercy ( <i>Al-Rahman</i> )	Medina
56	That Which is Coming ( <i>Al-Waqi'a</i> )	Mecca
57	Iron ( <i>Al-Hadid</i> )	Medina
58	The Dispute ( <i>Al-Mujadala</i> )	Medina
59	The Gathering ( <i>Al-Hashr</i> )	Medina
60	Women Tested ( <i>Al-Mumtahanah</i> )	Medina
61	Solid Lines ( <i>Al-Saff</i> )	Medina
62	The Day of Congregation ( <i>Al-Fumu'a</i> )	Medina
63	The Hypocrites ( <i>Al-Munafiqun</i> )	Medina
64	Mutual Neglect ( <i>Al-Taghabun</i> )	Medina
65	Divorce ( <i>Al-Talaq</i> )	Medina
66	Prohibition ( <i>Al-Tahrim</i> )	Medina
67	Control ( <i>Al-Mulk</i> )	Mecca
68	The Pen ( <i>Al-Qalam</i> )	Mecca
69	The Inevitable Hour ( <i>Al-Haqqa</i> )	Mecca
70	The Ways of Ascent ( <i>Al-Ma'arij</i> )	Mecca
71	Noah ( <i>Nuh</i> )	Mecca
72	The Jinn ( <i>Al-Jinn</i> )	Mecca
73	Enfolded ( <i>Al-Muzzammil</i> )	Mecca



Surah Number	English (Arabic) Title	Place of Revelation <sup>28</sup>
74	Wrapped in his Cloak ( <i>Al-Muddaththir</i> )	<i>Ayat</i> 1-7 are Meccan. Subsequent <i>ayat</i> are from a later period.
75	The Resurrection ( <i>Al-Qiyama</i> )	Mecca
76	Man ( <i>Al-Insan</i> )	Medina
77	Sent Forth ( <i>Al-Mursalat</i> )	Mecca
78	The Announcement ( <i>Al-Naba'</i> )	Mecca
79	The Forceful Chargers ( <i>Al-Nazi'at</i> )	Mecca
80	He Frowned ( <i>Abasa</i> )	Mecca
81	Shrouded in Darkness ( <i>Al-Takwir</i> )	Mecca
82	Torn Apart ( <i>Al-Infitar</i> )	Mecca
83	Those Who Give Short Measure ( <i>Al-Mutaffifin</i> )	Mecca
84	Ripped Apart ( <i>Al-Inshiqaq</i> )	Mecca
85	The Towering Constellations ( <i>Al-Buruj</i> )	Mecca
86	The Night-Comer ( <i>Al-Tariq</i> )	Mecca
87	The Most High ( <i>Al-'Ala</i> )	Mecca
88	The Overwhelming Event ( <i>Al-Ghashiya</i> )	Mecca
89	Daybreak ( <i>Al-Fajr</i> )	Mecca
90	The City ( <i>Al-Balad</i> )	Mecca
91	The Sun ( <i>Al-Shams</i> )	Mecca
92	The Night ( <i>Al-Layl</i> )	Mecca
93	The Morning Brightness ( <i>Al-Duha</i> )	Mecca
94	Relief ( <i>Al-Sharh</i> )	Mecca
95	The Fig ( <i>Al-Tin</i> )	Mecca
96	The Clinging Form ( <i>Al-'Alaq</i> )	Mecca
97	The Night Glory ( <i>Al-Qadr</i> )	Mecca
98	Clear Evidence ( <i>Al-Bayyina</i> )	Medina
99	The Earthquake ( <i>Al-Zalzala</i> )	Medina
100	The Changing Steeds ( <i>Al-Adiyat</i> )	Mecca
101	The Crashing Blow ( <i>Al-Qari'a</i> )	Mecca
102	Striving for More ( <i>Al-Takathur</i> )	Mecca
103	The Declining Day ( <i>Al-'Asr</i> )	Mecca
104	The Backbiter ( <i>Al-Humaza</i> )	Mecca
105	The Elephant ( <i>Al-Fil</i> )	Mecca

Surah Number	English (Arabic) Title	Place of Revelation <sup>28</sup>
106	Quraysh ( <i>Quraysh</i> )	Mecca
107	Common Kindness ( <i>Al-Ma'un</i> )	Mecca
108	Abundance ( <i>Al-Kawthar</i> )	Mecca
109	The Disbelievers ( <i>Al-Kafirun</i> )	Mecca
110	Help ( <i>Al-Nasr</i> )	Medina
111	Palm Fibre ( <i>Al-Masad</i> )	Mecca
112	Purity ( <i>Al-Ikhlās</i> )	Mecca <sup>31</sup>
113	Daybreak ( <i>Al-Falaq</i> )	Mecca
114	People ( <i>Al-Nas</i> )	Mecca

• **First Stage: Meccan Surahs (610-622)**

The first stage began when the Prophet received the first revelation in 610 and lasted until the *Hijra* in 622, when Muhammad and his followers left Mecca and moved north to Medina. Most of the revelations given to the Prophet while in Mecca reflect the original location. These verses tend to be short, powerful, and poetic. They are profound, but their profundity is compressed in a small number of words.

The pithy, potent *surat* of the Meccan period focus on warnings. They identify the power of Allāh, they warn humans that there will be an end of time, a Final Judgment, and they warn people to prepare for that end of time. These *surat* are recited throughout the modern Islamic world as every Muslim is called to prayer. There is a kind of poetry and power to the words even if a listener is unable to understand the Arabic words. They were appropriate for the circumstances when the revelation began.

• **Second Stage: Medinan Surahs (622-632)**

When the Prophet moved to Medina with his community, known as the *Hijra*, the second stage of his ministry began. This stage would continue for the last 10 years of his life, as the Prophet was the leader of a more complete Islamic community that was inspired by the principles of the Message he bore.

Throughout the second stage, Medina was the base for the Prophet. The very movement of the Prophet made Medina hugely important in the history of Islam. Medina became the place where the first real Islamic community was founded and came into being. After 12 hard years in Mecca, the Prophet established a community (*umma*) guided by the principles of the Qur'ān. In Medina, as he led this community, the nature of the revelations changed. The verses illuminate the newly-created *umma* as it develops and matures. It was appropriate, in the eyes of Allāh, for the change to take place, and to reveal the verses to support the evolution of the *umma*.

The chapters received in Medina are longer than those from Mecca, hence the Medinan *surat* occupy much of the space of the Qur'ān. The Medinan *surat* take the

<sup>31</sup> See [www.islamicity.com](http://www.islamicity.com).

form of advisory statements. The Medinan period is known as the period of "Qur'anic Legislation." The verses in the Medinan *surat* detail what one is supposed to do to respond to the warnings given repeatedly in the revelation of the Meccan *surat*. Thus, much of "Islamic Law" comes from the Medinan period.

The Medinan *surat* also contain elaborate stories. There are several parallels between them and stories in the Old Testament of the Bible. From an Islamic perspective, the true stories are the versions in the Qur'an, while the Biblical accounts somehow were corrupted to one degree or another. These differences aside, a commonality in the Judeo-Christian-Islamic heritage are stories about great early figures — the Prophets who preceded Muhammad.

### § 3.04 COMPARISONS TO BIBLE

#### [A] Overview

In approaching the Bible and its compilation, it is important to understand the similarities and differences between the *Tanak* and Old Testament. First, the *Tanak* is the Jewish sacred text, or holy book, while the Old Testament is part of the Christian holy book. The Old Testament occupies much more than half of the Christian Bible, and is specifically concerned with the time before Jesus Christ was born.

The *Tanak* is divided into 3 separate collections of books: the *Torah*, the *Prophets* (*Nevi'im*), and the *Writings* (*Kethuvim*). These books are roughly in chronological order, and they comprise the original canon of the Jewish faith:<sup>32</sup>

- The *Torah*, consisting of 5 books, chronicles the origins of humanity followed by the story of Abraham. Abraham was the father of Isaac and Ishmael, who are the patriarchs of the Judaism and Islam. The last 4 books contain the story of Moses, who received the 10 Commandments from God.<sup>33</sup>
- The books of the *Nevi'im* (*Prophets*) contain a recitation of an early period of Jewish history. Jewish conquests and defeats of this period are recounted, including the story of King David, along with many prophecies.<sup>34</sup>
- The *Kethuvim* (*Writings*) holds the *Psalms*, which are devotional hymns used at both Jewish Temple, and in Christian worship. The *Kethuvim* also contain a recitation of Jewish history that ends by leaving the future of the Jewish people uncertain.<sup>35</sup> Both the *Nevi'im* and *Kethuvim* are meant to call people back to a life of faith towards God, and to show when Israel has

<sup>32</sup> See STEPHEN L. HARRIS, UNDERSTANDING THE BIBLE 3 (New York, New York: McGraw Hill Higher Education, 6th ed., 2003). [Hereinafter, HARRIS.]

<sup>33</sup> See HARRIS, *supra*, at 10.

<sup>34</sup> See HARRIS, *supra*, at 10.

<sup>35</sup> See HARRIS, *supra*, at 10.

followed Divine Law, and when it has not.<sup>36</sup>

The Old Testament recognized by the Catholic Church contains the same books found in the *Tanak*. However, there are 14 additional books present in the Catholic Old Testament. These additional books include later writings never adopted in the Jewish faith.<sup>37</sup> They are sometimes known as the *Apocryphal* books, meaning "hidden," or "deuterocanonical," meaning they are the "second canon."<sup>38</sup> These books had fallen out of use by Protestant Christians. But, lately they have regained some measure of popularity by being included in many current publications of Bibles used by Protestants, although these books are sometimes contained in a separate section.

The Old Testament also is divided into groupings of books. However, the book sections in the Catholic Old Testament do not conform to the sections found in the *Tanak*. The first section of the Christian Old Testament is known as the *Pentateuch*, which (as the title intimates) is composed of the first 5 books of the Bible: *Genesis*, *Exodus*, *Leviticus*, *Numbers*, and *Deuteronomy*.<sup>39</sup> The following sections are the *Historical Books*, *Wisdom Books*, and *Prophetic Books*:

- *Pentateuch*: These books form the basis on which the rest of the Christian Bible, and *Tanak* are based. Even though the *Pentateuch* is divided into 5 separate books "[it] has always been understood as a single work,"<sup>40</sup> The *Pentateuch* relates Christian and Jewish beliefs concerning the Creation of the world by God (in *Genesis*), through the period of Jewish slavery in Egypt and to the verge of settlement in the Promised Land (*Exodus*, *Leviticus*, *Numbers*, and *Deuteronomy*).<sup>41</sup> These books are written in the form of prose that teach the laws and historical narratives of the early Jewish People.<sup>42</sup>
- *Historical Books*: Generally this section of the Old Testament is composed of the books ranging from *Joshua* to 2 *Maccabees*. The Catholic Study Bible starts *The Historical Books* with 1 *Samuel*.<sup>43</sup> The message of this grouping of books is that Israel is punished when it sins, but can flourish if the people return to a goodly life. Also included in the *Historical Books* is the promise

<sup>36</sup> See THE CATHOLIC STUDY BIBLE RG 37 (New York, New York: Oxford University Press, 1990, New American Bible trans.). [Hereinafter, BIBLE.]

<sup>37</sup> See HARRIS, *supra*, at 3.

<sup>38</sup> HARRIS, *supra*, at 6. "Deuterocanonical" connotes the book is a later writing that was originally composed in Greek instead of Hebrew, and not adopted for use in the *Tanak*. See BIBLE, *supra*, at RG 37.

<sup>39</sup> The name "*Pentateuch*" comes from the title given in the earliest Greek translation that dates to the 2nd century B.C., and means a five part writing." See BIBLE, *supra*, at RG 37. In the *Tanak* these books are known as the *Torah*. This reference to the *Torah*, and all other references herein to the *Torah*, *Nevi'im*, and *Kethuvim*, are from HARRIS, *supra*, at 4–5.

<sup>40</sup> BIBLE, *supra*, at RG 36–37.

<sup>41</sup> See BIBLE, *supra*, at RG 39.

<sup>42</sup> See BIBLE, *supra*, at RG 38.

<sup>43</sup> See BIBLE, *supra*, at RG 37.



of God that the ancestral line of King David will not perish.<sup>44</sup>

- *The Wisdom Books:* This section of the Old Testament consists of the books from *Job* to *Ecclesiastes*. These books teach that there is a proper way to live, in which people seek what is good and avoid what is evil. By seeking what is good, through a virtuous life, a person becomes successful and happy. This success and happiness is evidence of the wisdom a person gained throughout life.<sup>45</sup> "Israel's wisdom tradition . . . may not focus on specifics of religion but it is highly ethical, fundamentally monotheistic, and, at times, equates wisdom with fidelity to the law of Israel."<sup>46</sup>
- *The Prophetic Books:* This section of the Old Testament contains the books from *Isaiah* to *Malachi*. These books recount the lives and teaching of people who were called by and received the messages from God to humankind, then transmitted those messages to their communities through the Prophets. They passed judgment on the actions of the people and guided the people concerning public, private, and political matters.<sup>47</sup>

All Christians believe Jesus Christ is the Messiah whose coming is prophesized in the Old Testament. Saint Joseph, the earthly step-father of Jesus, who adopted Jesus as his son, was a descendant of King David. Thus, Christians believe Jesus is the heir of David, and His birth fulfills the promise of God, recorded in *2 Samuel*, as to the line of David.

The first 4 books of the New Testament are the Gospels as related by Saints Matthew, Mark, Luke and John. Following the Gospels is a history of the early Christian Church, the New Testament Letters, and the Revelation to Saint John:

- *The Gospels:* The word "Gospel" means "Good News."<sup>48</sup> There are 5 books in this section: *The Gospel According to Matthew*; *The Gospel According to Mark*; *The Gospel According to Luke*; *The Gospel According to John*; and *The Acts of the Apostles*. The first 4 books each tell the story of Jesus Christ, and the word "Gospel" is used to define His incarnation as a human, the Crucifixion, and the Resurrection that Christians believe provides humanity with salvation from sin, including original sin. (Muslims do not believe in original sin, and thus do not see the need for salvation from it. Likewise, they do not believe Christ was the Son of God, or that he was crucified or resurrected. Rather, they believe he was saved at the last minute and raised up to Heaven.) *The Acts of the Apostles* tells the story of the expansion of the early Christian Church to Gentiles and focuses largely on the works of Saints Peter and Paul.<sup>49</sup>
- *The New Testament Letters:* This section of the New Testament starts with *The Letter to the Romans*, and ends with *The Letter to the Hebrews*. These

<sup>44</sup> See BIBLE, *supra*, at RG 117.

<sup>45</sup> See BIBLE, *supra*, at RG 231-232.

<sup>46</sup> BIBLE, *supra*, at RG 232.

<sup>47</sup> See BIBLE, *supra*, at RG 877.

<sup>48</sup> See BIBLE, *supra*, The New Testament at 1.

<sup>49</sup> See BIBLE, *supra*, The New Testament at 184-185.

14 letters are all attributed to Saint Paul, although some of them are believed to have been written by his disciples and secretaries.<sup>50</sup> Saint Paul was writing words of encouragement to the wide-spread Christian communities, and the letters that are actually his work predate the books of the Gospels.<sup>51</sup>

- *The Catholic Letters:* There are 7 books in this section of the New Testament, from *The Letter of James*, to *The Letter of Jude*. While Saint Paul addressed a specific Christian community as his audience, these letters address Christians in general, and were written by authors of the second and third generations of Christianity.<sup>52</sup> In contrast to *The Catholic Letters* is *The Book of Revelation*. *Revelation* is attributed to Saint John, and it is full of apocalyptic symbolism. The message found in it is even in times of trouble (including the actual apocalypse) Christians need have no fear, because Christ will bring them through those times, and into Heaven.<sup>53</sup>

Extra-canonical writings are also present in Jewish and Christian history. These are writings that for one reason or another are not included in the Christian books. Examples of controversial extra-canonical writings are the Gnostic Gospels.

## [B] Tabular Summary

Table 3-2 is a SYNOPSIS of the Bible, both Old and New Testaments. This Table has 73 rows and 3 columns. The 73 rows cover each of the separate books in the Hebrew and Catholic Christian Bibles. The first column provides the section of the Bible in which the discussed book is found. The second column lists the title of the book. The third column summarizes information on authorship, and date and place of composition.

<sup>50</sup> See BIBLE, *supra*, The New Testament at 228.

<sup>51</sup> See BIBLE, *supra*, The New Testament at 228.

<sup>52</sup> See BIBLE, *supra*, The New Testament at 228, 368.

<sup>53</sup> See BIBLE, *supra*, The New Testament at 398-400.

Table 3-2:  
The Bible — Old and New Testaments

Section of Bible <sup>54</sup>	Title of Book <sup>55</sup>	Authorship and Estimated Date of Writing <sup>56</sup>
The Pentateuch: <i>Torah</i>	Genesis	There are four separate traditions which are sources for The Book of Genesis. They are the <i>Yahwist</i> (characterized by referring to God with the name <i>Yahweh</i> and written in the 9th or 10th century B.C.), <i>Elohist</i> (characterized by using the more generic term <i>Elohim</i> for God, written after 900 B.C.), <i>Priestly</i> (chronological lists and genealogies (work ended in 458 B.C. with Ezra), and <i>Deuteronomist</i> (characterized by its hortatory style, and themes of worship centered around the Temple, 800-700 B.C.). It is not clear when this book was written, but certain historical events are captured within it, which are also documented in non-Biblical sources, and can be dated to 2000-1500 B.C. The social conditions reflected in this book reflect the conditions present after 2000 B.C. Traditionalists believe Moses is the author of the Pentateuch. However, it is more likely there was a series of authors, which ended with Ezra's declaration of the text as sacred in 458 B.C. Genesis contains narrative prose as its literary form.
The Pentateuch: <i>Torah</i>	Exodus	Exodus contains both narrative and legal prose. The historical events documented in Exodus probably took place around 1300 B.C.
The Pentateuch: <i>Torah</i>	Leviticus	Leviticus contains legal prose.
The Pentateuch: <i>Torah</i>	Numbers	Numbers contains both legal and narrative prose.
The Pentateuch: <i>Torah</i>	Deuteronomy	Deuteronomy contains legal prose, and was approximately composed around 700 B.C.

<sup>54</sup> See Bible, *supra*, at vi-viii.

<sup>55</sup> See Bible, *supra*, at vi-viii.

<sup>56</sup> See Bible, *supra*, at RG32, RG37, RG38, RG77, RG105, RG109, RG116, RG142, RG187, RG198, RG202, RG207, RG211, RG221, RG223, RG241, RG255, RG265, RG273, RG278, RG287, RG308, RG309, RG320, RG321, RG327, RG330, RG342, RG343, RG354, RG358, RG361, RG366, RG367, RG368, RG371, RG373, RG374, RG376, RG377, RG379, RG387, RG451, 6, 7, 39, 47, 48, 67, 68, 96, 146, 147, 229, 232, 276, 293, 302, 303, 310, 311, 318, 324, 328, 329, 332, 333, 347, 349, 368, 369, 375, 376, 382, 387, 396, 399, 400, 822, 879, 1070. All quotations are from *id.*, Readers Guide (RG).

Section of Bible <sup>54</sup>	Title of Book <sup>55</sup>	Authorship and Estimated Date of Writing <sup>56</sup>
The Historical Books-Deuteronomistic History: <i>Nevi'im</i>	Joshua	The approximate date of composition is 600 B.C.
The Historical Books-Deuteronomistic History: <i>Nevi'im</i>	Judges	Depicts events taking place between B.C. 1220-1050, but was written after 586.
The Historical Books- <i>Kethuvim</i>	Ruth	It is not clear if this book was written before or after Israel's period in Exile. While the style seems similar to that used before exile, the context seems to be from around 450B.C.
The Historical Books-Deuteronomistic History: <i>Nevi'im</i>	1 Samuel	The approximate date of composition is 600 B.C.
The Historical Books-Deuteronomistic History: <i>Nevi'im</i>	2 Samuel	The approximate date of composition is 600 B.C.
The Historical Books-Deuteronomistic History: <i>Nevi'im</i>	1 Kings	The approximate date of composition is 600 B.C.
The Historical Books-Deuteronomistic History: <i>Nevi'im</i>	2 Kings	Describes King Josiah's reign (640-609 B.C.), and written after 586.
The Historical Books-Chronicler's History: <i>Kethuvim</i>	1 Chronicles	Written in the 500s B.C.
The Historical Books-Chronicler's History: <i>Kethuvim</i>	2 Chronicles	The approximate date of composition of 2 Chronicles might be 450 B.C. <sup>57</sup>
The Historical Books-Chronicler's History: <i>Kethuvim</i>	Ezra	Written after Ezra arrived in Jerusalem in 398 B.C.
The Historical Books-Chronicler's History: <i>Kethuvim</i>	Nehemiah	Written after Nehemiah arrived in Jerusalem, in 445 B.C. At least part of this work is written in the first person, and is attributed to Nehemiah himself.

<sup>57</sup> See <http://netministries.org/Basics/BB2Chron.htm>



Section of Bible <sup>54</sup>	Title of Book <sup>55</sup>	Authorship and Estimated Date of Writing <sup>56</sup>
The Historical Books: Deuterocanonical	Tobit	Tobit is the work of a single author, who wished to compose a religious novel of sorts.
The Historical Books: Deuterocanonical	Judith	Judith was not a book intended to report accurately the history of Israel, but is instead a meditation on God's care for Israel.
The Historical Books: <i>Kethuvim</i>	Esther	Portrays events that took place in the 5th century B.C. <sup>58</sup>
The Historical Books: Deuterocanonical	1 Maccabees	1 Maccabees depicts historical events that took place between 175-104 B.C.
The Historical Books: Deuterocanonical	2 Maccabees	2 Maccabees depicts historical events which took place between 180 and 161 B.C.
The Wisdom Books: <i>Kethuvim</i>	Job	There are three hypotheses as to the date of this book: 7th, 6th, or 5th century B.C.
The Wisdom Books: <i>Kethuvim</i>	Psalms	Psalms is a collection of separate books attributed to different authors. Dating the Psalms is difficult but at least some are traditionally attributed to King David or to others who lived during the same time.
The Wisdom Books: <i>Kethuvim</i>	Proverbs	At least part of Proverbs can be linked to a reform movement of King Hezekiah who ruled during the 7th century B.C.
The Wisdom Books: Deuterocanonical <i>Kethuvim</i>	Ecclesiastes	This book was probably written during the 3rd century B.C. although questions remain regarding its date, place of origin and authorship.
The Wisdom Books: <i>Kethuvim</i>	Song of Songs	An interpretive approach, such as was used in the <i>Song of Songs</i> , was common from about 20 B.C. to 54 A.D. in Jewish tradition, and likewise from 185 to 254 A.D. in Christian circles.
The Wisdom Books: Deuterocanonical	Wisdom	The approximate date of composition for this book is the 1st century B.C. It was written in Greek but is a Jewish work.
The Wisdom Books	Sirach	Sirach was written by Jesus, son of Eleazar between 200 and 175 B.C., and "was translated into Greek sometime after 132 B.C."

<sup>58</sup> See HARRIS, *supra*, at 293.

Section of Bible <sup>54</sup>	Title of Book <sup>55</sup>	Authorship and Estimated Date of Writing <sup>56</sup>
The Prophetic Books: <i>Nevi'im</i>	Isaiah	This book is generally attributed to Isaiah in the 8th century B.C., although there is the presence of at least one other author who was writing "at the end of the Babylonian exile," and covers 742-500.
The Prophetic Books: <i>Nevi'im</i>	Jeremiah	Much of this book is attributed to Jeremiah or to his disciples, and it was written in the 7th and 6th centuries B.C.
The Prophetic Books: <i>Kethuvim</i>	Lamentations	Although this book is sometimes attributed to Jeremiah and his distress at the destruction of the Temple there are indications within the book that Jeremiah is not its author.
The Prophetic Books: Deuterocanonical	Baruch	Baruch was the secretary to Jeremiah and would have been composing works shortly after Jeremiah. However, a reference to Sirach places at least one of the authors no earlier than 190 B.C., with a compilation within a single book probably dating from 180.
The Prophetic Books: <i>Nevi'im</i>	Ezekiel	Ezekiel prophesied from 593-571 B.C. but this work continued to be edited by later scholars.
The Prophetic Books: <i>Kethuvim</i>	Daniel	The earlier parts of Daniel were written between 168 and 164 B.C., but there are later additions. The author of Daniel is not known.
The Prophetic Books: <i>Nevi'im</i>	Hosea	Hosea was a Prophet in the 8th century B.C.
The Prophetic Books: <i>Nevi'im</i>	Joel	Joel was written around 400 B.C.
The Prophetic Books: <i>Nevi'im</i>	Amos	Amos was an early Prophet whose teachings were transmitted orally, and were only put in book form during a later period. He probably lived in the 8th century B.C.
The Prophetic Books: <i>Nevi'im</i>	Obadiah	6th or 5th century B.C.
The Prophetic Books: <i>Nevi'im</i>	Jonah	Jonah was written in the postexilic period.
The Prophetic Books: <i>Nevi'im</i>	Micah	Micah was an 8th century B.C. Prophet, and some of this book is attributed directly to him. However, at least two chapters were "probably added after the Babylonian exile."
The Prophetic Books: <i>Nevi'im</i>	Nahum	Nahum depicts the fall of Ninevah, which took place in 612 B.C.

Section of Bible <sup>54</sup>	Title of Book <sup>55</sup>	Authorship and Estimated Date of Writing <sup>56</sup>
The Prophetic Books: <i>Nevi'im</i>	Habakkuk	Habakkuk prophesied only a few years after Nahum.
The Prophetic Books: <i>Nevi'im</i>	Zephaniah	Zephaniah was a slightly earlier Prophet than Nahum.
The Prophetic Books: <i>Nevi'im</i>	Haggai	520 B.C.
The Prophetic Books: <i>Nevi'im</i>	Zechariah	Zechariah was a contemporary of Haggai, but more than one author wrote this book.
The Prophetic Books: <i>Nevi'im</i>	Malachi	Malachi was written around 455 B.C.
The Gospels	Matthew	The majority of scholars currently believe that Matthew was not the author of this book. This belief is based in large part on the fact it draws greatly from Mark. The author of Mark does not claim to have been a companion of Jesus. Matthew was probably written around 80 A.D., in the Roman capital of Syria.
The Gospels	Mark	It is believed Mark was the first Gospel written, and was used as one of two sources by the writers of Matthew and Luke. John Mark, who is referred to as the interpreter of Peter, probably wrote this book around 70 A.D. Because this book evinces a lack of familiarity with Jewish customs, some scholars believe a gentile wrote it, probably in Syria.
The Gospels	Luke	Authorship by Luke generally is attributed to a Syrian named Luke. Luke was not a first generation Christian, and he used both The Gospel of Mark and another source in writing this book. It was probably written around 80 or 90 A.D.
The Gospels	John	John might represent a tradition separate than the tradition that produced Matthew, Mark and Luke. This book likely has more than one author, although it may be later editors inadvertently changed the text. An eyewitness to the life of Jesus likely wrote this book, but the final arrangement probably was not completed until around 90 A.D.
The Gospels	Acts	Acts was probably written by the same Luke to which the Gospel is attributed.
The New Testament Letters	Romans	Saint Paul wrote this letter probably between 56 and 58 A.D., from Corinth Greece.

Section of Bible <sup>54</sup>	Title of Book <sup>55</sup>	Authorship and Estimated Date of Writing <sup>56</sup>
The New Testament Letters	1 Corinthians	Saint Paul wrote this letter around 56 A.D., from Ephesus.
The New Testament Letters	2 Corinthians	Saint Paul wrote this letter around 57 A.D., probably in Macedonia.
The New Testament Letters	Galatians	Saint Paul wrote this letter, probably around 55 A.D. from Ephesus.
The New Testament Letters	Ephesians	Saint Paul might or might not be the author of this letter. Possibly, it was written by a secretary acting on order from Paul, and may be a circular letter, rather than intended only for the Ephesians. It probably was written around 90 A.D.
The New Testament Letters	Philippians	Saint Paul wrote this letter, although the place and time of writing are debated. It may have been written in Caesarea between 57-58 A.D., or in Rome between 59 and 63, or Ephesus in 55. There also is the possibility that it is a composite of several Pauline letters.
The New Testament Letters	Colossians	Saint Paul wrote this letter, but the place and time of composition remain debated.
The New Testament Letters	1 Thessalonians	This letter was written by Saint Paul, because of news brought to him by Timothy, probably around 51 A.D.
The New Testament Letters	2 Thessalonians	This letter might not have been written by Saint Paul, but only on his authority. It probably was written around 80 A.D.
The New Testament Letters	1 Timothy	There are problems concerning authorship with this letter. If it was written by Saint Paul, then he probably did so around 65 A.D. If it was written by some other author, then it might have been composed "as late as the early second century" A.D.
The New Testament Letters	2 Timothy	See 1 Timothy
The New Testament Letters	Titus	See 1 Timothy



Section of Bible <sup>54</sup>	Title of Book <sup>55</sup>	Authorship and Estimated Date of Writing <sup>56</sup>
The New Testament Letters	Philemon	This letter was written by Saint Paul, likely while he was imprisoned in Rome between 61 and 63 A.D.
The New Testament Letters	Hebrews	It is not known who wrote this letter, or where it was written.
The Catholic Letters	James	This letter might have been written, through use of a secretary by a relative of Jesus named James. If so, then it probably is the earliest written New Testament work, dating to before 70 A.D. However, some scholars doubt this date, and place it around 90.
The Catholic Letters	1 Peter	This letter might be that of Saint Peter working through a secretary, or to a later author. If Peter is the author, then it likely was written around 60 A.D. Some scholars suggest the letter was written about 30 years later.
The Catholic Letters	2 Peter	This letter was not written by Saint Peter. It likely was likely written in the early to middle 2nd century A.D.
The Catholic Letters	1 John	1 John is much more like a treatise than a letter, and probably was written by a person in the same community that produced the Gospel According to John. This book was probably written towards "the end of the first century" A.D.
The Catholic Letters	2 John	2 and 3 John likely were written by the same author, and they are related to 1 John and the Gospel According to John.
The Catholic Letters	3 John	See 2 John.
The Catholic Letters	Jude	Jude likely was the brother of James, the relative of Jesus. Scholars do not believe Jude was the author of this work, instead proposing it was written at the earliest, at the end of the 1st century A.D.
The Catholic Letters	Revelation	The author of this book likely was "a disciple of John the Apostle," who wrote this apocalyptic book towards the end of the 1st century A.D.

## § 3.05 CONTROVERSIES ABOUT READINGS AND LANGUAGE

### [A] Debate about Variant Readings (*Qirā'āt*)

A corollary to the belief the Qur'ān is the *verbatim* Word of God (Allāh) is a belief the Qur'ān is timeless and unchanging. Muslims have had to defend this belief from the scholastic assault of Orientalists, who study the origins of the written Qur'ān. A point of contention concerns variant recitations of the Qur'ān — the *Qirā'āt*. Orientalist scholars argue the existence of variant readings (whether they are recitations believed by Muslims to be orthodox or not) are proof of the human origins of the Qur'ān. Muslim scholars counter that differences in recitation exist because Allāh allowed the Prophet to teach his followers in their own native dialects rather than in the *Qurayshi* dialect in which the Qur'ān was revealed — a problem faced and solved in the Caliphate of 'Uthmān.<sup>59</sup> Muslims urge that notwithstanding linguistic differences, each of the variant recitations is authoritative and correct as Muhammad taught them.<sup>60</sup>

Ibn Mujāhid was a Muslim scholar who advocated the use of only seven versions of the revelations. These seven *Qirā'āt* were believed to be the seven dialects in which Muhammad taught converts who did not understand the *Qurayshi* dialect.<sup>61</sup> Through the efforts of Ibn Mujāhid and others, the use of readings that did not conform to these seven recitations became illegal.<sup>62</sup> The illegality of non-conforming readings extended even to ones attributed to Companions of the Prophet, namely, Ubayy ibn-Ka'b and 'Abd-Allah Ibn Mas'ūd.<sup>63</sup> The New Standard Egyptian Edition of the Qur'ān makes use of one of these seven readings: the reading attributed to a teacher from Kufa, Iraq, named Hafs.<sup>64</sup>

A second area of friction between Orientalist and Islamic scholarship is the skeletal form of the early Qur'ānic text. In its earliest forms, the text did not include diacritical marks. Diacritical marks are signs placed above or below Arabic character script, not only to assist in pronunciation (as the marks signify vowel sounds like "a," "e," and "u"), but also to clarify an otherwise ambiguous meaning. When these marks are not present, it is possible to give a character a meaning other than the one intended by its author. This absence potentially would allow a person reading the Qur'ān to insert a meaning different from that taught by Muhammad.

Muslims scholars believe the early skeletal texts remain faithful to the Codex of 'Uthmān.<sup>65</sup> Also, because of the importance placed on oral learning in the Muslim

<sup>59</sup> See AL AZAMI, *supra*, at 151-153.

<sup>60</sup> See AL AZAMI, *supra*, at 153.

<sup>61</sup> See W. MONTGOMERY WATT AND RICHARD BELL, INTRODUCTION TO THE QUR'AN 48 (Edinburgh, United Kingdom: Edinburgh University Press, 1970).

<sup>62</sup> See ENCYCLOPEDIA OF ISLAM, *supra*, vol. 3 at 880 (entry on Ibn Mujāhid by J. Robson).

<sup>63</sup> See WATT, *supra*, at 49.

<sup>64</sup> See WATT, *supra*, at 49.

<sup>65</sup> See AL AZAMI, *supra*, at 156.

tradition, teachers would have known and used the correct meanings of the characters, even when diacritical marks were absent.<sup>66</sup> If believers inserted their own marks and meanings, then — Muslim scholars argue — there would be thousands of different readings present throughout the world. Yet, in fact, there are few differences in recitation around the world, and Muslim (and some non-Muslim) scholars attribute any to scribal error.<sup>67</sup>

### [B] Debate about Classical Arabic

There are also disagreements between Orientalist and Muslim scholars concerning the origins of Classical Arabic, which is the traditional language of the Qur'ān. A question piquing Orientalists is where and when Classical Arabic originated. Traditional Muslim scholars believe Classical Arabic was the language spoken by Ishmael, the patron of Islam, an early Prophet, and the son of Abraham and Hagar. Muslims believe Ishmael delivered his prophecies to his people in written and spoken Arabic. They conclude Classical Arabic actually gave rise to the other languages used on the Arabian Peninsula, which do not strictly conform to Arabic, and which pre-date Muhammad. These other languages include Nabatean, which Muslims contend is a form of Arabic.<sup>68</sup>

Because the dialect in which Muhammad received his revelations is an important religious issue, some Muslims see non-orthodox scholarship into the origins of Classical Arabic as an attack on Islam. Muslim scholars have offered many replies to these Orientalist investigations, including the dedication by Professor M.M. Al Azami of three chapters in one of his books, each of which support the traditional Muslim view of the origins of Classical Arabic.

Notably, the *hadiths* (the non-Prophetic utterances of Muhammad) have not convinced non-Muslim scholars. In 1905, the German Orientalist Karl Vollers (1857–1909) proposed Muhammad did not speak the Classical Arabic associated with modern Islam, and instead proposes this language developed only after the death of Muhammad.<sup>69</sup> Vollers contends the Classic Arabic associated with the Qur'ān actually was a higher language used only in poetry, and to which the Qur'ān eventually was adapted.<sup>70</sup> Vollers and others claim the language spoken by Muhammad and his companions lacked the *i'rāb*. "*I'rāb*" refers to traditional Arabic grammar, and in particular, the way words are pronounced, such as the spoken endings of Arabic words, as sometimes indicated by diacritical marks.<sup>71</sup> This higher language, known today as Classical Arabic, eventually replaced the original local language spoken by the Prophet.<sup>72</sup> Muslim scholars, and other notable Orientalists

<sup>66</sup> See Al Azami, *supra*, at 159.

<sup>67</sup> See Al Azami, *supra*, at 156.

<sup>68</sup> See Al Azami, *supra*, at 120–121.

<sup>69</sup> See Paul E. Kahle, *The Arabic Readers of the Koran* (1949), in *WHAT THE KORAN REALLY SAYS* 201–202 (Idn Warraq ed., Amherst, New York: Prometheus Books, 1998). (Hereinafter, Kahle.)

<sup>70</sup> See Paul E. Kahle, *The Arabic Readers of the Koran* (1949), in *WHAT THE KORAN REALLY SAYS* 201–202 (Idn Warraq ed., Amherst, New York: Prometheus Books, 1998).

<sup>71</sup> See Kahle, *supra*, at 202.

<sup>72</sup> See Kahle, *supra*, at 202.

such as the German Theodor Nöldeke (1836–1930), have criticized the arguments of Vollers.<sup>73</sup>

Despite such criticisms, another German Orientalist, Paul E. Kahle (1875–1964), pressed onward with this line of research and argument. Kahle emphasizes a little known early Islamic text *At-Tamhid Fi Ma Tifat At-Tajwid*, which Al Mālikā composed in 400 A.H.<sup>74</sup> This text “contains more than 120 exhortations admonishing people to use the *i'rāb* in reading the Koran,”<sup>75</sup> some of which are attributed to Muhammad or the *Ṣaḥābah*, and others to later historical figures. The fact these exhortations were written down, not only by the Muslim scholar Al Farrā', but also by other early Muslim scholars, leads Kahle to conclude Classical Arabic was not the language generally used to recite the Qur'ān during the lifetime of Al Farrā'.<sup>76</sup> Kahle proposes two historical alternatives:

- (1) The Prophet used the rules of Classical Arabic to recite the Qur'ān, and that, because of its difficulty, later converts to Islam had to be encouraged to use it; or
- (2) Conversely, the Prophet and *Ṣaḥābah* did not observe the rules of Classical Arabic, which actually developed after the death of Muhammad, but instead recited the sacred text based on the rules of Bedouin poetry.<sup>77</sup>

Under the second alternative, says Kahle, Classical Arabic only became the official language of the Qur'ān one or two centuries after Muhammad died.

Yahyā ibn Ziyād Al Farrā', who died in 822 (207 A.H.), was an early Muslim scholar exploring some of the same issues as Kahle. Al Farrā' studied Arabic grammar, poetry and *hadiths*, and was aware of controversies about the Arabic language.<sup>78</sup> Yet, he was unable to find a solution to them. Kahle states:

Al-Farrā' was in a difficult position. As a *grammarian* he could not deny that correct Arabic was to be found in Bedouin poetry. As a good *Muslim* he had to believe that the word of God had been revealed to the Prophet in the most correct language. As a *theologian* he was not allowed to admit any alterations in the language of the Holy Book. So he had to find a compromise. He found it by declaring that the influence of Bedouin language on the language in Mecca had taken place long before the time of the Prophet. From the different tribes of the Arabs who had come on pilgrimage to Mecca, the Kuraish had been able to hear all kinds of Arabic. So they had been able to select from the different forms of Arabic the best of each, just as they had selected their wives [by making their selection of wives only on unveiled women in order to increase their people's beauty and dignity]. In this manner their language had become superior to all the languages spoken by Arabs, superior also to the language spoken by the

<sup>73</sup> See Kahle, *supra*, at 202–203.

<sup>74</sup> See Kahle, *supra*, at 204–207.

<sup>75</sup> See Kahle, *supra*, at 204.

<sup>76</sup> See Kahle, *supra*, at 207.

<sup>77</sup> See Kahle, *supra*, at 207.

<sup>78</sup> See [www.inamreza.net/eng/inamreza.php?id=901](http://www.inamreza.net/eng/inamreza.php?id=901).



Bedouins, since certain inaccuracies that are to be found in the language spoken by the Bedouins had not been taken over by the Kuraish and were not to be found in the language spoken by the people of Mecca. In such a way the model Arabic that was used for reading the Koran from the end of the first century onward was identified by Al-Farrā' with the language spoken by the Kuraish in the time of the Prophet.<sup>79</sup>

Kahle believes the reports of Al Farrā' that early Muslims often studied in Bedouin neighborhoods to learn proper Arabic. But, Kahle concludes these trips would not have been necessary if Classical Arabic had been the primary language spoken in Mecca.<sup>80</sup>

Why are more non-conforming texts of the Qur'ān not available for study? Kahle proposes they were suppressed through burning, and their proponents were chastised. Kahle lists one such persecuted person as Ibn Miksam, who died in 354 A.H. Ibn Miksam added diacritical marks to the text of 'Uthmān according only to the grammatical rules of Arabic, but the diacritics did not conform to any of the seven official recitations (*Qirā'āt*).<sup>81</sup>

When in 322 A.H. Ibn Miksam's practice was condemned by a court of lawyers and readers, before which he had to appear, summoned by the Sultan, he had to recant and his books were burned, and we know of them only from occasional quotations.<sup>82</sup>

Kahle dates grammatical traditions that apply strict rules to yield conforming results as no later than 200 A.H.<sup>83</sup>

In sum, Al Azami, Kahle, and other scholars have addressed their beliefs concerning the origins of Classical Arabic and its use by Muhammad in the revelations of the Qur'ān. They are two among many scholars through the ages who have studied this subject arrived at divergent conclusions.

### § 3.06 THREE GRAND TENETS

"Islam" means "submission," that is, "submission to the will of God." But what does "submission to the will of God" mean? In a metaphysical sense, and in a practical day-to-day sense, this is a very difficult question. Specifically, Muslims believe there are three key articles of faith common to all of Islam, which help distinguish a Muslim from a non-Muslim. These tenets are the essence of what Muslims need to believe. All Muslims, regardless of where they live, their race, ethnicity, or language, agree on these simple and profound axioms.

<sup>79</sup> Kahle, *supra*, at 209 (emphasis original).

<sup>80</sup> See Kahle, *supra*, at 209-210.

<sup>81</sup> See Kahle, *supra*, at 203.

<sup>82</sup> Kahle, *supra*, at 203.

<sup>83</sup> See Kahle, *supra*, at 206. See also *id.* at 205 (quoting the Prophet as saying: "Whoever recites the Koran and reads it with i'rāb, he has a favor with God which is granted to him, if he desires he hastens it for him in this world, if he desires, he reserves it for him in the other world.").

#### [A] Tenet #1: Monotheism

Monotheism is the single most important message in the Qur'ān. Gibbon explains:

The creed of Mohammed is free from suspicion or ambiguity, and the Koran is a glorious testimony to the unity of God. The prophet of Mecca rejected the worship of idols and men, of stars and planets, on the rational principle that whatever rises must set, that whatever is born must die, that whatever is corruptible must decay and perish. In the *Author of the universe* his rational enthusiasm confessed and adored an infinite and eternal being, without form or place, without issue or similitude, present to our most secret thoughts, existing by the necessity of his own nature, and deriving from himself all moral and intellectual perfection.<sup>84</sup>

If there is any objectionable point in this passage, then it is only the possibility that the opening phrase "creed of Mohammed" intimates that monotheism was an idea of the Prophet, rather than a Truth revealed to him.

Simply put, Islam is relentlessly and uncompromisingly monotheistic. God is one, God is alone, and there are no other powers in the universe that are equivalent to God. There is only one God in the universe, and He is omnipotent, omniscient, and omnipresent. Catholic Christianity agrees on all of these points. This message is repeated over and over again in both the Meccan and Medinan *surahs* of the Qur'ān:

<sup>102</sup>That is God, your Lord. There is no God but He, the Creator of everything. Therefore, worship Him, who is above all as a Guardian. There is only one God, and God is all powerful.<sup>85</sup>

The Arabic word for "God," of course, is "Allāh". The word "Allāh" does not connote some strange, distant deity nor a weird being worthy of cult worship. Rather, the word "Allāh" is as common in Arabic as "God" is to Christians and Jews.

While there is unequivocal agreement on the tenet of monotheism, there is some difference between Islam and Catholic Christianity on the extent of theological speculation about the nature of God:

The metaphysical questions on the attributes of God and the liberty of man have been agitated in the schools of the Mohammedans as well as in those of the Christians; but among the former they have never engaged the passions of the people or disturbed the tranquility of the state. The cause of this important difference may be found in the separation or union of the regal and sacerdotal [i.e., priestly] characters.<sup>86</sup>

In other words, the history of Islamic theology, in sharp contrast to the history of Christian theology, has not been characterized by a vast body of speculation about the nature of God. Christianity underwent a considerable theological debate about the Holy Trinity — was God one being with three aspects, or not? Islam did not

<sup>84</sup> Gibbon, *supra*, at 653-654 (emphasis added).

<sup>85</sup> Qur'ān, *supra*, 6:102 at 88.

<sup>86</sup> Gibbon, *supra*, at 660.

burden itself with theological disputes about the Trinity of God. Its message has retained a profound simplicity and elegance: there is only one God in the universe, Allāh, and He has given to men and women a guide, the Qur'ān, and a guide-to-the-guide, the *Sunna* of the Prophet Muhammad, by which they can order their lives to be in accordance with His Will.

From an Islamic perspective, dilated discussions about the nature of God are useless. God cannot be known by the human mind and intellect, which are feeble and limited. No vision can comprehend Him; rather, He comprehends all visions. God is so much the center of everything, to dwell on His essential nature is to waste time. No person possibly can comprehend what God looks like, what He is composed of, or what is character is. Indeed, the questions are rather foolish, if not arrogant. Human language is circumscribed, and lacks the appropriate concepts and words to capture such an overwhelming reality. For Islamic theology, beyond His unity, omnipotence, omniscience, and omnipresent, not much else can be said.

Despite this fact, a number of Islamic philosophers have explored the aspects of God. For example, most Muslims would agree God has no gender, or if God has a gender, it is a characteristic that cannot be known. When Muslims use the masculine pronoun "He" for God, it does not mean God is a male. Rather, in the Qur'ān, God refers to Himself as "He." Human language is unable to convey that God is all things.

However, there is a way mankind can seek a glimmer of the nature of God. By looking into the actions of God, and through those actions, His Nature may be reflected:

<sup>24</sup>He is God, the Creator, the Maker, the Fashioner. To Him belong the best of names. Whatever is in Heaven or on Earth declares His praises and glory.<sup>27</sup>

"To Him belong the best of names" does not mean the "name" of God, in the sense that God has a name like "Mike" or "Akbar." To think of God like that is insulting. Rather, it means a True Name, a Name that deals with the actual nature of God, which man cannot possibly know.

By describing His attributes and understanding His actions, mortal men can better understand Him. The "99 Names of God," refers to list of His actions in the Qur'ān:

<sup>25</sup>He is God. There is no other God than He. He knows what is secret and what is open. He is the most gracious and the most merciful. He is God, there is no other God than He. <sup>26</sup>He is God: there is no other god than Him, the Sovereign, the Holy One, the Source of Peace, the Guardian of Faith, the Guarantor of Safety, the Mighty, the Irresistible, the Supreme Power. Glory to God.<sup>28</sup>

All of these adjectives that the Qur'ān uses can be put into a single phrase — the All Powerful, the Merciful. These words terms that a Muslim can use to address the

<sup>27</sup> Qur'ān, *supra*, 59:24 at 367.

<sup>28</sup> Qur'ān, *supra*, 59:22-23 at 367.

unknowable Force, the grand and central Force of the universe.

Examining the actions of God can bring mortals closer to understanding His Will. Creation, the greatest of His actions, is perhaps the most visible example. According to the Qur'ān, God created: the universe and all the creatures in it. These creatures include: men and women, angels, the devil, and *jinn*s.

Remember, God instituted the process of revelation with the Archangel Gabriel through the Prophet, and then onto the rest of human kind. Also, Muslims (like Christians) believe in the existence of the devil, and believe that the he was a fallen Angel, and Angel who has turned away from the path of God, or is a *jinn*. They believe the devil constantly tempts men and women, trying to get them to leave the path of God — the path expressed in the Qur'ān. *Jinn*s are still other creatures, spirits that God created, which are made from fire that are neither human, nor divine. The Qur'ān identifies God as the author of creation:

<sup>1</sup>Whatever is in heaven or on earth, let it declare the praises and glories of God, who is the exalted, the all wise. <sup>2</sup>To Him belongs dominion over heaven and earth. He gives life and death, and He has power over all things. <sup>3</sup>He is the first and the last, the evident and the hidden, and He has knowledge of all things. <sup>4</sup>He it is who created the heavens and the earth in 6 days, and then assumed His throne. <sup>5</sup>He knows what enters the earth, and what comes from it, what comes from heaven and ascends to it. He is with you wherever you are. God is aware of all that you do. <sup>6</sup>He has full knowledge of the secrets of all hearts.<sup>89</sup>

Observe that Muslims, Christians, and Jews agree that God created everything, and did so in 6 days. Again, Muslims believe this point because it is set forth in the Qur'ān.

What purpose do men and women have on earth, given that God created them and the earth? Men and women are on earth to magnify and glorify God through their deeds and thoughts. This purpose leads to the second basic tenet of Islam: a Day of Judgment.

## [B] Tenet #2: First and Final Judgment

In connection with the first tenet, Muslims hold that God created all things, including humankind. The creation of the universe, of humankind, was a purposeful one. That purpose was judgment, with the ultimate outcome for each soul being entry into Heaven or condemnation to hell.

Salvation in Islam means being brought up into Heaven. The Qur'ān has several descriptions of the nature of Heaven. Some are very physical, and speak of eternal pleasures. But, the most important description, again like Christianity, is being in the presence of God. Heaven, to a Muslim and a Christian, is being in the presence of God, feeling God's warmth and love. Hell is ever-lasting damnation, ever-lasting fire. It is the absence of God — the distance from God.

<sup>89</sup> Qur'ān, *supra*, 57:1-6 at 359.



The Qur'ān and Muslim theologians extensively discuss the judgment process. After death, a person waits for the final coming, when the person faces God, to undergo a series of stages before the Final Judgment is rendered sending that person to Heaven or hell. When a Muslim dies, a First Judgment — what Catholic Christians call “Particular Judgment” — will occur. There are two possible outcomes to this First Judgment:

**(1) For a Virtuous Muslim, and For Believers —**

Suppose the decedent has been virtuous in her life, striving to understand and apply the Will of Allāh in her endeavors. Or, suppose the decedent is a believer. Whether “believer” narrowly means a Muslim, broadly covers all people who believe in God (i.e., non-atheists), or in an intermediate sense refers to persons who are People of the Book (*ahl al kitāb*) is debatable.

In either case, the soul of the decedent will go up to Heaven, and not be denied permission to enter. Allāh will say to His Angels: “write in my Servant Book her name, and take her soul back to Earth.” This “Servant Book” is a record of the righteous, those who lived their lives in the service of Allāh, a “list of the truly good . . . in Illiyyin . . . a clearly written list,” as *surah* 83, *ayat* 18 and 20 put it.<sup>90</sup> “Illiyyin” has a dual meaning: it is record, or ledger, of the deeds of good people, or a high place, or in effect, Heaven. Then, her soul will be put back into her body, and a stage of questioning will commence. She will be asked “Who is your Lord?” “What is your religion,” and “Who is your Messenger?” She will answer these questions, and be richly rewarded for her answers: a window to Paradise will be opened to her. She will remain asleep in her grave, awaiting Final Judgment.

**(2) For a Mischievous Muslim, and For an Unbeliever —**

Suppose the decedent is a Muslim who has not sought to discern the Will of Allāh and submit to it, or is an unbeliever. Whether “unbeliever” narrowly means an atheist, broadly covers all non-Muslims, or in an intermediate sense refers to persons who are not *ahl al kitāb* is debatable.

In any event, the soul of the decedent will go up to Heaven, but permission to enter will be denied, and that soul will be thrown back down to Earth. Allāh will instruct His Angels to “write the name of the dead person in the Servant Book that is in the lowest level, and take her soul back to Earth.” This Book records the names of unfaithful servants. As *surah* 83, *ayat* 7 and 9 explain, it is a “list of the wicked in Sijjīn . . . a clearly numbered list.”<sup>91</sup> “Sijjīn” has a dual meaning: the register of sinners, or a prison, specifically, a deep pit that is a part of hell. Then, the soul of the decedent will be put back into her body, and questioning will commence: “Who is your Lord?”, “What is your religion,” and “Who is your Messenger?” She will be unable to answer these questions, and, therefore, punished. A window to hell will be opened for her, and she will sleep in her grave awaiting Final Judgment.

<sup>90</sup> Qur'ān, *supra*, 83:18, 20 at 413.

<sup>91</sup> Qur'ān, *supra*, 83:7, 9 at 413.

At Final Judgment, God will judge all people who live, who have ever lived, and who ever will live. God will judge each person according to whether or not he led his life in accordance with His Will. There are many statements in the Qur'ān about the Final Judgment and its nature:

<sup>92</sup>To God belongs dominion over heaven and earth, and the day of the hour of Judgment will be the day when the dealers in falsehood will perish.

<sup>28</sup>Every community you will see bowing the knee before God. <sup>29</sup>Every community will be called to its record. This day you will be recompensed for what you did. This, our record, speaks about you with truth, for we recorded in it all that you did.<sup>92</sup>

Notice that God has dominion over everything, including the Day of Judgment. The Qur'ān makes it clear only God knows when the Final Judgment will come; no person can know when the end of time will occur. The Final Judgment is left to God to decide when it happens, and mankind will not know when until it actually takes place.

On the Day of Final Judgment — or what Catholic Christians know also as the Judgment of Nations — all people will rise from their graves. When they do, the last reckoning will commence. There are four possible outcomes:

**(1) For Virtuous Muslims and Believers —**

Virtuous Muslims and believers will gain eventual entry into Paradise. Before entry, they will be held in a place called Kantara, which is akin to a bridge to Heaven. They will be purified of every jealousy, envy, and other vice they might have. Then, they will be admitted to Heaven for all eternity.

**(2) For Mischievous Muslims —**

Less-than-good Muslims will be condemned to hell. But, this punishment will — or may be — temporary.

**(3) For Unbelievers —**

Unbelievers will be condemned to hell. This punishment will be permanent.

**(4) For People whose Good and Bad Deeds are Equal —**

Some people — presumably, Muslims and believers — will not have led a sufficiently virtuous life to merit entry into Paradise, but not have led such an execrable life as to justify damnation. Their good and bad deeds were equal, meaning their good deeds keep them out of hell, but their bad deeds keep them out of Heaven. For them, there is a place called “Al Arāf,” which also is the title of *surah* 7 of the Qur'ān.

How will Allāh decide where to put a particular person? That is, on what criteria will He render Final Judgment? The answer is not entirely clear, but again the Book, or Books, of Records kept in Illiyyin and Sijjīn, in which the deeds of each

<sup>92</sup> Qur'ān, *supra*, 45:27-29 at 325-26.

person are recorded, matter. They will be used for reference in the Final Judgment. Ultimate salvation will depend on whether a person tried earnestly to do what that person was supposed to do, in terms of what Allāh expected. Salvation also will depend on whether that person sought sincerely to avoid actions Allāh forbade.

As repeated throughout the Qur'ân, Allāh will be merciful in His Final Judgment. At the end of time, when Allāh goes through the Book of Records, no doubt He will find every single person has failed to live his entire life completely in accordance with His will. Human beings are fallible, so God is merciful. A *bona fide* effort, trying to emulate ideal behavior, may sway Allāh to save rather than condemn a person.

In this respect, it is worth recalling that unlike Christianity, there is no Doctrine of Original Sin in Islam, and nothing analogous to it. Indeed, there is no word in Arabic comparable to the word "sin" with the same theological meaning that "sin" has in Christian theology. Muslims believe by doing something wrong, a person turns away from what God expects. Consequently, Salvation is based on doing the proper things as God has directed in the Qur'ân. The Meccan *sūrah*s, in particular, include many warnings about what God desires from His people and the consequences for failing to obey. If a person fails these expectations, that person must repent sincerely, and behave accordingly in the future, not presuming on the mercy of Allāh.

### [C] An Islamic Purgatory?

The ultimate fate of the fourth category of persons — those whose good and bad deeds are roughly equal — is intriguing. Are their souls in a kind of Islamic Purgatory? *Sūrah* 7, *āyat* 40-43 and 46-51 of the Qur'ân seem to suggest a third option, between Heaven and hell, for souls not yet ready for the former yet not deserving of the latter:

<sup>40</sup>The gates of Heaven will not be open to those who rejected Our revelations and arrogantly spurned them; even if a thick rope were to pass through the eye of a needle they would not enter the Garden. This is how We punish those who do evil — <sup>41</sup>Hell will be their resting place and their covering, layer upon layer — this is how We punish those who do evil. <sup>42</sup>But those who believe and do good deeds — and We do not burden any soul with more than its can bear — are the people of the Garden and there they will remain. <sup>43</sup>We shall have removed all ill feeling from their hearts; streams will flow at their feet. . . .

<sup>44</sup>A barrier divides the two groups with men on its heights recognizing each group by their marks: they will call out to the people of the Garden, "Peace be with you!" — they will not have entered, but they will be hoping, <sup>45</sup>and when their glance falls upon the people of the Fire, they will say, "Our Lord, do not let us join the evildoers!" — <sup>46</sup>and the people of the heights will call out to certain men they recognize by their marks, "What use have been your great numbers and your false pride?" <sup>47</sup>And are these the people you swore God would never bless? [Now these people are being told], "Enter

the Garden! You have nothing to fear, nor shall you grieve."<sup>48</sup>

Clearly, *āyat* 40-43 identify two groups of people: those who are saved, and for whom the gates of Heaven are open, and evildoers, who are tormented in hell. *Āyat* 43 suggests that with respect to the people of the Garden, the saved, God will have removed all ill feelings from their hearts. That removal suggests a cleansing process before entry into the Garden. *Āyat* 46-47 identify a third group, between "the two groups," who are men on the "heights" of a "barrier" — the people of the heights. This third group recognizes people of the Garden, and hopes to join them. The third group also recognizes the people of the Fire, in hell, and beseeches God not to be sent there.

Is there, then, something of a cleansing process, in Islamic theology akin to what Catholic Christianity calls "Purgatory"? That is, are Al Arāf, or a "Barrier," or the "Heights," the same as Purgatory?<sup>49</sup> The question of whether such a process occurs, or a way-station between Heaven and hell exists, has not been a major one debated among Islamic religious scholars (*ulema*), and unsurprisingly less attention has been given to the matter from a comparative vantage point.

The definition of "Purgatory" in Catholic theology is:

A state of final purification after death and before entrance into heaven for those who died in God's friendship, but were only imperfectly purified; a final cleansing of human imperfection before one is able to enter the joy of heaven.<sup>50</sup>

Typically, Purgatory is conceived of as an intermediate place, en route to Heaven. Yet, it is not a physical location. Rather, it is a post-death process for a soul that is saved through which that soul obtains the holiness needed to enter Heaven.<sup>51</sup> The essence of what happens in Purgatory:

<sup>40</sup> Qur'ân, *supra*, 40-43, 46-49 at 97-98 (emphasis added).

<sup>44</sup> Interestingly, some Turkish dictionaries translate "Purgatory" as "Arāf," and many Turkish words are derived from Arabic. See, e.g., [www.zargan.com/sozluk.asp?Sozcuk=A%27raf&DisplayLang:=2](http://www.zargan.com/sozluk.asp?Sozcuk=A%27raf&DisplayLang:=2) and [http://translate.google.com/translate?hl=en&auto\[en\]araf](http://translate.google.com/translate?hl=en&auto[en]araf) (both translating "Arāf" as "purgatory"). But see *TÜRKÇE/OSMANLICA-İNGİLİZCE REDHOUSE SÖZLÜĞÜ* (REDHOUSE TURKISH/OTTOMAN TO ENGLISH DICTIONARY) 68 (İstanbul, Turkey: SEV Matbaacılık ve Yayıncılık AS (SEV Printing and Publishing Inc), 1997) (translating "Arāf" as "a place separating Paradise from Hell"). Interestingly, some Persian (*Farsi*) dictionary also may translate "Arāf" as "Purgatory." See, e.g., [www.farsidict.com](http://www.farsidict.com).

Possibly, a related point is an Islamic doctrine known as punishment in the grave. According to this doctrine, when a person dies, two angels punish the decedent until they have sanctioned him for all his bad deeds, or until the Day of Final Judgment.

<sup>49</sup> CATECHISM OF THE CATHOLIC CHURCH, *Glossary* at 896 (United States Catholic Conference, Inc., Washington, D.C.: Libreria Editrice Vaticana, 2nd ed. 1997) [Hereinafter, CATECHISM.] For theological treatments of Purgatory, John A. Hardon, S.J., *THE CATHOLIC CATECHISM* 273-80 (1981) [hereinafter, HARDON]; MONIKA K. HELLWIG, *UNDERSTANDING CATHOLICISM* 180-81 (1981).

<sup>50</sup> See CATECHISM, *supra*, at ¶¶ 1030-1032 at 268-269, ¶ 1054 at 275. Similarly, Father Hardon states: [In spite of some popular notions to the contrary, the Church has never passed judgment as to whether purgatory is a place or in a determined space where the souls are cleansed. It simply understands the expression to mean the state or condition under which the faithful departed undergo purification.

HARDON, *supra*, at 274.



is the suffering of the faithful which causes a "purging" of temporal punishment due to sin.<sup>97</sup>

At first glance, both are intermediate states in which souls experience some tribulation.

But, the concepts are distinct. First, there is a difference in the nature of the concepts. The Qur'ân describes Al Arâf, or the Barrier or Heights, in distinctly physical terms, whereas Catholic sources emphasize the preparation of a soul for Heaven. Second, there may be a difference in the timing when the concepts become relevant. Purgatory is associated with Particular Judgment in Catholic theology. Its possible Islamic analog seems to be connected with Final Judgment. Third, perhaps there is a distinction as to atmosphere. The prevailing atmosphere in Al Arâf may be one uncertainty as to the final disposition of a soul, whereas souls in Purgatory are happy knowing the purification they undergo there is to ready them for the Beatific vision (i.e., to see God).

### [D] Conceptions of Heaven and Hell

The concepts of Heaven and hell in Islam and Catholic Christianity are strikingly similar. First, in both faiths, they are Divine creations, in addition to the earth, for humans to inhabit after death. Second, each place bears similar characteristics: Heaven holds pleasure and plenty, while hell burns with eternal flame and pain.

The Qur'ân presents Heaven in a tangible, visceral way. Faithful Muslims can expect a lush garden bearing succulent fruit, plush couches covered in silk, and sweet bubbling springs after death.<sup>98</sup> Allâh created a place with fresh dates and cool shade, rewards a desert-dwelling Bedouin could have imagined, making conversion to Islam easy and appealing.

The Bible, also born in the harsh climes of the Levant, contains similar descriptions of Heaven. It is a blessed place God created to receive His faithful adherents and provide them with ease and joy after death. A River of Life runs through the middle of a marvelous city, feeding an ever-bearing tree to free every person from want.<sup>99</sup>

The physical description of Heaven in the Qur'ân is naturalistic, focusing on fruit, water, and shade outside. In contrast, the Biblical depiction of Paradise is constructed, with several references to God building a city for his faithful in the Heavens.<sup>100</sup>

Faithfully departed Muslims are reunited with previously deceased loved ones and family members. *Surah* 56 promises those that ascend to Heaven will see "many from the past" and many from later generations.<sup>101</sup> Numerous passages

<sup>97</sup> See REV. PETER KLEIN, *THE CATHOLIC SOURCE BOOK* 120 (Dubuque, Iowa: Brown-Roa, 2000).

<sup>98</sup> See QUR'ÂN *supra*, 55:46-78 at 354-55.

<sup>99</sup> See BIBLE, *supra*, *Revelations* 22:1-5 at 423.

<sup>100</sup> See BIBLE, *supra*, *Psalms* 19:1 at 658, *John* 14:2 at 172, and *2 Corinthians* 5:1 at 281.

<sup>101</sup> QUR'ÂN, *supra*, 56:39-40 at 356.

in the Qur'ân also declare decedents will be "pair[ed] with beautiful-eyed maidens"<sup>102</sup> or "pure spouses."<sup>103</sup>

A common myth, based on ignorance and disdain, holds that extremists are awarded 99 virgins in Heaven if they carry out an act of suicide in their (purported) defense of Islam. This belief could not be more wrong. First, suicide is a major sin and commission of it excludes a person from Heaven and puts them in hell.<sup>104</sup> Second, there is no Qur'anic basis for the number of wives accorded to anyone in Heaven. The Qur'ân states the dead may be paired with:

<sup>34</sup>incomparable companions <sup>35</sup>We have specially created — <sup>36</sup>virginal,  
<sup>37</sup>loving, of matching age.<sup>105</sup>

But the numerical source is found in a very weak *hadith*.<sup>106</sup> According to Ibn Kathir (d. 1373 A.D.) in his Qur'anic commentary (*Tafsir*) of *Surah Al-Rahman* (55), *ayah* 72:

Muhammad was heard [to] say: "The smallest reward for the people of Heaven is an abode where there are eighty thousand servants and seventy two wives, over which stands a dome decorated with pearls, aquamarine and ruby, as wide as the distance from [Damascus, Syria] to San'a [in Yemen]."<sup>107</sup>

In no way does this passage link martyrdom or sacrifice to extremist acts, much less draw from Qur'anic revelations about the true rewards of Heaven.

Hell, in both religions, is the destination for faithful sinners or righteous non-believers.<sup>108</sup> It is a terrible place, where the shades of the dead are constantly burned by fire, whipped by arid winds, and scalded by boiling water that fails to quench any thirst.<sup>109</sup> Both holy texts are redolent with images of blazing fire and tormented souls.

<sup>102</sup> QUR'ÂN, *supra*, 52:20 at 345.

<sup>103</sup> QUR'ÂN, *supra*, 2:25 at 6.

<sup>104</sup> See THE TRANSLATION OF THE MEANINGS OF SAHÎH AL-BUKHÂRI, ARABIC-ENGLISH by Dr. Muhammad Muhsin Khan (Islamic University, Medina, Kingdom of Saudi Arabia: Dar Ahya Us-Sunnah, Al Nahawiya, March 1978), vol. II, book XXIII (The Book of Funerals — Al-Jana'iz), *hadith* no. 445, p. 251, and vol. VIII, book LXXIII (The Book of Al Adab (Good Manners)), *hadith* no. 73, pp. 44-45.

<sup>105</sup> QUR'ÂN, *supra*, 56:34-37 at 356.

<sup>106</sup> SALAHUDDIN YUSUF, RIYADHUS SALHIN, COMMENTARY ON NAWAWI, Chapter 372, (Riyadh, Kingdom of Saudi Arabia: Dar-us-Salam Publications, 1999), posted at [http://en.wikipedia.org/wiki/Houri#cite\\_ref-50](http://en.wikipedia.org/wiki/Houri#cite_ref-50).

<sup>107</sup> AL-TIRMIDHI, SUNAN, vol. IV: "The Features of Heaven as Described by the Messenger of Allah," Chap. 21, *hadith* no. 2987, also quoted in IBN KATHIR, TAFSIR (QUR'ANIC COMMENTARY) (commentary on *Surah Rahman* (55), *ayah* 72), posted at *Hour*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Houri#cite\\_ref-50](http://en.wikipedia.org/wiki/Houri#cite_ref-50). Interestingly, the Arabic word "Huri" or "Huriyah" seems on occasion to be translated as "maiden" or "virgin," but in fact it refers to splendid companions who are well-matched and of equal age, and to lovely eyed, voluptuous women of modest gaze. The point is the correct meaning is not confined to the sexual dimension, but more broadly encompasses beauty and goodness.

<sup>108</sup> See QUR'ÂN, *supra*, 2:174-175 at 19.

<sup>109</sup> See QUR'ÂN, *supra*, 56:42-44 at 356-357.

Passages in the Old Testaments condemn the godless to “dwell with the consuming fire”<sup>110</sup> and regard them with “shame and everlasting contempt.”<sup>111</sup> In the New Testament, idolaters are subjected to the wrath of God:

He will be tormented with burning sulfur in the presence of Holy Angels and of the Lamb. And the smoke of their torments rises for ever and ever. There is no rest day or night for those who worship the beast and his image, or for anyone who receives the mark of his name.<sup>112</sup>

The sinful are separated from the faithful by a literal and figurative chasm:<sup>113</sup> want or satisfaction, torment or joy.

The Qur'ān often refers to the Mercy of Allāh, only to warn shortly after of the punishment for ignoring His Message.<sup>114</sup> Once condemned to hell, there is little chance of ever escaping the torture of the fire:

As for those who conceal the Scripture that God sent down and sell it for a small price, they only fill their bellies with Fire. God will not speak to them on the Day of Resurrection, nor will He purify them: an agonizing torment awaits them.<sup>115</sup>

As with Heaven, metaphorical images of the torments of hell are readily comprehensible to a desert-dwelling audience. Threats of constant heat and thirst are all too real to Arab Bedouins, making the Message of Allāh and salvation in Heaven all the more alluring.

### [E] Tenet #3: Intervention

God, in His infinite mercy, intervened in human history, at a specific moment, and in a specific place, to give humankind a guide (the Qur'ān), through the Prophet, which would make His Will known. This third tenet is linked to the second tenet which tells Muslims that they must lead their lives in accordance with His Will, and the Final Judgment will be based on whether or not they succeeded.

The Qur'ān is the ultimate expression of God's Will, as revealed to the Prophet Muhammad beginning in 610. “Qur'ān” literally means “recital” in Arabic. Muslims use the Arabic definite article “al” (“the”), and say “*al Qur'ān*,” which means “the Recital” — to Muslims, the greatest, most significant recital ever in all human history.

<sup>110</sup> Bible, *supra*, Isaiah 33:14 at 912.

<sup>111</sup> Bible, *supra*, Daniel 12:2 at 1105.

<sup>112</sup> Bible, *supra*, Revelations 14:10-11 at 414.

<sup>113</sup> Bible, *supra*, Luke 16:26 at 130.

<sup>114</sup> See Qur'an, *supra*, 2:39 at 7.

<sup>115</sup> Qur'an, *supra*, at 2:174 at 19.

### § 3.07 NO APPEAL

There is no appeal against the Qur'ān. After all, if the Qur'ān is the recitation of the literal expression of the Will of God, and if there is only one God in the universe who is all powerful, then there can be no appeal. The Qur'ān is not the product of a Divine inspiration given in the words of a man. When the Prophet Muhammad recited the Qur'ān to his community, he made it plain to them, and they understood, that it was the Will of God as He, Allāh, wanted it expressed.

Indeed, the whole question of appeal is absurd. It is a western, and perhaps secular, legal perspective. To a Muslim, there is no reason to appealing against the words of the Qur'ān. The Qur'ān exists for each of person as an absolute, authoritative guide:

<sup>27</sup>We have placed before mankind in this *Koran* every tale, so that they [mankind] are advised. <sup>28</sup>It is an Arabic *Koran*, without error, so that they may guard against evil.

...

<sup>41</sup>Indeed, We have sent down to you the book with truth for mankind. Whoever receives guidance benefits his own soul. But, he who strays injures his own soul. And you [Muhammad] are not set over them [mankind] to dispose of their affairs.<sup>116</sup>

Clearly, the Qur'ān is an absolute statement or expression of the Will of Allāh. Acceptable and unacceptable actions are defined by the Qur'ān. Good behavior, in accordance with this guide, is the gateway to Heaven.

### § 3.08 NO INTERCESSION

Individuals have free will to choose their behavior. It is up to individual Muslims, to approach God, as manifest in the Qur'ān, and to read, hear, and assimilate it, and draw from it everything they need to know about His Will. Individuals are responsible for conducting their lives within those principles. There will be no intercession from any human or other agency on your behalf before God at the Final Judgment:

<sup>43</sup>Do they take for intercessors others besides God? Even if they have no authority and no knowledge, <sup>44</sup>say this [*i.e.*, you, Muhammad, say this] this: To God holy, to God alone, is intercession.<sup>117</sup>

At the end time, God will judge each person. The Qur'ān does not create a human agency, or invest in any person — including the Prophet Muhammad — an absolute Divine authority to define what is right or wrong, or how to understand the Qur'ān. Understanding is an important individual journey.

Here, then, is a difference with Christianity. Jesus has authority to tell right from wrong, as Christians believe Christ is God. In the Catholic tradition, there are

<sup>116</sup> Qur'an, *supra*, 39:27-28, 41 at 297-98.

<sup>117</sup> Qur'an, *supra*, 39:43-44 at 298.



angels and saints who may intercede on behalf of an individual, or on behalf of those in purgatory.

Note how "protestant" the Muslim faith is. Nothing stands between the individual and God. Like the Protestant Christian movement beginning with the Reformation in the 16th century, but to a stronger degree, Muslims insist submission to God is between the individual and God. God gives guidance through the Qur'ân and *Sunnah* of the Prophet, but leaves it to each person to discern and apply the precepts to everyday life.

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## PART TWO

### GOLDEN AGE

## Chapter 4

### CALIPHS OF MECCA AND MEDINA (*RASHIDUN*) (632–661 A.D.)

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*Ozymandias* (1818)

I met a traveler from an antique land  
Who said: Two vast and trunkless legs of stone  
Stand in the desert . . . Near them, on the sand  
Half sunk, a shattered visage lies, whose frown,  
And wrinkled lip, and sneer of cold command,  
Tell that its sculptor well those passions read  
Which yet survive, stamped on these lifeless things,  
The hand that mocked them, and the heart that fed:  
And on the pedestal these words appear:  
“My name is Ozymandias, king of kings:  
Look on my works, ye Mighty, and despair!”  
Nothing beside remains. Round the decay  
Of that colossal wreck, boundless and bare  
The lone and level sands stretch far away.

Percy Bysshe Shelley (1792-1822),  
*The Poems of Percy Bysshe Shelley* 255 (Stephen Spender, ed.,  
New York, New York: Heritage Press 1974)

#### SYNOPSIS

§ 4.01 DEATH OF MUHAMMAD AND SUCCESSION CRISIS (632 A.D.)

§ 4.02 FOUR RIGHTLY GUIDED CALIPHS (*RASHIDUN*)

[A] Abū Bakr As Siddiq

[B] ‘Umar Ibn Al Khaṭṭāb

[C] ‘Uthmān Ibn Affan

[D] ‘Alī ibn Abi Ṭalib

§ 4.03 LEGAL DEVELOPMENTS

§ 4.01 DEATH OF MUHAMMAD AND SUCCESSION CRISIS  
(632 A.D.)

After the death of Muhammad in 632 A.D., a power vacuum swept through the growing Muslim community. Before his death, Muhammad did not choose a successor, nor did he set forth how his successor should be chosen. Some scholars



even question whether Muhammad intended there to be a successor at all.<sup>1</sup> Amid the chaos surrounding the Prophet's death emerged two competing views as to who should be the successor to the Prophet. This early split would lay the foundations for the *Sunni* and *Shi'ite* sects.

The *Shi'a* minority believed, 'Ali, the cousin and son-in-law of Muhammad, was chosen by the Prophet to be the next leader. In addition, 'Ali and his followers believed succession should be based on blood-ties to the Prophet.

The *Sunni* majority believed succession should be based on following the traditions, acts, words and statements of the Prophet.<sup>2</sup> Therefore leadership should pass on to the most senior, pious, wise and noble person. This community chose Abū Bakr to become the first Khalifa or Caliph.<sup>3</sup> Bakr would be succeeded by Omar<sup>4</sup>, followed by 'Uthmān, and then by 'Ali. These first four successors to Muhammad are known as the "*Rashidun*."<sup>5</sup> Later Caliphs (probably as a result of influence from 'Ali who was the last of the *Rashidun* and the original supporter of bloodline succession) received their status in a hereditary fashion.<sup>6</sup>

#### § 4.02 FOUR RIGHTLY GUIDED CALIPHS (RASHIDUN)

Table 4-1:  
The Four Rightly Guided Caliphs (*Rashidun*)

Caliph	Years Served (A.D.)	Most Notable Aspect of Reign
Abū Bakr	632-634	Expansion of the Muslim Empire during the <i>Riddah</i> Wars, unifying all of Arabia.
'Umar (Omar)	634-644	Further expansion into Egypt, Syria and Iraq. Dissemination of the teachings of the Qur'an. Established legal system with prescribed punishments and jail system. Sometimes called "Umar the Great."
'Uthmān	644-656	Conquests across Africa, Armenia and Afghanistan. Official version (canonical text) of the Qur'an.
'Ali	656-661	First Civil War (First <i>Fitna</i> ) within the Muslim Empire.

<sup>1</sup> This view, noted in Roy Jackson, *Fifty Key Figures In Islam*, at 9 (Routledge, 2006), is speculative.

<sup>2</sup> The term "*Sunni*" is derived from the Arabic word "*Sunnah*," which means "tradition."

<sup>3</sup> Arabic term for "successor" or "representative."

<sup>4</sup> Sometimes written as "Umar."

<sup>5</sup> "*Rashidun*" has been translated to mean Rightly Guided or Righteously Guided.

<sup>6</sup> See ALBERT HOURANI, *A HISTORY OF THE ARAB PEOPLES* 25 (New York, New York: MJF Books, 1991). [Hereinafter, HOURANI.]

#### [A] Abū Bakr As Siddiq

Abū Bakr was chosen as the first Caliph, leading the Muslim community in the wake of Muhammad's death. He was a likely candidate for the position because he was one of the first, if not the first, to convert to Islam, and a close friend and confidant to the Prophet. Abū Bakr traveled with Muhammad to Medina in the *Hijra*, and led public prayer during Muhammad's fatal illness.<sup>7</sup> He also was the father-in-law of Muhammad father-in-law after the marriage of his daughter, 'Aisha, to the Prophet. In his inaugural speech, Abū Bakr is quoted as saying:

if I neglect the laws of God and His messenger [Muhammad], then  
refuse me obedience.<sup>8</sup>

This statement established the Qur'an and the teachings of the Prophet as the governing body of law and principles to guide the Muslim community.

Abū Bakr enjoyed a relatively short reign as Caliph, spanning from June of 632 until August of 634. Despite this short time period, he was able to unify and expand the geographic range of Islam due to his ability to convert large populations to Islam as a result of successful military conquests. Abū Bakr followed in the teachings of Muhammad and did not exact revenge on his conquered enemies which added to the popularity of the conquering Muslims. He also purchased the freedom slaves who were being persecuted for their belief in Islam.<sup>9</sup>

Perhaps one of most significant contributions of Abū Bakr to Islam and the Muslim community (*ummah*), was his success in the *Riddah* Wars. ("*Riddah*" means "apostasy," so the conflicts also are known as the Wars of Apostasy.) These wars were the result of uprisings by several tribes who had given allegiance to Muhammad. These tribes took the position that their allegiance was just that, only to Muhammad, and thus with Muhammad's death, so too died the allegiance. Bakr resisted this notion, proclaiming that the allegiance was to Islam and Allāh, not just the Messenger. Bakr appointed Khalid ibn Al Walid as the commander of the newly established army.<sup>10</sup> Khalid was once described by Muhammad as "the sword of Allāh."<sup>11</sup> By winning many fierce battles, Khalid expanded the modest territory claimed under Muhammad to include the entire Arabian Peninsula, and extending northward into present day Iraq and Syria.<sup>12</sup>

Abū Bakr, like the Prophet, died from illness just two years into his reign. Unlike Muhammad, Bakr left no question about succession, appointing Omar ibn al Khaṭṭab as the next Caliph. Bakr left a legacy of being known as the most generous,

<sup>7</sup> See ROY JACKSON, *FIFTY KEY FIGURES IN ISLAM* 9 (New York, New York: Routledge, 2006). [Hereinafter, JACKSON.]

<sup>8</sup> ROBERT PAYNE, *THE HISTORY OF ISLAM* 89 (New York, New York: Barnes and Noble, 1989). [Hereinafter, PAYNE.]

<sup>9</sup> See CYRIL GLASSE, *THE NEW ENCYCLOPEDIA OF ISLAM* 23 (Walnut Creek, California: AltaMira Press, 1989). [Hereinafter, *ENCYCLOPEDIA OF ISLAM*.]

<sup>10</sup> See PAYNE, *supra*, at 90.

<sup>11</sup> PAYNE, *supra*, at 94.

<sup>12</sup> See MALISE RUTHVEN, *HISTORICAL ATLAS OF ISLAM* at 27 (Cambridge, Massachusetts: Harvard University Press, 2004). [Hereinafter, *HISTORICAL ATLAS OF ISLAM*.]

devout and learned.<sup>13</sup> Through his appointment of Omar, Bakr established principles of law known as *shura*, leadership through consultation, *aqd*, the contract between a ruler and the ruled, and *bayah*, the oath allegiance given to the leader.<sup>14</sup>

### [B] 'Umar Ibn Al Khaṭṭāb

Unlike Abū Bakr, who was appointed by a committee of sorts, 'Umar received his appointment from Abū Bakr himself. Despite the direct appointment, 'Umar was likely to have been the successor if the choice had gone to a group deliberation.<sup>15</sup> As a staunch supporter of the appointment of Abū Bakr to the Caliphate after the death of Muhammad, he helped keep order during that tumultuous time.<sup>16</sup> 'Umar enjoyed a much longer tenure as Caliph, his reign spanning ten years from 634-644.

'Umar continued the rapid expansion of the Muslim empire, relying on the military prowess of Khalid. Muslim armies struck blows to the Sasanian and Byzantine empires, claiming territories in present day Iran and Egypt.<sup>17</sup> In addition, the Persian army was decimated, though no large territorial gains were claimed.<sup>18</sup> Although 'Umar maintained the policy of Abū Bakr toward conquered populations with respect to freedom of religion, and taxation, he reversed course when it came to infidel participation in successive raids on new territories. Before the reign of 'Umar, the conquered populations were not allowed to participate in such raids. Now, they were not only allowed, but also actively encouraged to do so.<sup>19</sup> He also created a stipend system known as *diwan*, where stipends were paid to those who fought for the Islamic cause. However, this system carried a hierarchy based on conversion to Islam and service to the religion which created different classes and laid the foundations for later civil wars.<sup>20</sup>

'Umar also set legal precedents for various crimes, establishing jails and police to enforce them.<sup>21</sup> For instance, adultery carried a punishment of stoning and drunkenness was punished with 80 lashes of a whip.<sup>22</sup> 'Umar was dedicated to the dissemination of the word of the Qur'ān. He sent teachers to all provinces,<sup>23</sup> and is responsible for the collection of numerous *ḥadīth*.<sup>24</sup> Further, 'Umar established the

<sup>13</sup> See PAYNE, *supra*, at 95.

<sup>14</sup> JOHN L. ESPOSITO ED., *THE OXFORD DICTIONARY OF ISLAM 4* (Oxford, England: Oxford University Press, 2003). [Hereinafter, *OXFORD DICTIONARY OF ISLAM*.] The contract is sealed with a clasp of the hands along with a recitation of allegiance to the ruling figure. This method continued at least through the *Rashidun* Caliphs.

<sup>15</sup> See JACKSON, *supra*, at 14.

<sup>16</sup> See *ENCYCLOPEDIA OF ISLAM*, *supra*, at 462.

<sup>17</sup> See HOURANI, *supra*, at 23; *HISTORICAL ATLAS OF ISLAM*, *supra*, at 29.

<sup>18</sup> See JACKSON, *supra*, at 15.

<sup>19</sup> See JACKSON, *supra*, at 14.

<sup>20</sup> See HOURANI, *supra*, at 24.

<sup>21</sup> See ALVIN J. SCHMIDT, *THE GREAT DIVIDE 104* (Regina Orthodox Press, 2004). [Hereinafter, SCHMIDT.]

<sup>22</sup> See SCHMIDT, *supra*, at 105.

<sup>23</sup> See SCHMIDT, *supra*, at 104 (Regina Orthodox Press, 2004).

<sup>24</sup> "Ḥadīth" are the words and acts of Muhammad and other early Muslims and are considered a

Islamic calendar, using the year of the *Hijrah* as year 1.

A few years before his death, 'Umar removed Khalid from his position as commander of the army. This move was likely a combination of the extravagant lifestyle of Khalid and a desire to disassociate the success of expansion with prowess of Khalid as a warrior.<sup>25</sup> 'Umar was assassinated a few years later by a Persian slave who stabbed him in the back while at prayer in a mosque.<sup>26</sup> In the few days 'Umar survived after this attack, he appointed an election committee to choose his successor.<sup>27</sup> This resulted in the choosing of 'Uthmān Ibn Affan.

### [C] 'Uthmān Ibn Affan

By some historical accounts, the election committee first offered leadership to 'Ali on the condition he maintain the policies of Abū Bakr and 'Umar. 'Ali could not accept these stipulations and refused the offer, leaving 'Uthmān to take up the mantle of Caliph.<sup>28</sup> Although his time as Caliph was marred by civil unrest, 'Uthmān managed to keep control for 12 years, from 644-656.

'Uthmān, lacking any military skill himself and a strong general like Khalid, was still able to harness the momentum and continue the expansion of the Muslim Empire. By the end of his reign, the Empire has surged East into present day Afghanistan and parts of Pakistan, North through Armenia bordering the Black Sea and over to the Caspian Sea and West into portions of Turkey.<sup>29</sup> 'Uthmān shirked the predating fears of crossing the Mediterranean sending the Muslim navy to conquer Cyprus.<sup>30</sup> Instead, his problems came from his appointments of provincial governors in the newly conquered territories as well as some pre-existing establishments.

Legend says the problems of 'Uthmān began when he lost the seal-ring of the Prophet Muhammad.<sup>31</sup> More likely, his problems were a result of perceived nepotism in his appointments. By selecting family members rather than those most qualified to serve, 'Uthmān was ignoring the *Sunnah* of those before him. A prime example can be seen in a province of Persia where 'Uthmān cycled through a series of incompetent relatives as local rulers.<sup>32</sup> Dissent from this area as well as a group from Egypt under similar conditions were responsible for his eventual murder.

particularly authoritative source, second only to the Qur'ān. See *OXFORD DICTIONARY OF ISLAM*, *supra*, at 101.

<sup>25</sup> See PAYNE, *supra*, at 100.

<sup>26</sup> See SCHMIDT, *supra*, at 43.

<sup>27</sup> See JOHN L. ESPOSITO, *ISLAM: THE STRAIGHT PATH 38* (New York, New York: Oxford University Press, expanded ed., 1991). [Hereinafter, *STRAIGHT PATH*.]

<sup>28</sup> See JACKSON, *supra*, at 18.

<sup>29</sup> See *HISTORICAL ATLAS OF ISLAM*, *supra*, at 29.

<sup>30</sup> See PAYNE, *supra*, at 107.

<sup>31</sup> See *NEW ENCYCLOPEDIA OF ISLAM*, *supra*, at 466.

<sup>32</sup> See PAYNE, *supra*, at 106-107.



Prior to his death, 'Uthmān authorized the compilation of an official version of the Qur'ān.<sup>33</sup> In the process variant collections of the Qur'ān were destroyed so that the surviving versions were uniform.<sup>34</sup> 'Uthmān reputedly died with a copy of the Qur'ān in his lap when the angry mob stormed his home.<sup>35</sup>

#### [D] 'Ali ibn Abī Ṭalib

In the wake of the murder of 'Uthmān, and consequent power vacuum, 'Ali was recognized by most Muslims as the next Caliph. Nevertheless, several factions remained opposed to him, which led to his demise after 6 years of the First Muslim Civil War, or First *Fitna*, which lasted from 656–661.<sup>36</sup> (The Second *Fitna* lasted from about 680/683 to 685/692.) The Caliphate of 'Ali corresponded with the years of the First *Fitna*, and in 661, he was assassinated. Focused on discord within the Arab-Islamic Empire, 'Ali never had the opportunity to continue the efforts of his predecessors to expand that Empire.

The first wave of opposition included 'Āisha, favorite wife of the Prophet after Khadyja, and two Companions of the Prophet (*Ṣaḥābah*), Talha ibn Ubaydallah and Al Zubayr ibn Al Awwam. 'Ali was reluctant to fight, but armed conflict was inevitable. The two forces met at the Battle of the Camel (also called the "Battle of Bassorah" or "Battle of Jamal"), in 656 A.D. 'Ali quashed the movement against him.<sup>37</sup> This battle marked the first clash between two Muslim forces.<sup>38</sup> His next struggle was with Muawiyah, a powerful provincial governor from Persia who had also laid claim to the Caliphate. 'Ali marched his army of followers into war with Muawiyah at the "Battle of Siffin," which occurred between May and July 657 A.D. (37 A.H.).<sup>39</sup> This Battle ended in a stalemate wherein 'Ali and Muawiyah agreed to settle the dispute through arbitration — a costly mistake for 'Ali. A group known as the *Khārijites* (i.e., seceders, or secessionists) splintered off from his support base believing that the issue of who was to reign as Caliph was to be decided by the Will of God (Allāh), not the negotiations of men.<sup>40</sup> It would be a member of this faction who would later assassinate 'Ali.

'Ali did not accomplish much for the Muslim community (*ummah*) during his reign as Caliph. Still, his behavior prior to becoming Caliph had an overall positive impact on Islam. The followers of 'Ali — the *Shī'ites* — contend he was the first male convert to Islam, not Abū Bakr. Regardless, 'Ali was definitely one of the first, and his contributions to the religion in its infancy were invaluable. When Muhammad and the small group of supporters left for Medina during the *Hijra*, 'Ali slept in the bed of Muhammad, pretending to be the sleeping Prophet so as to

create a diversion.<sup>41</sup> After the death of the Prophet, and appointment of Abū Bakr, 'Ali instructed his followers not to protest because he feared a split in the religion would be detrimental to its success.<sup>42</sup> Despite his thrice-thwarted claim to the Caliphate, and his difficult reign as Caliph, 'Ali remained a loyal supporter and advisor to all three of the preceding *Rashidun*.<sup>43</sup>

Within the *Shī'ite* Muslim community, 'Ali was and is revered as possessing absolute spiritual and temporal authority. His tomb, in Najaf, Iraq, is a place of pilgrimage for *Shī'ite* Muslims.<sup>44</sup> Each year, *Shī'ites* celebrate the Festival of *Ghadir* to mark his appointment as successor to the Prophet.<sup>45</sup> Today, his discourses, sermons, letters, and sayings serve as the *Shī'ite* framework for Islamic government.<sup>46</sup> Further, his compilation of the Qur'ān is the version used today by *Shī'ites*. It differs from the version commissioned by 'Uthmān in that it is longer, and contains references to 'Ali.<sup>47</sup> The death of 'Ali marked the end of the *Rashidun* Caliphs, and the beginning of the *Umayyad* Caliphate.

#### § 4.03 LEGAL DEVELOPMENTS

In a few decades following the death of the Prophet Muhammad, Islam spread rapidly across much of the known world, partly through peaceful conversion, and partly through violent conquest. Islamic Law developed through the *Rashidun*, the *Umayyad* and *Abbasid* Caliphates, and subsequent Regional Sultanates. Inevitably as with all empires, the political and military prowess of Muslim authorities waned, and the territory they held shrank. But, the *Shari'a* remained, influenced by these authorities during their respective periods of grandeur.

Consider, then, legal developments during the *Rashidun* era. The Prophet Muhammad did not do away with the pre-Islamic system of arbitration that had been used by the Bedouins and sedentary Arab communities. To the contrary, Muhammad himself was a renowned *hakam*, and the Qur'ān modified and refined pre-Islamic arbitral practices. In fact, the Caliphs of Medina continued the arbitral system, though they were not the supreme arbitrators — thus affirming a modest degree of separation between judicial and political functions. The Caliphs were supreme rulers and administrators.

As supreme rulers, the *Rashidun* Caliphs were the chief lawgivers for the Islamic community, aside from the law given by the Qur'ān itself, which of course possessed a unique religious authority. As supreme administrators, the Caliphs focused on organizing the territories that had been conquered. However, these Caliphs did not lay much of a foundation for administration of the *Shari'a*. For instance, they did not appoint *qādis* (Islamic judges).

<sup>33</sup> See JACKSON, *supra*, at 19.

<sup>34</sup> See OXFORD DICTIONARY OF ISLAM, *supra*, at 329.

<sup>35</sup> See SCHMIDT, *supra*, at 44.

<sup>36</sup> See JOHN L. ESPPOSITO ED., OXFORD HISTORY OF ISLAM 15 (New York, New York: Oxford University Press, 1999). [Hereinafter, OXFORD HISTORY OF ISLAM.]

<sup>37</sup> See OXFORD HISTORY OF ISLAM, *supra*, at 15.

<sup>38</sup> See STRAIGHT PATH, *supra*, at 39.

<sup>39</sup> See NEW ENCYCLOPEDIA OF ISLAM, *supra*, at 40.

<sup>40</sup> See NEW ENCYCLOPEDIA OF ISLAM, *supra*, at 40.

<sup>41</sup> See JACKSON, *supra*, at 17.

<sup>42</sup> See JACKSON, *supra*, at 18.

<sup>43</sup> See NEW ENCYCLOPEDIA OF ISLAM, *supra*, at 41.

<sup>44</sup> See NEW ENCYCLOPEDIA OF ISLAM, *supra*, at 41.

<sup>45</sup> See OXFORD DICTIONARY OF ISLAM, *supra*, at 15.

<sup>46</sup> See OXFORD DICTIONARY OF ISLAM, *supra*, at 15.

<sup>47</sup> See JACKSON, *supra*, at 18.

Their dual roles as supreme political and administrative authorities sometimes led to the development of legal rules and practices that went beyond Qur'anic Legislation. While in pursuit of the organization of conquered territories, the Caliphs of Medina extended Penal Law by adding punishments. For example, authors of satirical poems against rival tribes would be punished with flogging. That kind of satirical poetry had been common in pre-Islamic times, but the Caliphs (like Muhammad himself) sought to break the tribe as a unit of social organization, and create a transcendent Islamic community. Additionally, the punishment for unlawful intercourse was stoning to death. This punishment is not set forth in the Qur'an. Rather, it is a punishment borrowed from Mosaic Law (that is, the Law of Moses — Jewish Law).<sup>48</sup>

The Caliphs began to create these punishments to fill in the gaps left between the Qur'an and real life. They, like the Prophet before them, sought to create an Islamic community, and in so doing confronted the ancient Arabian tribal system. If the *Shar'ia* was to mean anything in a practical everyday sense, in terms of changing the behavior of individuals on matters like sexual morals, then it would have to have serious sanctions associated with it.

Still, the Caliphs did not simply (and probably could not) sweep away Pre-Islamic Customary Law. The arbitral system remained. So, too, did vestiges of retaliatory actions and the payment of blood money. If the kin of the victim wanted to retaliate, or exact a payment of blood money, then oftentimes the Caliphs did not stand in the way.

In other words, during the reign of the Caliphs of Medina, the legislative and administrative activities of the "government" were not separated, but the arbitral activities were conducted by other persons not necessarily holding official positions. To this day, arbitration plays a very prominent role in dispute resolution under the *Shar'ia*, and in most instances, supreme political leaders are not supreme arbitrators.

<sup>48</sup> See JOSEPH SCHACHT, *AN INTRODUCTION TO ISLAMIC LAW* 15 (Oxford, England: Oxford University Press (Clarendon Paperbacks) 1982).

## Chapter 5

### UMAYYAD CALIPHATE (661-750 A.D.)

Uneasy lies the head that wears a crown.

William Shakespeare (1564-1616),  
*Henry IV, Part II*, Act III, Scene I (King Henry IV) (1596-99)

#### SYNOPSIS

- § 5.01 ORIGINS
- § 5.02 DEVELOPMENT AND EXPANSION
- § 5.03 LEGAL, POLITICAL, AND SOCIAL STRUCTURE
- § 5.04 DISCONTENT
- § 5.05 COLLAPSE
- § 5.06 SALIENT DEVELOPMENTS IN *SHAR'IA*
  - [A] Appointment of *Qādis*
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  - [F] Inspector of Market (*Amil al-Souq*)
- § 5.07 *SHAR'IA* NOT YET A COMPLETE SYSTEM

#### § 5.01 ORIGINS

The *Umayyad* Caliphate was the second of four Arab caliphates established after the death of Muhammad. Historically one of the five or six largest empires of the world, headquartered in Damascus, the *Umayyad* Caliphate represented the political unity of the Muslim world from the years 661 to 750 A.D. Territorial expansion (and the administrative and cultural problems created by such expansion) is the most notable legacy of the *Umayyad* Caliphate.

Interestingly, the original intentions of the *Umayyad* clan had nothing to do with a reverence for Islam. The *Umayyads* once hoped to kill Muhammad and strangle the new faith before it matured.<sup>1</sup> After three leaders of the *Umayyad* clan were killed by prominent *Hashemites* (the clan to which Muhammad belonged) at the

<sup>1</sup> See, e.g., ROBERT PAYNE, *THE HISTORY OF ISLAM* at 117 (New York, U.S.A.: Dorset Press, (1959)). [Hereinafter, PAYNE.]



Battle of Badr, Abū Sufyan Ibn Harb (560-650 A.D.), the grandson of Umayya, pledged to exterminate the adherents of Islam.<sup>2</sup> By the year 630, however, when Muhammad took control of Mecca and announced a general amnesty for all, Abū Sufyan changed course and embraced the new religion. This event commenced a roughly 30-year period in which the *Umayyads* patiently and cunningly acquired the title deeds to the faith.

The ascendancy of the *Umayyad* clan was manifest in the Caliphate of Uthman Ibn Affan (644-656), an *Umayyad* and the third of the four Rightly Guided Caliphs (*Rashidun*).<sup>3</sup> Uthman instituted an astonishingly audacious system of nepotism. By the end of his reign, nearly all the governorships, the imperial treasury, and the armed forces throughout Arabia were controlled by his close relatives.<sup>4</sup> Though the *Umayyad* Caliphate would not be officially launched until after the five-year reign of 'Alī (a *Hashemite* and the fourth Rightly Guided Caliph), the foundation for *Umayyad* control over the Muslim world was established.

Following the assassination of 'Alī in 661, Muawiyah (602-680), the son of Abū Sufyan and Governor of Syria under Uthman, successfully persuaded a number of supporters of 'Alī to proclaim him as Caliph instead of Hasan, the son of 'Alī and his wife, Fātimah. Immediately following his elevation, Muawiyah moved the capital of the Caliphate to Damascus, and later set in motion the process of dynastic rule. From there, a succession of *Umayyad* rulers instituted a continuous policy of expansion and centralization of authority. Indeed, the *Umayyad*s transformed the Islamic community "from an Arab [sheikhdom] into an Islamic empire whose rulers were dependent on religion for legitimacy and the military for power and stability."<sup>5</sup> Ironically, those who fought Muhammad ended up inheriting the religious empire which Muhammad built.

## § 5.02 DEVELOPMENT AND EXPANSION

Table 5-1:  
*Umayyad Caliphs*<sup>6</sup>

Caliph	Years Served (A.D.)	Most Notable Aspect of Reign
Muawiyah I (also spelled "Mu'awiyya" or "Mu'awiyah")	661-680	Massive territorial expansion.  Caliphate becomes a dynastic Empire.
Yazid I	680-683	Continuous war over the legitimacy of dynastic rule. Battle of Karbala

<sup>2</sup> See PAYNE, *supra*, at 34-39.

<sup>3</sup> See PAYNE, *supra*, at 106.

<sup>4</sup> See PAYNE, *supra*, at 107.

<sup>5</sup> JOHN ESPOSITO, *ISLAM: THE STRAIGHT PATH* at 42 (New York, U.S.A., Oxford University Press (1988)). [Hereinafter, ESPOSITO.]

<sup>6</sup> See PAYNE, *supra*, at 117-152.

Caliph	Years Served (A.D.)	Most Notable Aspect of Reign
Muawiyah II	683-684	Died of the plague 2 months into reign
Marwan I	684-685	Recaptured Egypt for the Caliphate, but died 9 months later
Abd al-Malik	685-705	Reconsolidation of <i>Umayyad</i> control over the Caliphate. Construction of Dome of the Rock. Arabic becomes official language; Muslim coinage
Al-Walid I	705-715	Conquered Spain in west, and armies reach China to the east. Empire at its largest size. Mosque of the Prophet in Medina rebuilt. Great Mosque of Damascus constructed. Believed by some to have poisoned the 4th <i>Shī'ite Imām</i> , Zayn al 'Ābidin.
Suleiman	715-717	Siege of Constantinople fails, end of Arab attacks on Byzantine capital
Umar	717-720	Most gentle of the <i>Umayyad</i> Caliphs, and the only one to be regarded as "righteous" in subsequent Islamic tradition
Yazid II	720-724	Destruction of Christian images within the territory of the Caliphate
Hishām	724-743	Costly defeats in the east and west, curtailment of military expansion, but puts down a rebellion by Fiver <i>Shī'ites</i> ( <i>Zaydis</i> ) led by Zayd ibn 'Alī, half brother of the 5th <i>Shī'ite Imām</i> , Muhammad al Baqir
Al-Walid II	743-744	Widespread corruption and rapid decline of the Caliphate
Yazid III	744	Promised to rid the Empire of corruption, but died 5 months into reign
Ibrahim	744	Two-month reign, then overthrown by Marwan II
Marwan II	744-750	Attempts to re-establish central authority ultimately fails. Ongoing struggles against opposition movements; Empire falls to the <i>Abbasids</i>

Assuming power in 661 A.D., the *Umayyad*s wasted no time in establishing the fundamental characteristics of the new Caliphate: imperial, dynastic, and domi-

nated by an Arab military aristocracy.<sup>7</sup> In a practical and symbolic move, the capital of the Islamic Empire shifted to Damascus, a cosmopolitan Byzantine city, and stark contrast from the less sophisticated Arabian heartland. The location of the city facilitated the *Umayyad* army's conquest of the entire Persian and half the Byzantine (Roman) Empire. Within a decade, Muslim forces conquered Kufa (Iraq), Syria, Palestine, Persia, and Egypt. Advancing further into North Africa, the Caliphate's army established bases in Tunisia, from there moving westward and conquering Morocco. Soon thereafter Muslim forces entered Spain.<sup>8</sup> On the eastern front, the empire steadfastly expanded its borders across Central Asia, eventually establishing an important presence on the Indian Subcontinent.<sup>9</sup>

As the borders of the Empire expanded, assimilating conquered peoples into the new polity became increasingly important. For that to happen, those conquered had to become productive (though not equal) citizens of the Caliphate. Native civil servants and ministers often were retained to assist and train their new Muslim masters.<sup>10</sup> The new Caliphate needed to take advantage of existing knowledge and practices, thus, secretaries and commercial traders were drawn liberally from the groups that served previous rulers.<sup>11</sup> These efforts helped set a foundation which allowed the Caliphate to launch three major initiatives, each aimed at making a statement about imperial permanence.

The first initiative was the creation of a new style of coinage, occurring around the year 690,<sup>12</sup> because currency was a symbol of power and identity. Rather than producing coins that displayed human figures, the *Umayyads* strategically chose to mint coins proclaiming in Arabic the oneness of God and the truth of the religion.<sup>13</sup> It was a powerful message intended to symbolize the purported Divine authority of the Caliphate.

The second initiative, also occurring around 690, was the elevation of Arabic as the official language of administration.<sup>14</sup> A unifying language helped simplify governance of the Caliphate, and furthered the Arabization and Islamization of the culture, state, and society.<sup>15</sup> Once Arabic became the official language, its status as the *lingua franca* of North Africa and the Middle East was inevitable.

Finally, the *Umayyads* oversaw the creation of exquisite monumental buildings, solidifying the notion of the power and permanence of the Caliphate.<sup>16</sup> In particular, the magnificent Dome of the Rock, was built in the 690s on the site of the Jewish

<sup>7</sup> See ESPPOSITO, *supra* at 42.

<sup>8</sup> ALBERT HOURANI, *A HISTORY OF THE ARAB PEOPLES*, at 26 (Warner Books, (1991)). (Hereinafter, HOURANI.)

<sup>9</sup> See ESPPOSITO, *supra* at 42.

<sup>10</sup> See ESPPOSITO, *supra* at 42.

<sup>11</sup> See HOURANI, *supra* at 27.

<sup>12</sup> See HOURANI, *supra*.

<sup>13</sup> See HOURANI, *supra*.

<sup>14</sup> See HOURANI, *supra*.

<sup>15</sup> See ESPPOSITO, *supra* at 42.

<sup>16</sup> See HOURANI, *supra* at 27.

Temple in Jerusalem.<sup>17</sup> This mosque, along with a series of great mosques built throughout the empire, was intended as a sign the *Umayyad* Caliphate would endure. Moreover, such buildings symbolized the growth of a new and distinct community — the Islamic *ummah*.

## § 5.03 LEGAL, POLITICAL, AND SOCIAL STRUCTURE

The advent of *Umayyad* rule brought forth the gradual development of an Islamic legal system, though not necessarily a cohesive one. The Four Rightly Guided Caliphs, oversaw an ad hoc approach to law, rendering decisions as new questions arose.<sup>18</sup> In a sense, each controversy was a “case of first impression,” and did not carry any substantial precedential value. In contrast, the *Umayyads* established an administrative structure, incorporating the office of the *qādi* (judge).<sup>19</sup> Usually, the *qādi* was an official appointed by the caliph to serve as his delegate to provincial governments, settling disputes and making sure decrees from Damascus were implemented correctly. These early judges relied on the Arab customary laws of the particular province under their jurisdiction, as well as the Qur’ān and their own personal judgment.<sup>20</sup> As a result, the legal code was an amalgamation of administrative decrees and judicial decisions that differed significantly from one locale to another.

The political systems of earlier Arab societies, fashioned for smaller, less diverse, more tribally-inclined communities, were not suited for an empire. *Umayyad* rulers thus developed a strong, centralized Arab kingdom, adopting Byzantine institutional and bureaucratic styles and modifying them to meet Arab Muslim needs.<sup>21</sup> *Umayyad* governance was based on the perpetuation of an Arab military aristocracy and maintaining power through a hereditary social caste system. A new mid-level ruling class developed, drawing heavily from army leaders and tribal chiefs. Above all else, these rulers were committed to the idea of a unified kingdom and were hostile to insurgent claims to power based on local solidarity.<sup>22</sup>

The traditional, accepted role of a Caliph as protector of the faith gave the *Umayyads* enormous power. *Umayyad* rulers relied heavily on Islam, both for legitimacy and as a means of justifying their conquests.<sup>23</sup> However, their government was not so much directed at the promotion of Islam, but toward worldly ends determined by self-interest.<sup>24</sup> The most basic objective of the Caliphate was to maintain power, but the size and diversity of their kingdom would eventually complicate their ambitions.

<sup>17</sup> See HOURANI, *supra*, at 28. Professor Hourani argues that “the building of the Dome in this place has been convincingly interpreted as a symbolic act placing Islam in the lineage of Abraham and disassociating it from Judaism and Christianity.” *Id.*

<sup>18</sup> See ESPPOSITO, *supra*, at 76.

<sup>19</sup> See ESPPOSITO, *supra*, at 76.

<sup>20</sup> See ESPPOSITO, *supra*, at 76.

<sup>21</sup> See HOURANI, *supra*, at 28.

<sup>22</sup> See HOURANI, *supra*, at 26.

<sup>23</sup> See, ESPPOSITO, *supra*, at 42.

<sup>24</sup> See, ESPPOSITO, *supra*, at 42.



Muslim society in the Caliphate was divided into four primary classes.<sup>25</sup> Arab Muslims made up the elite, though (in contrast to the pre-*Umayyad* Era) the companions of the Prophet were not given special status. The next class consisted of non-Arab converts to Islam. Though all Muslims are theoretically equal before God, the *Umayyads* treated non-Arab Muslims as second-class citizens, in particular, they did not receive the special tax privileges of Arab Muslims. The third class was the *dhimmi*, or non-Muslim People of the Book, those who possessed a revealed Scripture (Jews and Christians). The *dhimmi* were treated as distinct communities within the Caliphate. Finally, there was a slave class, comprised mostly of captives from battle.

The *Umayyads* held to a less universalist conception of Islam than their rivals and, arguably, even regarded the religion as property of the conquering aristocracy.<sup>26</sup> Indeed, the Caliphs appear to have viewed themselves as God's representatives, and did not feel it incumbent upon them to share their power with the emerging class of religious scholars.<sup>27</sup> Above all else, the *Umayyads* transformed the Islamic Caliphate from a fundamentally religious institution to a dynastic one. This controversial transformation would play a key role in the decline of the Caliphate.

## § 5.04 DISCONTENT

As with any empire, animosity towards the *Umayyad* Caliphate was present from the very beginning. Many critics and opponents, seeking to legitimate their own aspirations, used an "Islamic yardstick" to condemn the *Umayyads*.<sup>28</sup> The first major wave of turmoil broke out upon the death of Muawiyah in 680 A.D. The issue was over whom should succeed him: his chosen successor, Yazid (645-683), or a member of the family of 'Ali, namely, his son Hussein (626-680) (also spelled "Husayn").<sup>29</sup>

The resulting conflict became known as the Second *Fitna*, or civil war.<sup>30</sup> When Yazid came to power, Hussein was persuaded by a group of supporters in Iraq to lead a rebellion. Popular support never materialized, but Hussein and his small band of followers already set off toward Damascus.<sup>31</sup> They never reached their destination, however, as they were slaughtered by an *Umayyad* army at Karbala.<sup>32</sup> The slaughter of Hussein was a catalyzing event, leading directly to the division of the Islamic community into *Sunni* and *Shi'ite* branches. Yet, the victory at Karbala haunted the *Umayyads*, as the Caliphate continually struggled to bring Iraq under

<sup>25</sup> See, ESPOSITO, *supra*, at 41.

<sup>26</sup> G.R. HAWTING, *THE FIRST DYNASTY OF ISLAM: THE Umayyad Caliphate, AD 661-750* 12 (Routledge, 2nd ed. (2000)). [Hereinafter HAWTING.]

<sup>27</sup> See HAWTING, *supra*, at 13.

<sup>28</sup> See ESPOSITO, *supra*, at 43.

<sup>29</sup> FRED M. DONNER, *Muhammad and the Caliphate*, in *THE OXFORD HISTORY OF ISLAM* (John Esposito, ed.) 16-17 (New York, New York: Oxford University Press, 1999). [Hereinafter DONNER.]

<sup>30</sup> See DONNER, *supra*, at 16-17.

<sup>31</sup> See ESPOSITO, *supra*, at 45.

<sup>32</sup> See ESPOSITO, *supra*, at 45.

its control.<sup>33</sup> Karbala provided *Shi'ites* with an act of martyrdom on the grandest of proportions, which deepened their hatred of the *Umayyads* and strengthened their resolve to undermine the Empire.

Another group, known as the *Kharijites* (a quasi-revolutionary Islamic group that regarded the *Umayyads* as usurpers), led numerous uprisings and revolts against the *Umayyad* Caliphate.<sup>34</sup> They splintered from the main Islamic community because they believed leadership was Divinely given, making the arbitration between 'Ali and Muawiyah invalid. The *Kharijites* also promoted Islamic egalitarianism, the diametric opposite of the social and political caste system of the *Umayyads*.<sup>35</sup>

Critically, the Caliphate was also challenged by religious scholars (*ulema*) who felt the obsession of the *Umayyads* with wealth and power undermined not only the traditional Arab way of life, but also God's law.<sup>36</sup> While these scholars generally recognized *Umayyad* accomplishments as necessary to establishing a functional Arab empire, they believed the *Umayyad* practice of incorporating the indigenous bureaucracy of conquered lands produced an un-Islamic society.<sup>37</sup> Imperial expansion brought in a diversity of customary laws from Medina, Damascus, Iraq, Basra, etc., producing a confused and contradictory body of laws. The *ulema* believed *Umayyad* practice should entirely conform with Islamic principles. Because the institutions and law of the Caliphate were not sourced in Islam, the Caliphate itself was un-Islamic.

Additionally, the non-Arab Muslims were disgruntled over the special tax privileges afforded to Arab Muslims but not to them.<sup>38</sup> They were usually forced to pay the same amount as that levied on non-Muslims, which, they argued, violated the principles of Islamic egalitarianism. As a consequence, the large percentage of the Caliphate population made up of non-Arab Muslims became increasingly alienated from the *Umayyads* and major threat to the stability of the empire.

After several years of contrast and inequality within the Caliphate, animosity and social unrest emerged. Armies clothed in splendid silk rode out to massacre defenseless villagers, while the *Umayyad* nobility wrote poetry and ordered the construction of massive, beautiful buildings. Luxury and poverty, modernism and barbarism existing side by side could not sustain an Empire with such gross inconsistencies.

<sup>33</sup> See DONNER, *supra*, at 17.

<sup>34</sup> See DONNER, *supra*, at 17.

<sup>35</sup> See ESPOSITO, *supra*, at 44.

<sup>36</sup> See ESPOSITO, *supra*, at 50.

<sup>37</sup> See ESPOSITO, *supra*, at 50-51.

<sup>38</sup> See ESPOSITO, *supra*, at 43.

## § 5.05 COLLAPSE

The violent and politically crude path the *Umayyads* followed to power ultimately contributed to the Caliphate's demise. By 730 A.D., anti-*Umayyad* sentiment intensified and grew to encompass multiple factions: *Shī'ites* and *Khārijites* who regarded the *Umayyads* as usurpers; religious scholars who denounced the failure of the *Umayyads* to uphold Islamic law; and non-Arab Muslims who resented their second-class status.<sup>39</sup>

The growing size and strength of the Muslim community also worked against the *Umayyads*.<sup>40</sup> Their political base, Syria, was becoming increasingly weak in relation to the growing Muslim countries further east. The nascent cities in Iraq, Iran, and Africa (many of which did not exist prior to Islam) were more fully Arab than the Syrian cities, and were firmly grounded in the religion.<sup>41</sup> Their citizens began to assert their independence from a Caliphate they viewed as illegitimate, out of touch, or both.

The *Hashimiyya* movement, led by the *Abbasid* family of Iraq, finally overthrew the *Umayyad* Caliphate.<sup>42</sup> The *Abbasids* took advantage of the various sources of discontent with *Umayyad* rule, effectively piecing together a diverse opposition organization. They kept their own identity secret, simply rallying supporters in the name of "the family of Muhammad."<sup>43</sup> This vague sentiment particularly appealed to many *Shī'ites*, who assumed the movement was in favor of a descendant of 'Alī.<sup>44</sup> Unlike earlier rebellions by the supporters of 'Alī and Hussein, the *Abbasids* patiently organized a cohesive underground movement. They strategically built up a secure power base before rising in open revolt, allowing them to take the *Umayyads* largely by surprise.<sup>45</sup>

In 746, the opposition movement rallied around Abū Muslim, a freed *Abbasid* slave.<sup>46</sup> He initiated a massive revolt against *Umayyad* rule in the eastern, Persian areas of the empire (Khurasan), in 747. Soon thereafter these opposition forces established control over Khurasan and dispatched an army westwards.<sup>47</sup> Once full-scale war erupted and Iraq fell to the *Hashimiyya* in 749, the *Umayyad* Caliph Marwan was compelled to mobilize troops and advance to the south. The two forces clashed in January 750 at the Battle of the Zab in Iraq, and the *Umayyads* were defeated. Damascus fell to the *Abbasids* in April 750, effectively ending the *Umayyad* Caliphate once and for all.

<sup>39</sup> See ESPOSITO, *supra*, at 52.

<sup>40</sup> See HOURANI, *supra*, at 26.

<sup>41</sup> See HOURANI, *supra*, at 26.

<sup>42</sup> See ESPOSITO, *supra*, at 52.

<sup>43</sup> See DONNER, *supra*, at 24-25.

<sup>44</sup> See DONNER, *supra*, at 25.

<sup>45</sup> See DONNER, *supra*, at 25.

<sup>46</sup> See ESPOSITO, *supra*, at 52.

<sup>47</sup> See PAYNE, *supra*, at 147.

§ 5.06 SALIENT DEVELOPMENTS IN *SHAR'Ā*

As a legal matter, it is important to avoid underestimating the role the *Umayyad* Caliphate played in the development of the *Shar'ā*. The *Umayyads* created a new Arab-Muslim society, along with a new, more mature legal system for the administration of justice, and Islamic jurisprudence. The illustrations below highlight the procedural and administrative contributions of the *Umayyads* to the *Shar'ā*. Further illustrations are in the areas of taxes and war.

The motives of the *Umayyads* were not entirely altruistic. The rulers were a savvy lot. Thus, for example, they supported the application of serious Criminal Law penalties (*ḥadd*), some of which are set forth in the Qur'ān. While working to prevent tribal feuds, the *Umayyad* rulers upheld retaliatory punishments (*ta'zīr*) authorized by the Qur'ān for victims, or their kin, against perpetrators. Certainly, such policies helped unify the Caliphate and foster basic rule-of-law and stability, all under an Islamic banner.

[A] Appointment of *Qāḍīs*

As Arab Muslims expanded their Empire under the Caliphs of Medina, and the conquered territories expanded and were consolidated by the *Umayyads*, it became necessary to administer the law. This problem was especially acute in urban areas, where case volumes increased.

The pre-Islamic arbitration system in which a *ḥakam* (arbitrator) played the central role was not suitable for a vast Empire with its urban centers.<sup>48</sup> As a result, the *Umayyad* Caliphate appointed sitting Islamic judges, *qāḍīs*, in place of *ad hoc* *ḥakam*. Whereas the *ḥakam* exercised authority over the case at bar, the *qāḍī* had far more extensive powers, and in effect was the delegate of the *Umayyad* governor of a particular jurisdiction. *Qāḍīs* were trusted with the governor's judicial power, although he always retained the ability to decide any lawsuit he wished and to dismiss the *qāḍī* himself.<sup>49</sup>

Accordingly, in his sweeping history, *The Decline and Fall of the Roman Empire* (1776 A.D.), English historian and Member of Parliament Edward Gibbon (1737-1794) describes the context and role of the "Cadi" in rather cynical terms:

... It was the interest of the caliphs, the successors of the prophet and commanders of the faithful, to repress and discourage all religious innovations; the order, the discipline, the temporal and spiritual ambition of the clergy are unknown to the Moslems; and the sages of the law are the guides of their conscience and the oracles of their faith. From the Atlantic to the Ganges the Koran is acknowledged as the fundamental code not only of theology but of civil and criminal jurisprudence; and the laws which regulate the actions and the property of mankind are guarded by the infallible and immutable sanction of the will of God. This religious servitude is attended with some practical disadvantage; the illiterate legislator has

<sup>48</sup> JOSEPH SCHACHT, AN INTRODUCTION TO ISLAMIC LAW 24 (Oxford, England: Oxford University Press (Clarendon Paperbacks), 1982). [Hereinafter, SCHACHT.]

<sup>49</sup> See SCHACHT, *supra*, at 24.



been often misled by his own prejudices and those of his country; and the institutions of the Arabian desert may be ill adapted to the wealth and numbers of Ispahan [Isfahan] and Constantinople. On these occasions *the Cadi respectfully places on his head the holy volume and substitutes a dexterous interpretation more apposite to the principles of equity and the manners and policy of the times.*<sup>50</sup>

True enough, the *qāḍī* was not an independent judge. While he was not appointed directly by the Caliph, he was appointed by the chief executive of the territory, namely, the provincial governor, and served as his legal secretary. In turn, the governor served at the pleasure of the Caliph. Thus, in a secular sense, the power of the *qāḍī* derived from the Caliph through the provincial governor.<sup>51</sup>

However, Gibbon's description understates the expertise of the *qāḍī*. As the years of the *Umayyad* Caliphate progressed, particularly by 715-720, the appointments went to increasingly specialized individuals. While there was no organized system for technical legal training, those persons selected as *qāḍīs* were pious, and studied Islamic law in their spare time. They met with other similarly-situated people to discuss the subject, and through their intellectual gatherings developed a sound reputation, including among the Caliphs themselves.

These specialists tended to have a singular focus: the conformity of existing customs and practices with the Qur'ān, and the narrowing of any gaps so as to realize in practice an Islamic way of life. They examined behaviors from a religious standpoint, particularly an ethical one in the Qur'ānic sense, using that standard to condone, reject, or suggest changes.<sup>52</sup> This task quickly became burdensome, necessitating a further position. Thus, Muslims of the *Umayyad* Caliphate borrowed another office from the *Sassanid* Persians, called the "Clerk of the Court," or, in Arabic, "*katib*."<sup>53</sup> The *katib* functioned as a secretary to the *qāḍī*. But, at this point, justice was administered in a decentralized manner. It was left to provincial governors to select their legal secretaries, and for these *qāḍīs* to make use of their own secretaries.

Thus, in the late *Umayyad* Caliphate, a specialized judicial office, the *qāḍī*, with both secular and religious dimensions to the office, emerges. Individuals appointed to the office were private scholars, known for their piety and knowledge, and thereby the object of reverence from the public. Indeed, these *qāḍīs* were, "the first *muftīs* in Islam."<sup>54</sup>

A "*muftī*" is a specialist in Islamic law who gives an opinion that is considered authoritative. Thus, criticism by a *muftī* of a governmental act on the ground of that act being religiously unacceptable carries great weight. The "precedent" for such criticism began with the *qāḍīs-cum-muftīs* of the *Umayyad* Period. Yes, the Caliphs

appointed them, and yes, they hardly were a bastion of political opposition to the Caliphs. But no, they were not utterly silent when an act or regulation of the Caliph was ripe for criticism.

However, the reach of the *qāḍī* was limited only to Muslims. A *qāḍī* did not hear cases involving the non-Muslim peoples living in the Empire. For the non-Muslim communities, the traditional legal officers, such as ecclesiastical and rabbinical tribunals for Christians and Jews, respectively, continued to exercise their functions.<sup>55</sup>

## [B] Decisions of *Qāḍīs*

Jurisdiction over Muslims was a critical issue in the *Umayyad* Caliphate. With it, *Umayyad* officials developed a body of judicial decisions that "laid the basic foundations of what was to become Islamic law."<sup>56</sup> That is not to say their decisions launched a systematic common law, or that the doctrine of *stare decisis* emerged. It did not.

Judicial precedent, in the Anglo-American sense of authority of a previous decision, is not officially part of the *Shar'ā*. That is, prior decisions are not one of the Four Sources of Islamic Law: Qur'ān, *Sunnah*, *qiyās* (analogical reasoning), and *ijma'* (consensus), i.e., they are not part of the *uṣūl al-fiqh*. Yet, the last two sources, particularly *ijma'*, bear at least a passing resemblance. At the same time, the *Umayyad qāḍīs* did exercise some discretion, called "*ra'y*" (sound opinion). They were careful to operate within the parameters of the Qur'ān and prevailing Islamic religious norms, and thereby certain legal practices arose.

One example is in the law of evidence. The *qāḍīs* imposed an obligation on a plaintiff to take an oath in order to avoid relying exclusively on witnesses for evidence to support the plaintiff's claim.<sup>57</sup> In so doing, the *qāḍīs* were incorporating Qur'ānic obligations and Islamic norms with their practical concern about excessive dependence on one kind of evidence.

More generally, the *qāḍīs* used Qur'ānic principles as the benchmark for evaluating customs and practices. Doing so allowed them to incorporate Islamic norms and ethics into the substance of the law. Indeed, given the vast territory of the *Umayyad* Caliphate, they accomplished what the Prophet tried to do in the early Islamic community on a much larger scale.<sup>58</sup>

## [C] Ancient Schools of Law

Another illustration of the importance of the *Umayyad* era in the development of the *Shar'ā* relates to the emergence of the Ancient *Sunni* Schools of Law.<sup>59</sup> That is to say, many *Sunni* Schools developed during the 7th, 8th, and 9th

<sup>50</sup> EDWARD GIBBON, *THE DECLINE AND FALL OF THE ROMAN EMPIRE* 653 (1776) (New York, New York: Penguin Books, abridged version, 1980) (emphasis added). The 6 volumes of this work originally were published between 1776 and 1788.

<sup>51</sup> See SCHACHT, *supra*, at 27.

<sup>52</sup> See SCHACHT, *supra*, at 27.

<sup>53</sup> See SCHACHT, *supra*, at 21.

<sup>54</sup> SCHACHT, *supra*, at 27.

<sup>55</sup> See SCHACHT, *supra*, at 25.

<sup>56</sup> SCHACHT, *supra*, at 25.

<sup>57</sup> See SCHACHT, *supra*, at 25.

<sup>58</sup> See SCHACHT, *supra*, at 27.

<sup>59</sup> See SCHACHT, *supra*, at 28.

centuries A.D. As the number of *qādīs* grew, they tended to coalesce into different groups. Their members became known as pious religious scholars (*ulema*) and religious lawyers (i.e., lawyers specializing in Islamic Law), called "*fukahā*."

For example, there were Schools in the Hejaz (at Mecca and Medina), and in Iraq (at Basra and Kufa). The Schools in Iraq were particularly influential (with Kufa being especially renowned), and the Schools in the Hejaz tended to follow, rather than catalyze, legal developments. These Ancient Schools developed not because of religious differences among Muslims, but rather as the result of geographic distance and the consequent difficulty of regular travel and communication. It also was the result of differences in local conditions and practices.

However, from a broad and fundamental standpoint, the Ancient Schools did not differ materially on either legal principles or methodology. While they had their idiosyncrasies, they followed a considerable body of common doctrine.<sup>60</sup> This commonality was, first and foremost, taking the Qur'ān seriously, in the sense of taking a set of maxims from the Qur'ān, and then application of these norms to everyday issues to reach formal, legal conclusions. The Qur'ān was the font of legal principle that would govern problems of the family, inheritance, commerce, crime, and so forth.

There was a second dimension to what the Ancient Schools held in common: the emergence of the *Sunnah* as a source of law. In a general sense, "*Sunnah*" means "practice," "well-established precedent," "ancient practice," or "lifestyle."<sup>61</sup> A key question is: whose practice, precedent, or lifestyle? The obvious answer is that of the Prophet and the First Islamic Community at Medina and later Mecca. What the Prophet (first) and the First Islamic Community (second) did and said represented the ideal for Muslims, behavior as one ought to behave in order to submit to the Will of God.

Put differently, the Qur'ān was a living tradition, a source of law made alive by the Ancient Schools of Law. It was made alive by the *Sunnah*, by reference to what the Prophet's words and deeds, and secondarily to the lifestyle of the First Islamic Community. The *Sunnah* was an ideal that provided guidance to Muslims to lead their lives in accordance with God's Revelation as manifest in the Qur'ān. Therefore, the *Sunnah* itself was guidance to the *ulema* in understanding and applying Qur'ānic principles to legal problems.

Therein lay an important development ushered in by the Ancient Schools, initially by the Schools in Iraq, and later by those in Syria. The *Sunnah* of the Prophet was important for political and theological reasons, but these Schools rendered it relevant in a legal context. The practices of the Prophet, as verified by the *ulema*, were a basis for legal decision-making, and thus for regulating the behavior of Muslims in an effort to continue a living tradition.

In sum, there was commonality among the Ancient Schools on the importance of the Qur'ān and the importance of the *Sunnah* of the Prophet in a legal context.

<sup>60</sup> See SCHACHT, *supra*, at 29.

<sup>61</sup> SCHACHT, *supra*, at 30.

But, commonality does not mean unanimity. There were disagreements within Schools, and those with legal perspectives different from the majority in their School often made their views known. Consider the example of the School at Kufa, where the views of Ibn Mas'ud were widely accepted. Those *ulema* who disagreed with some of the doctrines of Ibn Mas'ud had to invoke an arguably higher authority than Ibn Mas'ud, namely, the Caliph 'Alī (whose headquarters were in Kufa). Those views, ascribed to 'Alī, were sporadic and never universally accepted.<sup>62</sup>

## [D] Traditionists and Increasing Reliance on *Sunnah* of Prophet

The Traditionist movement may be "the most important single event in the history of Islamic law in the second century of the *Hijra*" (i.e., 722-822 A.D.).<sup>63</sup> The reason for emphasis on the event is simple: the movement led to increasing dependence on the *Sunnah* of the Prophet as an authoritative source of Islamic Law, and correspondingly less reliance on independent reasoning (*ijtihād*).

Traditionists were found throughout the Umayyad Caliphate, particularly wherever one of the Ancient Schools was located. But they opposed the Ancient Schools of Law on a crucial point: the *Sunnah* of the Prophet. The Traditionists were not content with resting legal doctrine on a claim to a living tradition of the Prophet, or to a teaching of one of the Companions of the Prophet. Rather, they insisted on a detailed statement — a "tradition" — by a witness of the sayings and deeds of the Prophet.

Likewise, they insisted on proof of an unbroken and unadulterated chain from that witness to the present day through which the *Sunnah* was transmitted orally by reliable people. In Arabic, that chain of transmission of a tradition, or more precisely the transmitters, is called "*isnād*."

As Professor Schacht points out, the Traditionists:

disliked all human reasoning and personal opinion which had become an integral part of the living tradition of the ancient schools and which had, indeed, been a constituent element of Islamic legal thought from its very beginnings. . . . Their general tendency was towards strictness and rigorism. . . . They were occasionally interested in purely legal issues, . . . but they were mainly concerned with subordinating the legal subject-matter to religious and moral principles, expressed in traditions from the Prophet.<sup>64</sup>

In brief, the Traditionists demanded adherence to the actual, proven words and actions of the Prophet as a basis for Islamic Law.

While their motives may have been pure, Professor Schacht doubts the authenticity (in terms of tracing a clear line back to the Prophet) of most traditions they

<sup>62</sup> See SCHACHT, *supra*, at 33.

<sup>63</sup> See SCHACHT, *supra*, at 34.

<sup>64</sup> SCHACHT, *supra*, at 34-35.



advocated.<sup>65</sup> In any event, while some traditions gained acceptance as authoritative, there was strong resistance from the Ancient Schools of Law. Hence, many of the traditions did not prevail against the interpretations rendered by the *ulema* from these Schools.

One example of unsuccessful traditions circulated by the Traditionists is when they urged that the Prophet prohibit any commercial practice that would cause an artificial rise or fall in prices, such as outbidding.<sup>66</sup> On that basis, the Traditionists said any contract made that involved such practices was invalid.

The Traditionists lost most of the battles, but not the war. Even though most of the traditions they held to be authentically those of the Prophet did not prevail against the opposition of the Ancient Schools, does not mean they lost all. Eventually, their thesis came to be accepted: once a tradition was proven to be that of the Prophet — authentic part of the *Sunnah* of the Prophet — then it could not be rejected.

At best, the *ulema* could try to circumscribe the impact of the tradition of the Prophet, and try to render it more consistent with the living tradition they advocated, through two devices. First, they could add their interpretation to that tradition. Second, they could invoke other traditions, infusing them with their own perspectives.

But, over time, the *Sunnah* of the Prophet became accepted as a source of law second in importance only to the Qur'an itself. Thus, the Traditionists won the "war" in the sense of shifting the debate to the ground of authentic tradition.

The element of personal discretion and individual opinion in Islamic law was prior to the growth of traditions, particularly the traditions from the Prophet, but because of the success of the main thesis of the Traditionists, most of what had originally been discretionary decisions and the result of individual reasoning by the scholars was put into the mouth of the Prophet.<sup>67</sup>

In brief, the *Sunnah* of the Prophet was a later development — it did not pre-date the use of reasoning. It took time for the tradition of the Prophet to be accepted by the *ulema* as an authoritative source of Islamic Law.

That this acceptance was gradual must be stressed. In retrospect, it may seem obvious the *Sunnah* should be important, and all Muslims after the death of the Prophet in 632 onwards accepted it as such. However, as the intellectual struggles between the Traditionists and the *ulema* of the Ancient Schools show, that was not the case. The authoritativeness of the *Sunnah* was not taken for granted from the earliest days of Islam.

<sup>65</sup> See SCHACHT, *supra*, at 35.

<sup>66</sup> See SCHACHT, *supra*, at 35.

<sup>67</sup> SCHACHT, *supra*, at 40.

## [E] Increasing "Islamicization" of Legal Rules

In part because of the efforts of the Traditionists to find authority for rules in the sayings and deeds of the Prophet, during the *Umayyad* Caliphate the field of law became increasingly religious in character. This process, called "Islamicization," is meant to convey the idea that legal reasoning, on the one hand, and considerations of religious and ethical points, on the other hand, became less and less distinct.<sup>68</sup> In brief, the subject matter of law was seen through an Islamic lens, and legal issues were handled in a more pronounced Islamic manner.

## [F] Inspector of Market (*Amil al-Souq*)

What about the old Roman magistrates, who were part of the Byzantine Empire? Here is a final illustration of the legal importance of the *Umayyad* Caliphate. In the lands of Byzantium that were over-run by the Muslims, the magistrates fled. But, while Muslims in the *Umayyad* era did not assimilate the Roman magistrates, they did pick up on one office: the inspector of the market, who in Arabic is called "*amil al-souq*" or "*sahib al-souq*," (During the *Abbasid* Caliphate, the equivalent title "*muhtasib*" was used.) The inspector of the market held limited civil and criminal powers.

## § 5.07 SHARĀ'Ā NOT YET A COMPLETE SYSTEM

The above illustrations should not suggest the *Sharī'a* became a complete system, in theory or in practice, during the *Umayyad* Caliphate. To the contrary, Islamic Law still was in its formative period in 750 A.D. when the Caliphate collapsed. In fact, in the context of the decisions of *qādis*, "[t]he scene was set for a more thorough process of Islamicizing the existing customary law."<sup>69</sup> But, some of the tendencies that animated in Islamic legal thinking since the time of the Prophet crystallized, and were consummated, during this Caliphate.

<sup>68</sup> See SCHACHT, *supra*, at 41.

<sup>69</sup> SCHACHT, *supra*, at 26.

## Chapter 6

### ABBASID CALIPHATE (750–1258 A.D.)

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They that stand high have many blasts to shake them,  
And if they fall, they dash themselves to pieces.

William Shakespeare (1564–1616),  
*Richard III* (1592), Act I, Scene 3 (Queen Margaret)

#### SYNOPSIS

- § 6.01 ORIGINS
- § 6.02 CONSOLIDATION AND DEVELOPMENT
- § 6.03 FLOWERING OF ISLAMIC CIVILIZATION
- § 6.04 ADMIXTURE OF LAW AND POLITICS
- § 6.05 DECAY AND DOWNFALL
- § 6.06 CALIPHATE IN RETROSPECT
- § 6.07 SALIENT DEVELOPMENTS IN *SHARĀʿA*
  - [A] Appointment of *Qādīs* Bound by *Sharīʿa*
  - [B] Development of Inspector of Market (*Muhtasib*)
  - [C] No Fusion of Sacred and Profane
  - [D] Split between *Sharīʿa* and *Siyāsa*
  - [E] Failed Attempt at Codification

#### § 6.01 ORIGINS

The *Abbasid* Caliphate was the third of the Islamic Caliphates, coming after the Four Rightly Guided Caliphs and immediately following the *Umayyad* Caliphate. It was ruled by the *Abbasid* dynasty of caliphs, who established their capital in the new city of Baghdad after overthrowing the *Umayyads* in 750 A.D. Under *Abbasid* rule, the Islamic community enjoyed prodigious economic prosperity and a remarkable flourishing of intellectual and cultural advancement. Though their actual power was severely curtailed after about 950, *Abbasid* caliphs reigned until 1258, when the Mongol commander Hulagu Khan conquered Baghdad.

The *Umayyads* were overthrown by an opposition movement led by Abu Muslim, a freed *Abbasid* slave.<sup>1</sup> The *Abbasids* distinguished themselves from the *Umayyads* by attacking the *Umayyads*' dubious moral character and ineffective methods of

<sup>1</sup> JOHN ESPOSITO, *ISLAM: THE STRAIGHT PATH* at 52 (New York, New York: Oxford University Press (1991)). [Hereinafter, ESPOSITO.]



political administration. The movement was fueled by support from various Islamic factions, including, notably, non-Arab Muslims (especially Persians) and *Shī'ites*. The revolt gradually gained the support of most Arabs as well.

From the early stages of their movement, the *Abbasids* enjoyed the overwhelming backing of non-Arab Muslims, known as the "*ma'wali*." The *Abbasids* used the second-class status of the *ma'wali* in the *Umayyad* Caliphate to foster unease in the kingdom.<sup>2</sup> Frustrated by their marginalization and inability to rise in the kinship-based Arab society, the *ma'wali* formed an especially important bloc in the *Abbasids* revolution. Persians, in particular, were a key component of the revolt, as they were eager to form a society centered not on the old Arab aristocracy but on a capable, functioning bureaucracy in which they could participate.

*Shī'ites* also were early supporters of the opposition movement, persuaded and encouraged by the familial connection to the Prophet touted by the *Abbasids*. Indeed, the *Abbasids* based their claim to rule the Islamic Caliphate on their descent from Abbas ibn Abd al-Muttalib, one of the youngest uncles of the Prophet Muhammad. These groups and others, motivated by their frustration with the *status quo*, hope for a more pure Islamic society, and individual hunger for political or financial gain, effectively coalesced and brought down the once-mighty *Umayyad* Caliphate. The fissures in the *Abbasids* coalition, however, would later contribute to the gradual weakening of their power.

The seizure of power by the *Abbasids*, and continued dynastic reign, were legitimized on Islam. Indeed, discontent with the *Umayyads* was so great, and the *Abbasids* coalition so diverse, the *Abbasids* seem to have come to power "under the banner of Islam."<sup>3</sup> However, the *Abbasids* did not take their Islamic mandate for granted. Rather, they took great care publicly to align their government with the religion: fostering the development of Islamic scholarship, building mosques, and becoming great patrons of the emerging religious class, the *ulema*.<sup>4</sup> Much more systematically than the *Umayyads*, the *Abbasids* sought to justify their rule in Islamic terms.

As evidence, the *Abbasid* Caliphs claimed to rule by Divine authority as members of the family of the Prophet.<sup>5</sup> They saw themselves as recipients of a Divine mandate, changing the title of the Caliph from "Successor or Deputy of the Prophet" to "Deputy of God," or, the Persian-inspired title, "Shadow of God on Earth."<sup>6</sup> This exalted, heavenly-like status was reinforced by the exquisite palace of the Caliph, a plethora of devoted attendants, and a formal court etiquette. All subjects were required to bow before the Caliph and kiss the ground, an unmistakable signal of the caliph's absolute power. The *Abbasid* Caliphs clearly held

<sup>2</sup> IRA LAPIDUS, *A HISTORY OF ISLAMIC SOCIETIES* at 54 (Cambridge University Press, 2nd ed. (2002)). [Hereinafter, LAPIDUS.]

<sup>3</sup> See LAPIDUS, *supra*, at 53.

<sup>4</sup> See LAPIDUS, *supra*, at 53.

<sup>5</sup> ALBERT HOURANI, *A HISTORY OF THE ARAB PEOPLES* at 36 (New York, New York: Warner Books (1991)). [Hereinafter, HOURANI.]

<sup>6</sup> See LAPIDUS, *supra*, at 53.

a deep belief in the God-given authority of kings.<sup>7</sup>

## § 6.02 CONSOLIDATION AND DEVELOPMENT

Table 6-1:  
*Abbasid Caliphs*<sup>a</sup>

Caliph	Years Served (A.D.)	Major Developments During Reign
Abū'l Abbas As-Saffah	750-754	<i>Abbasids</i> consolidate power, establish capital at Hashimiyah.
Al Mansūr	754-775	Baghdad built as new capital. <i>Abbasids</i> use massive violence to quash rivals.
Al Mahdi	775-785	Renewed "Holy War" against Byzantium. Arab-Islamic Empire prospers.
Al Hadi	785-786	Morocco lost as <i>Shī'ites</i> flee and found the <i>Idrisid</i> Dynasty.
Harūn Al Rashīd	786-809	Arab-Islamic Empire reaches height of its political and economic glory. Most famous <i>Abbasid</i> Caliph.
Al Amin	809-813	Army suffers major defeat at Rayy. Baghdad seized by rebels.
Al Ma'mun	813-833	Islamic Golden Age, with renaissance of sciences and arts.
Al Mu'tasim	833-842	Capital moved to Sāmarrā, Iraq. Arab-Islamic Empire becomes more militant.
Al Wathiq	842-847	Empire begins to dwindle. Rise of Turkish Praetorian guards.
Al Mutawakkil	847-861	Military defeated by Greeks. Great Mosque at Sāmarrā, Iraq built.
Al Muntasir	861-862	None.
Al Musta'in	862-866	None.
Al Mu'tazz	866-869	None.
Al Muhtadi	869-870	None.
Al Mu'tamid	870-892	Decay halted. Army reorganized, government restructured.
Al Mu'tadid	892-902	Baghdad restored as capital. Egypt re-conquered.

<sup>7</sup> ROBERT PAYNE, *THE HISTORY OF ISLAM*, at 153 (New York, New York: Dorset Press (1959)). [Hereinafter, PAYNE.]

<sup>a</sup> Caliphs marked with an asterisk (\*) ruled over a fragmented Empire and had little, if any, actual power. Most of them were mere figureheads, used by whoever held power as a symbol of legitimate Islamic government.

Caliph	Years Served (A.D.)	Major Developments During Reign
Al Muktafi	902-908	Arab-Islamic Empire regains glory. Byzantines defeated, economy prospers.
Al Muqtadir	908-932	Last <i>Abbasid</i> Caliph to have any real power. Arab-Islamic Empire declines again.
Al Qahir	932-934	Significance of Caliphs diminishes. Arab-Islamic Empire all but dead.
Al Radi	934-940	Rise of Turkish guards, on whom the Caliphs depend greatly.
Al Muttaqi	940-944	None.
Al Mustakfi	944-946	None.
*Al Muti	946-974	<i>Buwayhids</i> seize Baghdad, Turkish guards ousted.
*Al Ta'i	974-991	<i>Buwayhids</i> chart a new course, creating libraries and hospitals.
*Al Qadir	991-1031	Arab-Islamic Empire prospers again. New literature flourishes.
*Al Qa'im	1031-1075	Turmoil and struggle for power. Rise of <i>Seljuk</i> Turkish Dynasty.
*Al Muqtadi	1075-1094	Sultans acknowledge the spiritual jurisdiction of <i>Abbasids</i> .
*Al Mustazhir	1094-1118	Jerusalem conquered in First Crusade.
*Al Mustarshid	1118-1135	<i>Abbasids</i> try unsuccessfully to reassert political power.
*Al Rashid	1135-1136	Another failed attempt at independence from the <i>Seljuk</i> Turks.
*Al Muqtafi	1136-1160	Crusades rage, though <i>Seljuk</i> Turks not enthusiastic for war.
*Al Mustanjid	1160-1170	<i>Fatimid</i> Dynasty in Egypt ( <i>Shi'ite</i> ) extinguished, <i>Sunni</i> Islam again prevails.
*Al Mustadi	1170-1180	None.
*Al Nasir	1180-1225	<i>Seljuk</i> Turkish Sultanate erodes, power vacuum in Iraq
*Ali az-Zahir	1225-1226	None.
*Al Mustansir	1226-1242	Founding of the Al Mustansiriyya Madrasa.
*Al Musta'sim	1242-1258	Baghdad sacked by Mongols. <i>Abbasid</i> Caliphate finally dies.

The first major decision by the *Abbasids* was to move the capital of the Arab-Islamic Empire from Damascus to the newly-created city of Baghdad, known

in Arabic as the City of Peace.<sup>9</sup> This move, in 762 A.D., reflected an imperial transition to a Persian-influenced culture. Indeed, the power of the *Abbasids* lay less in the eastern Mediterranean countries than in southern Iraq, Iran, and central Asia. This geographical transition was significant. Persian culture differed from Arab culture. The Persians were a settled people, were influenced greatly by the Far East, and admired extravagance, glamour, and majesty more than their *Umayyad* predecessors.<sup>10</sup>

In government, the *Abbasids* took from, but greatly refined, *Umayyad* practice. Though they keenly understood the appreciation of the *Umayyads* for centralized authority, the *Abbasids* delegated various administrative powers. The administration was divided into a number of *diwans* (offices): a bureau for the affairs of the army, a chancery to draw up documents and handle official correspondence, a treasury to supervise and keep records of revenue and expenditure.<sup>11</sup> At its peak around the mid-ninth century, the *Abbasid* administration was staffed by thousands of clerks and secretaries who served as the bureaucratic machinery of the empire. The *Abbasids* established a new position called "*vizier*," whose main purpose was to serve as an adviser to the Caliph. A substantial amount of authority was delegated to local emirs, a development which gradually led to the replacement of the Arab aristocracy with a Persian bureaucracy.

The most pressing difficulty facing the *Abbasid* leadership was overcoming the political challenges created by the far-flung nature of the Arab-Islamic Empire.<sup>12</sup> These rulers, governing through a vast hierarchy of widely dispersed officials, had to ensure those officials did not become too strong or abuse their power. An intelligence system was thus created to keep the caliph informed of happenings in the outlying provinces.<sup>13</sup> But, given the limited ability of leaders in Baghdad to communicate directly with those in the provinces, implementing administrative decrees was an inherently complex task. Perhaps as a consequence, military operations during the early period were minimal. Rather than pursuing conquest and expansion, the leaders of the Caliphate focused their energies on internal matters, seeking to establish order and to remind local governors not to operate independently of central authority.

Despite their appetite for splendor, *Abbasid* caliphs were capable of being as merciless and autocratic as their *Umayyad* predecessors. As evidence, Abū al Abbas (reigned 750-754), the first *Abbasid* caliph, proudly took the title "the blood shedder" (*al-Saffah*) — a designation perhaps earned by his insistence on having the royal executioner by his side at all times.<sup>14</sup> In a strategic move, the *Abbasids* replaced the Syrian-dominated military aristocracy with a salaried army and corresponding bureaucracy, comprised mainly of Persians. Though the *Abbasids*

<sup>9</sup> See ESPPOSITO, *supra*, at 52.

<sup>10</sup> See PAYNE, *supra*, at 153.

<sup>11</sup> See HOURANI, *supra*, at 34-35.

<sup>12</sup> RALPH BRAUER, BOUNDARIES AND FRONTIERS IN MEDIEVAL MUSLIM GEOGRAPHY, at 7-8 (1995). [Hereinafter BRAUER.]

<sup>13</sup> See HOURANI, *supra*, at 35 (1991).

<sup>14</sup> See PAYNE, *supra*, at 154.



explained this change through reference to the principles of Islamic egalitarianism, it was more likely the result of their goal of instituting royal favor and instilling fear in would-be detractors.<sup>15</sup>

Violence was ubiquitous during the early years of the Caliphate, employed whenever necessary to consolidate the authority of the *Abbasids*. Abu Muslim, who almost singlehandedly brought the *Abbasids* to power, was seen as a rival and promptly killed.<sup>16</sup> Even the *Shīʿite* supporters of the *Abbasids* were viewed as intolerable threats. Though the *Shīʿites* had played an important role in the war of the *Abbasids* against the *Umayyads*, they became disaffected once the *Abbasids* embraced *Sunni* Islam and disavowed any support for *Shīʿi* beliefs.<sup>17</sup> Careful to avoid a boiling conflict, early *Abbasid* Caliphs brutally crushed the *Shīʿites*.<sup>18</sup>

### § 6.03 FLOWERING OF ISLAMIC CIVILIZATION

The *Abbasids* proudly claim they introduced a “*dawlah*,” or new era. The first two centuries of the Caliphate were marked by unparalleled splendor and prosperity. In contrast to the military-driven successes of the *Umayyads*, *Abbasid* accomplishments were based not on conquest, but instead on trade, commerce, industry, and agriculture.<sup>19</sup> All this was made possible by the absorption of such a large area into a single political empire — a development which allowed for linkage of the two great sea basins of the civilized world, the Mediterranean and the Indian Ocean. The movement of armies, merchants, scholars, and pilgrims became easier, as did ideas, styles, and beliefs.<sup>20</sup>

Moreover, a vast sphere of interaction was created, making it possible for there to grow functioning governments, bustling cities, international trade, and even an impressive agricultural surplus. An internationally recognized monetary system developed, using the *Abbasid dinar* as the primary instrument of exchange. Economic relations demanded a shared system of behavior, which became possible as yet more of the populations ruled by Muslims converted to Islam. The trends were thus mutually reinforcing: as Islam grew, collective prosperity increased; as communities and regions prospered, Islam became further entrenched throughout the Arab-Islamic Empire.

The seemingly infinite wealth and resources of the *Abbasid* Caliphs enabled them to become great patrons of art, culture, and the sciences. Influenced by the purported *hadith*, “the ink of a scholar is more holy than the blood of a martyr,” *Abbasid* leaders stressed the value of knowledge and actively championed intellec-

tual pursuits. What can rightly be called the Islamic Renaissance began with Caliph Al Mamun around 819 A.D. Under Al Mamun, for the first time in Islamic history, a ruler “identified himself with the cultural aspirations of his people and celebrated the native genius of [those] he ruled.”<sup>21</sup> Al Mamun established a “House of Wisdom” (*Bayt Al-Hikmah*) in Baghdad, where both Muslim and non-Muslim scholars gathered and translated much of the world’s knowledge into Arabic. Thus, the most important works of literature, philosophy, and the sciences from other cultures were made accessible through a collaborative effort in Baghdad between Muslims, Christians, Jews, and others. This period of translation and assimilation laid the groundwork for a truly incredible era in which the Muslim world became the unrivaled intellectual center for science, philosophy, and literature.

During the *Abbasid* years, Muslim scientists viewed the physical universe within the context of their Islamic worldview.<sup>22</sup> The scientific atmosphere also fostered a great synthesis: informed by indigenous and foreign sources (Arab, Persian, Hellenistic, and Indian) and transformed by scholars throughout Islamic world.<sup>23</sup> Scientific advancements in the first two hundred centuries of the *Abbasid* caliphate include: algebra, pioneered by Persian scientist Muhammad ibn Musa Al Khwarizmi (c. 780-850 A.D.);<sup>24</sup> the scientific method (the use of experiments to distinguish between competing theories set within an empirical orientation), developed by Ibn Al Haytham (c. 965-1039 A.D.) in his *Book of Optics*;<sup>25</sup> astronomy as advanced by Al Battani (c. 858-929 A.D.), who improved the accuracy of the measurement of the precession of the axis of the earth;<sup>26</sup> and Muslim chemists who played an important role in the foundation of modern chemistry.

Medicine in medieval Islam made notable advancements, including discoveries in the understanding of anatomy and various diseases, such as measles and smallpox. The Persian scientist Ibn Sīnā (c. 980-1037 A.D.), known in the West as Avicenna, wrote two encyclopedias, *The Canon of Medicine* and *The Book of Healing*, which later earned him the title “father of modern medicine.”<sup>27</sup> His work and that of his counterparts had directly influenced the research of European scientists during the Renaissance.

Islamic philosophy flourished during the *Abbasid* Caliphate, the result of a successful transplant from Greece to Muslim lands. Muslim philosophers appropriated Hellenistic ideas of Plato (428/427-348/347 B.C.), Aristotle (384-322 B.C.), Plotinus (204-270 A.D.), and others, and extended those teachings into their Islamic context and worldview.<sup>28</sup> Islamic philosophy emphasized the unity of God and

<sup>15</sup> See ESPOSITO, *supra*, at 53.

<sup>16</sup> See ESPOSITO, *supra*, at 155-156.

<sup>17</sup> See ESPOSITO, *supra*, at 52-53.

<sup>18</sup> Many *Shīʿite* survivors subsequently fled the empire for the Maghreb (North Africa), eventually establishing the *Idrisid* Kingdom. See CHARLES ANDRÉ JULIEN AND ROGER LE TOURNEAU, *HISTORY OF NORTH AFRICA: TUNISIA, ALGERIA, MOROCCO* (1970). For a brief review of other opposition movements and the separate political units created therefrom, see HOURANI, *supra*, at 38-43.

<sup>19</sup> See ESPOSITO, *supra*, at 53.

<sup>20</sup> See HOURANI, *supra*, at 43.

<sup>21</sup> See PAYNE, *supra*, at 173.

<sup>22</sup> See PAYNE, *supra*, at 56.

<sup>23</sup> See PAYNE, *supra*, at 56.

<sup>24</sup> FRANK SWETZ, *LEARNING ACTIVITIES FROM THE HISTORY OF MATHEMATICS*, at 26 (1994).

<sup>25</sup> *MEDIEVAL SCIENCE, TECHNOLOGY, AND MEDICINE: AN ENCYCLOPEDIA 237-240* (Abingdon, England: Routledge, 2005, Thomas Glick, Steven John Livesey & Faith Wallis eds.). (Hereinafter, *MEDIEVAL SCIENCE*.)

<sup>26</sup> See *MEDIEVAL SCIENCE*, *supra*, at 79-80.

<sup>27</sup> See *MEDIEVAL SCIENCE*, *supra*, at 256-258.

<sup>28</sup> See ESPOSITO, *supra*, at 55.

sought to explain how God can be "one" while also possessing the attributes of omnipotence and omnipresence.<sup>29</sup> Muslim philosophers studied the knotty relation between Divine creation articulated in the Qur'an, and the Aristotelian teaching of the eternity of the world.<sup>30</sup> Great Islamic philosophers of the *Abbasid* era included Al Farabi (870-950 A.D.), who came to be known as "the second teacher or master" (the first being Aristotle); Ibn Sinā, remembered as "the great commentator" on Aristotle; and Al Jahiz (781-868 A.D.), a pioneer in evolutionary thought.<sup>31</sup>

Critically, the Islamic philosophical movement was important not only in its time, but also contributed to the transmission of Greek philosophy to Medieval Europe. Indeed, the West would later retrieve part of its lost heritage when European scholars, visiting centers of Islamic learning, re-translated the Greek philosophers using the writings of the Muslim disciples of those philosophers.<sup>32</sup> Moreover, Islamic philosophy broadened the discussion of essence and existence, an issue of central significance to Saint Thomas Aquinas (1225-1274 A.D.) and Duns Scotus (1265-1308 A.D.). The emphasis of Muslim philosophers on the necessity of divine existence had important implications for later arguments by Aquinas and Scotus about the existence of God.<sup>33</sup>

A literary revolution also took place during the *Abbasid* years, facilitated in part by the increasing prominence of the Arabic language. As Islam continued to grow, accepting the Qur'an as the Word of God implied an understanding of the language in which it was written. Thus, Arabic became the medium of expression not only on the Arabian Peninsula, but also in those regions of the empire whose inhabitants converted to Islam.<sup>34</sup> Together with Arab writers, a diverse group of authors drew inspiration from the way their countries were impacted by the coming of Islam. Those authors discussed the multiplicity of cultures and the changing viewpoints on morality and behavior, seeking to express their ideas in an attractive, Islamic literary form.

The emergence of a large and literate Arabic-speaking population spurred a plethora of written works, ranging from romantic poetry to moralistic fables to spectacular fantasy tales. Underlying these works was commentary on friendship and love, envy and pride, falsity and sincerity.<sup>35</sup> Famous writers of the era include the artistic poet Ibn Al Muqaffa (died c. 756 A.D.), an *Abbasid* official of Iranian origin; the social commentator Al Jahiz (781-868 A.D.), an African Muslim of slave origin; the entertaining novelists Al Hamadhani (967-1007 A.D.) and Al Hariri (1054-1122 A.D.); and documenters of history such as Al Baladhuri (died 892 A.D.), Al Tabari (838-923 A.D.), and Al Mas'udi (c. 896-956 A.D.).<sup>36</sup> The most famous fiction

from this era is *The Book of One Thousand and One Nights (Arabian Nights)*, an epic conglomeration of folk stories with Middle Eastern, North African, and Indian elements.<sup>37</sup> The book took form in the 10th century and was concluded in the 14th century.<sup>38</sup>

## § 6.04 ADMIXTURE OF LAW AND POLITICS

Developing a cohesive body of Islamic Law, *Shari'a*, and a corresponding judicial system, was the greatest administrative accomplishment of the *Abbasids*, and arguably their most profound contribution to Islam. The attention given to law during the *Abbasid* Caliphate was in part the result of the failure of the *Umayyads* to implement an effective Islam legal system. By the 8th century A.D., numerous voices were demanding Islamic Law be defined more clearly and uniformly. The four great early Islamic legal scholars, Abū Hanifa (699-787), Mālik ibn Anas (710-795), Muhammad al Shāfi'i (768-820), and Ahmed ibn Hanbal (780-855), who eventually would be known as the founders of the *Hanafi*, *Māliki*, *Shāfi'i*, and *Hanbali* Schools of Law, respectively, systematically reviewed *Umayyad* law and customs in light of Qur'anic teachings.<sup>39</sup> They concluded dramatic change was necessary.

Having used Islam as justification for their revolution, the *Abbasid* Caliphs became committed patrons of Islamic learning. They cultivated the establishment of the *ulema*, whose essential objective was to discover, interpret, and apply the Will of God to everyday life.<sup>40</sup> The bulk of this work took place between the years 750 and 900, and the resulting consensus produced the binding legal rules that have governed much of Muslim life since.<sup>41</sup> Under the *Abbasids*, the *ulema* were the jurists, theologians, and educators of society; the ultimate interpreters and protectors of Islamic Law.<sup>42</sup> The judge (*qādi*) was to administer the law as it was articulated by the jurists — a practice which laid the foundation for the Islamic court system. Thus, law embodied not the product of government decrees, or even judges' decisions *per se*, but rather the work of scholars who painstakingly developed a comprehensive code based on the Qur'an.<sup>43</sup>

In a break from the past, the functions of judges were separated from those of the governors and Caliphs. Judges held no political or financial duties; they were to decide conflicts in light of the emerging system of Islamic Law.<sup>44</sup> Thereby, the

<sup>29</sup> JOHN SHAND, *FUNDAMENTALS OF PHILOSOPHY* 181 (Abingdon, England: Routledge, 2003). [Hereinafter, SHAND.]

<sup>30</sup> See SHAND, *supra*, at 181.

<sup>31</sup> See SHAND, *supra*, at 180-181.

<sup>32</sup> See ESPOSITO, *supra*, at 55.

<sup>33</sup> See SHAND, *supra*, at 181.

<sup>34</sup> See HOURANI, *supra*, at 49.

<sup>35</sup> See HOURANI, *supra*, at 50-52.

<sup>36</sup> See HOURANI, *supra*, at 51-53.

<sup>37</sup> There have been hundreds of "Arabian Nights" books published in the West, many of which contain tales that did not actually appear in *The Book of One Thousand and One Nights*. Various characters from this epic have become imbued in Western culture, including Disney movies, such as *Aladdin*, *Ali Baba*, and *Sinbad*.

<sup>38</sup> EVA SALLIS, *SHERAZADE THROUGH THE LOOKING GLASS: THE METAMORPHOSES OF THE THOUSAND AND ONE NIGHTS* 2-3 (Abingdon, England: Routledge, 1999).

<sup>39</sup> See ESPOSITO, *supra*, at 76-77.

<sup>40</sup> See ESPOSITO, *supra*, at 77.

<sup>41</sup> See ESPOSITO, *supra*, at 77.

<sup>42</sup> See ESPOSITO, *supra*, at 54.

<sup>43</sup> See ESPOSITO, *supra*, at 54.

<sup>44</sup> See HOURANI, *supra*, at 36.



*Abbasids* imparted to the office of judge enhanced importance and administrative independence.

Despite the collective goal of developing a truly Islamic jurisprudence, considerable differences of opinion did arise and amplify, especially during the early years of the *Abbasid* Caliphate. These differences created divisions between the law schools and prevented the Caliphate from effectuating a truly unified legal system. Divergences were not surprising. After all, the Qur'an is not a legal treatise; only about 80 of its 6,236 verses (*ayat*) discuss law in the strict sense of the term (crime and punishment, family laws, contracts, etc.).<sup>45</sup> As a result, the doctrines of the Four *Sunni* Schools of Law depended in part on the interpretations and opinions of jurists who were, naturally, influenced by the customs of their respective environment.

A comparison of Medina and Kufa provides an illustrative example of this divergence of jurisprudence. Law in both cities stemmed from an interpretation of the Qur'an, viewed in light of the precedents of the Prophet and the Four Rightly Guided Caliphs. Where the Qur'an was silent, however, jurists in each city applied local practice in their elaboration of the law. Thus, in the Arab-dominated, patri-lineal system of Medina, jurists emphasized the Qur'an and customary tribal law, considered to be the Prophetically informed practice and consensus of the Medinan community.<sup>46</sup> An advocate of this legal perspective was *Imām* Mālik ibn Annas, whose positions were articulated in his treatise *Muwatta*.

In contrast, scholars in the younger, more diverse city of Kufa relied less on traditions and more on jurist opinion and local law.<sup>47</sup> This perspective was articulated by *Imām* Abū Hanīfa and Al Shaybani (749-805 A.D.). A practical example of the distinction between the two perspectives is found in the laws of marriage of the two cities. In Kufa, a husband was deemed the equal of his wife's family with regard to lineage and financial status, while no such law existed in the more conservative and homogenous city of Medina.<sup>48</sup>

By the end of the first 100 years of the *Abbasids* in power, significant differences between legal doctrines continued to exist. Two opposing groups emerged: those who sought to establish uniformity by limiting the use of reason and relying on the traditions of the Prophet, and those who asserted their right to reason for themselves in light of considerations such as equity or the public interest.<sup>49</sup> History is unsure where the *Abbasid* leaders stood on these issues, though they made an effort to re-consolidate their authority over the *ulema*. Indeed, by the 9th century, scholars in both camps began to feel they, not the caliphs, should be the final arbiters in matters of law.<sup>50</sup>

<sup>45</sup> N.J. Coulson, *A HISTORY OF ISLAMIC LAW* 12 (Edinburgh, Scotland: Edinburgh University Press, 1964).

<sup>46</sup> See ESPOSITO, *supra*, at 77-78.

<sup>47</sup> See ESPOSITO, *supra*, at 78.

<sup>48</sup> See ESPOSITO, *supra*, at 78.

<sup>49</sup> See ESPOSITO, *supra*, at 78.

<sup>50</sup> Fred M. Donner, *Muhammad and the Caliphate*, in *THE OXFORD HISTORY OF ISLAM* 27 (New York, New York: Oxford University Press, 1999, John Esposito, ed.). [Hereinafter, Donner.]

Sensing a threat, the *Abbasids* used a *minha* (inquisition) between 833 and 848 to play the two camps off each other.<sup>51</sup> The repercussions of the episode, however, made *Imām* Ahmed ibn Hanbal and other scholars heroes, thereby strengthening the long-term vitality of the *ulema*. When *Imām* Muhammad ibn Idris Al Shāfi'i, by then regarded as the "father of Islamic jurisprudence," thereafter decisively fixed a methodology for all *Shari'a* schools, he did so largely independent of the *Abbasid* political masters.

## § 6.05 DECAY AND DOWNFALL

The "Golden Age of Islamic Civilization" paralleled the increasing fragmentation of the universal Islamic Caliphate. Thus, while the empire experienced an unprecedented intellectual and cultural revolution brought about by the *Abbasids*, those same leaders were gradually losing their ability to rule. Governing an empire extending from the Atlantic to Central Asia was simply impossible, even for the *Abbasids*. Moreover, from the beginning of their rule they faced an inescapable problem: how to transform limited power derived from a tenuous coalition of divergent interests into something stable and enduring. Over time, this challenge proved insurmountable.

Political unity deteriorated rapidly from about 860 to 945 A.D., as regional differences precipitated a series of secessionist movements in Morocco, Tunisia, Syria, and Iran.<sup>52</sup> While regional rulers in the provinces continued to give nominal allegiance to the caliph, they exercised actual rule over their territories and established their own hereditary dynasties.<sup>53</sup> Religious differences exacerbated the problems of the *Abbasids*. *Khārijites* and *Shi'ites* staged revolts and asserted independence from the *Sunni* political authority. Adding to the *Abbasids'* difficulties was a general shortage of money. It was caused by inefficiency and extravagance in the bureaucracy, loss of tax revenues due to the rise of independent provinces, and a severe decline in the agrarian productiveness of Iraq.<sup>54</sup> As a result, the once powerful *Abbasid* Caliphate began to decline.

Seeking to protect themselves from a major revolt, in the 9th century, the *Abbasids* created an army loyal only to themselves. Drawn mainly from Turkish slaves known as *Mamluks*, the force was critical in delaying the further breakdown of the Empire. But, this mysterious army, together with the decision of Caliph Al Mutasim to transfer temporarily the capital from Baghdad to Sāmarrā, divided the Caliph from the people he claimed to rule.<sup>55</sup> The power of the *Mamluks* grew, and eventually the *Abbasid* Caliphs were at the mercy of their increasingly corrupt Turkish protectors.

The extent of the disintegration of the *Abbasid* Caliphate was evident by 945, when the *Buwayhids*, a *Shi'ite* dynasty from Western Persia, invaded Baghdad and

<sup>51</sup> See Donner, *supra*, at 27.

<sup>52</sup> See ESPOSITO, *supra*, at 58.

<sup>53</sup> See ESPOSITO, *supra*, at 58.

<sup>54</sup> See Donner, *supra*, at 30.

<sup>55</sup> See PAYNE, *supra*, at 178-180.

successfully seized power.<sup>56</sup> Although the *Buwayhids* were *Shīʿites*, they did not abolish the *Sunni* orientation of the empire and allowed the caliph to remain on his throne as a fictional leader. As a result, the *Abbasids* continued to reign, but only as a symbol of legitimate government and Muslim unity. They were effectively dispossessed of all authority to rule over the empire.<sup>57</sup> Real power passed to a series of *Buwayhid* and *Turkic* military dynasties and sultanates, or to whichever band of renegades could temporarily take hold of Baghdad.

Despite their loss of political authority, the ongoing “soft” influence of the *Abbasid* caliphs should not be underestimated. Perhaps similar to the British monarchs, the caliphs answered a deeply felt need, symbolizing the traditional virtues of the empire. Their significance was reflected in their role in official ceremonies, where they continued to be accorded half-divine status.<sup>58</sup> As the successors of Muhammad, they were viewed by many believers as the mediators between heaven and earth. Thus, they did not need to be powerful in the political sense; it was enough they existed.<sup>59</sup>

The official end of the *Abbasid* dynasty came in 1258, when the Mongol leader Hulagu Khan (c. 1217–1265), the grandson of Genghis Khan (c. 1162–1227), sacked Baghdad. The Mongol forces arrived on the eastern fringes of the Islamic world in 1219 and violently took control of many regions. They swept through Iran and the Caucasus Mountains in 1256, and thereafter set their sights on the Caliphate, or what remained of it. Upon conquering Baghdad, the Mongols executed the last *Abbasid* caliph, Al Mustasim, along with a good part of the population of the city.<sup>60</sup> In addition, the Mongols ruthlessly destroyed the Grand Library of Baghdad, or *House of Wisdom*, and other libraries in the city. The Grand Library contained innumerable precious books and documents on virtually all subjects, from medicine to philosophy to law to astronomy.

The pitiless destruction of this eminent center of learning (arguably the world's most famous and paramount intellectual center of that time) would have disastrous and long-lasting implications for the Muslim world. With just one battle, the tireless work of thousands of scholars was lost forever. Survivors are said to have claimed the Tigris River ran black for months, full of ink from the vast quantity of books thrown into the river. Perhaps more than anything else, the destruction of the Grand Library of Baghdad symbolized the end of the Golden Age of Islamic Civilization.

## § 6.06 CALIPHATE IN RETROSPECT

The elimination of the *Abbasids* and advent of the Mongols was a major turning point in Islamic history. The nomadic orientation of Mongols dealt a blow to urban life and rural agriculture, neither of which fully recovered their former levels of

prosperity.<sup>61</sup> When recovery did come, it followed new patterns: different cities rose to prominence as formerly important ones languished, and once important regions diminished in significance.<sup>62</sup> The arrival of the Mongols also accelerated the immigration of Turkish-speaking peoples, and Arabic gradually ceded its status as the *lingua franca* of the Near East. Critically, the Mongol invasion also marked the first time, since the establishment of the Caliphate over 600 years earlier, a large part of the Islamic world was ruled by a non-Muslim power. This reality forced many Muslims to doubt their assumption that God's favor for their community was revealed in their abiding political superiority.

However, the demise of the *Abbasids* — and thus the Imperial Caliphate — must not obscure the many notable achievements of the era. The expansion of the Empire established the foundation upon which Islam grew, from Spain in the west to India in the east. The *Abbasids* helped give birth to a sophisticated new civilization in Eurasia, easily the most culturally and intellectually advanced of its time. By the end of the *Abbasid* Caliphate, the Islamic community no longer was defined only by boundaries and hegemony. It was defined by a common set of religious beliefs, a uniquely Islamic culture, and an elaborate system of law and practice. These features were solidified by the end of the Caliphate, so even rule by non-Muslims could not destroy Islamic identity.

## § 6.07 SALIENT DEVELOPMENTS IN *SHARʿA*

### [A] Appointment of *Qāḍīs* Bound by *Sharīʿa*

In its legal policies, the *Abbasid* Caliphate sought centralization, specifically, the appointment of judges and the nature of the laws applied. The *Abbasid* Caliphate sought to make Islamic Law as the only law of the state. It was successful in one important sense: from this Caliphate onward, *qāḍīs* were bound to follow and apply the *Sharīʿa*.

Under the *Abbasid* Caliphate, a *qāḍī* had to be appointed formally by the central government, and be a specialist in Islamic Law.<sup>63</sup> Moreover, the Caliphate created the office of Chief *Qāḍī*, known in Arabic as “*Qāḍī Al Quḍḥat*.” The first Chief *Qāḍī* was Abū Yūsuf. He and his successors served not only as key advisors to the Caliph, but also were responsible, on behalf of the Caliph, for appointments and dismissals of *qāḍīs*. Once appointed, the job of the *qāḍī* was to apply the *Sharīʿa*, with some degree of at least theoretical independence from the central government that selected him.

<sup>56</sup> See Payne, *supra*, at 178–180.

<sup>57</sup> See Payne, *supra*, at 178–180.

<sup>58</sup> See Payne, *supra*, at 183.

<sup>59</sup> See Payne, *supra*, at 183.

<sup>60</sup> See Donner, *supra*, at 59.

<sup>61</sup> See Donner, *supra*, at 59.

<sup>62</sup> See Donner, *supra*, at 59.

<sup>63</sup> JOSEPH SCHACHT, AN INTRODUCTION TO ISLAMIC LAW 50 (Oxford, England: Oxford University Press (Clarendon Paperbacks) 1982). [Hereinafter, SCHACHT.]



### [B] Development of Inspector of Market (*Muhtasib*)

The *Abbasids* appropriated the *Umayyad* office of *amil al-souq*, inspector of the market, who held limited civil and criminal powers. During the *Abbasid* Caliphate, however, this office, now called "*hisba*," evolved and expanded. The label attached to it changed, with the officer holding the position known as a "*muhtasib*." As a testament to its durability, the office of *hisba* still exists in some Muslim countries.

But what does an Inspector of the Market actually do? The *Abbasid* Caliphate looked to the Qur'an for the answer, specifically, *surah* 3 ayat 104, 110, 114, *surah* 7 ayah 157, *surah* 9 ayah 71, 112, *surah* 22 ayah 41, and *surah* 31 ayah 17. Generally, the answer was to "encourage good and discourage evil."<sup>64</sup> In other words, the *muhtasib* was to enforce Islamic morality in the marketplace. He was responsible for cutting off the hand of a thief caught in the act of stealing, and flogging a drunkard or an unchaste man.

### [C] No Fusion of Sacred and Profane

In one respect highly relevant to Islamic Law, the *Abbasids* failed: they never permanently fused the Sacred Law (*Shari'a*) with the political power, as is evident from the decline of the Arab-Islamic Empire in the late 800s A.D. and after. This failure is somewhat ironic, because the Caliphate intended to continue the trend toward the Islamicization of the law as it existed under the *Umayyad* Caliphate. Indeed, in the hope of distinguishing themselves from their *Umayyad* predecessors, the *Abbasids* equated the rule of law on earth with the rule of God on earth.<sup>65</sup>

Hence, the *Abbasids* supported religious law, as worked out by the *ulema*, as the legitimate normative standard for measuring behavior. They did not necessarily exempt themselves from application of the standard, sometimes asking members of the *ulema* for opinions on official matters (though not always following the religiously-based advice).

The failure to combine the sacred and profane happened because many people living under the *Abbasid* Caliphate did not embrace a complete fusion. They knew their rulers were occasionally hypocritical in their translation of religious theory into everyday practice. The Caliphate was essentially despotic, and cloaking despotism with appeals to the rule of God on earth was unsuccessful.<sup>66</sup>

The experience of the *qadis* is a good example. Though they were specialists in the *Shari'a*, and the *Abbasid* Caliphs picked them to apply it, every *qadi* could be dismissed by the Caliph, and many were. Moreover, every *qadi* needed the Caliph to execute a judgment, particularly in the area of Penal Law. In contrast, *qadis* under the *Umayyad* Caliphate, functioning as legal secretaries to the governors of the provinces, operated with both judicial and executive powers.<sup>67</sup> They could

<sup>64</sup> See SCHACHT, *supra*, at 50.

<sup>65</sup> See SCHACHT, *supra*, at 49.

<sup>66</sup> See SCHACHT, *supra*, at 49.

<sup>67</sup> See SCHACHT, *supra*, at 50.

conduct a criminal investigation, and ensure a punishment was administered. Under the *Abbasid* Caliphate, a separation of powers occurred as a result of the centralization of appointments: the *qadi* applied the substantive and procedural law of the *Shari'a*, but the police (known as "*shurta*") were given investigative and penal powers.

The reason for this separation, as much as it benefited the political interests of the *Abbasids*, lay in the *Shari'a* itself. The Islamic Law of Evidence allocates to the *shurta* the power to undertake a criminal investigation. As for civil investigations, the *Abbasids* established "Courts of Complaints," which were distinct from the tribunals of the *qadis* (though apparently with some over-lapping jurisdiction). These Courts may have been derived from the institution of the "investigation of complaints" of *Sassanid* Persia, which inquired into matters like alleged miscarriages of justice, wrongful behavior of a *qadi*, and major property disputes.<sup>68</sup>

Another example of the "bottom line" focus of *Abbasid* Caliphs on their own power is their insertion into the judiciary. Obviously, a Caliph could not legislate in a formal religious sense, given the acknowledgment of the Qur'an and *Sunnah* as sources of law. But, a Caliph could, and did when convenient, obfuscate the line between new legislation and administrative rules designed to implement existing Sacred Law.

Moreover, a Caliph could be considered to be religious scholar and lawyer, able to apply the *Shari'a* just like any *qadi*.<sup>69</sup> As such, a Caliph had at least as much room for discretion in legal decision-making as a *qadi*. His personal opinion had to be bounded by the Qur'an and *Sunnah* of the Prophet. But, on a point where there was neither Revelation nor authentic tradition, there was room for maneuver.

### [D] Split between *Shari'a* and *Siyasa*

As the years of the *Abbasid* Caliphate continued, the difference between the ideal, religiously-based law, the *Shari'a*, and what sometimes occurred in practice became more apparent. That practice, as intimated above, was administrative regulation by Caliphs dressed up as religious scholars.

The Arabic term "*siyasa*" means "policy." *Siyasa* is a broad term encompassing the discretionary power of a sovereign ruler to enforce the *Shari'a*, including through legislation on matters of police powers and criminal justice, and on taxation.<sup>70</sup> The exercise of this discretionary power was widely used by the sultans of the Ottoman Empire, and continues to be an acknowledged part of Islamic Law. Even a *qadi* must follow what a ruler says in exercising the *siyasa* power, so long as the instruction is consistent with the *Shari'a*.

Thus, there are often two layers of law, the *Shari'a* administered by the *qadi*, and the *Siyasa* comprising administrative regulations, or policies, given effect by a supreme political authorities. The *Shari'a* is Divine Law, whereas the *Siyasa* is based on custom and equity, or some modernist legislation (e.g., a code), but often

<sup>68</sup> See SCHACHT, *supra*, at 51.

<sup>69</sup> See SCHACHT, *supra*, at 53.

<sup>70</sup> See SCHACHT, *supra*, at 54.

on political expedience or whim. It functions as a "double administration of justice" prevailing "in practically the whole of the Islamic world."<sup>71</sup>

### [E] Failed Attempt at Codification

Early during the *Abbasid* Caliphate, there was an unsuccessful effort to codify the *Shari'a*. It was sponsored by an Iranian who had converted to Islam, a man named Abd-Allāh Ibn Al Mukaffa', and who was the Secretary of State to the Caliph. Ibn Al Muqaffa' wrote a treatise for one of the *Abbasid* Caliphs, Mansūr.

However, Ibn Al Mukaffa' held an expansive view of the *Sunnah*, not limited to the practices and words of the Prophet. His view also included administrative regulations implemented by the *Umayyad* Caliphate. This interpretation meant a Caliph reserved sole discretionary authority to issue decisions on administrative matters — for example, involving the military or civil administration.

To be sure, this discretion was bounded by the Qur'an and *Sunnah*, with the latter being defined broadly. Where they failed to establish a principle or obligation, the Caliph alone held the discretion to fill the void. In other words, the Caliph had the authority to codify the *Sunnah*.

In his treatise, Ibn Al Muqaffa' pointed out great differences in both the theory of Islamic jurisprudence, and the way in which Islamic law was implemented in practice. The lines of differentiation were drawn by the Ancient Schools of Law, and thus reflected geographic diversity. Ibn Al Muqaffa' criticized the divergences in legal theory and practice, and worried they were widening, in part because of flawed and excessive individual reasoning.

So, Ibn Al Muqaffa' called upon the Caliph to examine critically the state of Islamic jurisprudence and administration, and to seek a uniform codification of the law. The code would include the administrative decisions of the Caliphs, and would be revised periodically by future Caliphs. Significantly, *qādis* would be bound by the code. One would think this message would have been a popular one. After all, the treatise was "a plea . . . for state control over law [which] was in full accord with the tendencies prevailing at the very beginning of the *Abbasid* era."<sup>72</sup>

Yet, Ibn Al Mukaffa' was executed in 756 A.D. as the *Abbasid* Caliphs backed away from the extremist claim of being "cousins of the Prophet." Simultaneously, religious leaders sought to eschew an uncomfortably close relationship with the Caliphate. It was quite enough the Caliphs could appoint and dismiss *qādis*. But, to control the law itself would be too much.

In other words, Ibn Al Mukaffa' sought a tight link between "mosque and state," a popular idea when the *Abbasids* first came to power, but quickly fell into disfavor. Separation between mosque and state became the goal of many in the *ulema*, and the Caliphs, whatever their pre-disposition, had to yield. This significant atmospheric change was to the long-run benefit of the *Shari'a*.

<sup>71</sup> See SCHACHT, *supra*, at 55.

<sup>72</sup> SCHACHT, *supra*, at 56.

Islamic law became more and more removed from practice, but in the long run gained more in power over the minds than it lost in control over the bodies of the Muslims.<sup>73</sup>

That is, the fortunes of Islamic Law did not rise and fall with the Arab-Islamic Empire. A different history is that of Canon Law, the fortunes of which to some degree rose and fell with the political power of the Vatican in Europe. For Muslims, the *Shari'a* was the cornerstone of the rule of law, no matter what form of government existed.

<sup>73</sup> See SCHACHT, *supra*, at 56.



## Chapter 7

### THE CRUSADES (1095–1272 A.D.)

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*Muslims and Christians, precisely because of the burden of our common history so often marked by misunderstanding, must today strive to be known and recognized as worshippers of God faithful to prayer; eager to uphold and live by the Almighty's decrees, merciful and compassionate, consistent in bearing witness to all that is true and good, and ever mindful of the common origin and dignity of all human persons, who remain at the apex of God's creative design for the world and for history.*

Address of His Holiness Pope Benedict XVI, Meeting with Muslim Religious Leaders, Members of the Diplomatic Corps, and Rectors of Universities in Jordan, Mosque Al Hussein bin Talal, Amman, Jordan, 9 May 2009 (emphasis added)

#### SYNOPSIS

§ 7.01 DEFINING "CRUSADES"

§ 7.02 ORIGINS OF CRUSADES

§ 7.03 FIRST CRUSADE

§ 7.04 RISE OF ZENGI AND SECOND CRUSADE

§ 7.05 RISE OF SALADIN, FALL OF JERUSALEM, AND THIRD CRUSADE

§ 7.06 FINAL FIVE CRUSADES

§ 7.07 IMPACTS AND PERCEPTIONS

#### § 7.01 DEFINING "CRUSADES"

The Crusades have come to have far-reaching religious, social, and geo-political impacts. But, in historical fact, what were the "Crusades"? Succinctly put, they were a series of religion-inspired military campaigns waged by Roman Catholic Western Europe against external and internal adversaries. These campaigns occurred between 1095 and 1272 A.D. In the end, they were largely failures, a historical fact that renders most invocations of the term puzzling, if not ominous.

The original and fundamental goal of the Crusades was to recapture Jerusalem and the surrounding Holy Land from Muslim control. Why was, and is, Jerusalem and the Holy Land important to Christians? The Archbishop of Kansas City, Kansas explains:

The answer to that question is to be found in our [Christian] belief in the incarnation of the Son of God, Jesus Christ. It is our belief that the Word became flesh and dwelt among us. The Holy Land is important to us because it is intimately linked to our belief in the historical Jesus. Jesus was not some mythical figure, the hero of some inspirational piece of fiction.

Put in a rather simple way, preserving the Christian shrines in the Holy Land and keeping them accessible to Christian pilgrims is important because we believe in Christmas. As Christians, we believe that the Lord of the universe . . . so loved us that he was conceived by the Holy Spirit in the womb of Mary. We believe he was born as a helpless baby in Jerusalem in the simplest of conditions in Bethlehem. We believe that this historical Jesus grew up in Nazareth under the care of Mary and Joseph. We believe that he performed his first miracle during a wedding feast at Cana in Galilee. We believe that Jesus walked the roads of Galilee teaching from "pulpits" in synagogues, on fishing boats, and on mounts. We believe that he fed the multitudes and healed many who were sick in body and spirit.

We believe that Jesus came to Jerusalem, taught in the temple precincts and drove the money changers out of the temple. We believe that our Lord gathered his apostles for the Passover meal and in the context of his last supper, celebrated the first Eucharist. We believe that Jesus empowered — ordained — his apostles to do this in memory of him.

We believe that our Lord asked Peter, James, and John to watch and pray with him in the Garden of Gethsemane. We believe that he was betrayed by Judas, abandoned by his apostles, brought to trial before the Sanhedrin and [Pontius] Pilate. We believe that Jesus carried the cross on the Via Dolorosa, was crucified on Calvary, and placed in the tomb of Joseph of Arimathea.

We believe in this real, historical person, Jesus Christ, who was born, lived, ministered, and died in actual places. We believe that these places were sanctified by the One who was born, lived, walked, taught, suffered, and died there.<sup>1</sup>

Consider an analogy: Jerusalem and the Holy Land are to Christians as Mecca and Medina are to Muslims. The analogy is imperfect. Christians and Muslims, respectively, differ in their understanding of who Christ and Muhammad were, and what their legacies are. Still, the comparison suggests the historical significance of territory whereupon a grand religious tradition is born. It also intimates that such territory ought to be preserved as a heritage and inspiration for, and open to the world, and never covered by the blood of war or closed to certain peoples.

Manifestly, the Crusades were directed at Muslims, although the Eastern Orthodox Byzantine Empire and disparate Jewish communities also were adversely affected. To Western Europeans of the time, a Crusade was seen as a war answering a command from God. This command was viewed — again, at the time — as

<sup>1</sup> Archbishop Joseph F. Naumann, *Catholics' Concern for Holy Land is Rooted in Historical Jesus*, THE LEAVEN (Newspaper of the Archdiocese of Kansas City, Kansas), 15 October 2010, at 2.

authorized by a legitimate authority, the Holy Father. The Pope, by virtue of his power as the Vicar of Christ, seemed to outline the objective of the war and offer crusading soldiers full remission of their sins.<sup>2</sup>

Retrospectively, the Crusades were not waged at the behest of God. And, there is reasonable debate as to the extent to which the Papacy actively condoned them. Yet, appreciating the Crusades from an Islamic vantage point remains uncommon in the non-Muslim world, despite accounts like *The Crusades Through Arab Eyes* (1984) by Amin Maalouf. For the better, though, the dominant view today among Catholic Christians is the Crusades were not religiously or morally acceptable. Further, in 2000, Pope John Paul II extended an apology for unfaithfulness to the Gospel teaching and violent actions toward believers of other faiths — an apology that apparently covered the Crusades.

## § 7.02 ORIGINS OF CRUSADES

Table 7-1:  
Summary of Crusades

Crusade Number	Years	Key Battles	Final Result	Involvement of Pope
1 <sup>st</sup> Crusade	1095-1099	Edessa, Antioch, Jerusalem	Christians take Antioch and Jerusalem, massacre of many Muslims	Urban II launches Crusade through sermon at Clermont
2 <sup>nd</sup> Crusade	1145-1149	Damascus	Muslims protect all their important cities	Eugenius III launches Crusade through Papal bull
3 <sup>rd</sup> Crusade	1188-1192	Cyprus, Acre, Arsuf	Christians make minor gains, but fail to take Jerusalem	Gregory VIII launches Crusade through Papal bull
4 <sup>th</sup> Crusade	1198-1204	Zara, Constantinople	Sack of Constantinople	Innocent III proclaims new Crusade
5 <sup>th</sup> Crusade	1213-1229	Damietta	Christians diplomatically take back Jerusalem	Innocent III launches crusade through Papal bull
6 <sup>th</sup> Crusade	1248-1254	Jerusalem	Crusaders defeated, lose Jerusalem for final time	None
7 <sup>th</sup> Crusade	1270	None	None	None
8 <sup>th</sup> Crusade	1271-1272	None	Failure for Christians, end of the Crusades	None

<sup>2</sup> CHRISTOPHER TYERMAN, *FIGHTING FOR CHRISTENDOM: HOLY WAR AND THE CRUSADES*, at 30 (Oxford University Press, 2004). [Hereinafter, TYERMAN.]



Since the advent of Islam, Christians and Muslims episodically have struggled with one another. Islam, unlike other religions, seemingly threatened the religious and political ascendancy of Christianity.<sup>3</sup> At the same time Muslim armies overtook the Eastern Roman Empire, Spain, and much of the Mediterranean, Islam challenged the essential tenets of Christian religious claims. While revering God's messengers — from Adam through Jesus — as Prophets, Islam rejected the doctrine of Christ's Divinity and the authority of the Catholic Church (and Protestant) Churches.

Instead, Islam called on all, including the People of the Book (Jews and Christians), to accept the final revelation, the Qur'an, and join the Islamic *ummah*, and to live under Islamic governance.<sup>4</sup> This universal mission was manifest in the spread of Muslim rule over many Christian territories, and by the eleventh century a significant number of Christians had converted to Islam and adopted Arabic language and manners. One event that particularly hardened Western attitudes toward the Islamic world occurred in 1009. The *Fatimid* Caliph Al Hakim bi-Amr (985–1021) ordered the destruction of the Church of the Holy Sepulchre — the spot venerated by Christians as where Christ was crucified and buried, and the scene of the empty tomb at the Resurrection. Though the Byzantine Empire was allowed to rebuild the Church 20 years later, the damage, in Christian minds, was done.

Generally, the Western European response to the growth of Islam was narrow-minded and intolerant, characterizing Muhammad as an imposter and dismissing Islam as a religion of the sword.<sup>5</sup> Christian fears and jealousy amplified as Islam grew into a powerful civilization while Western Europe languished in its Dark Ages. Europe was held together by military aristocracies who ruled over local resources by force. The relative stabilization of European borders after the Viking, Hungarian, and Islamic invasions had left a large class of armed warriors who, without an outlet for their military skills, spent their energies fighting one another and terrorizing local peoples.<sup>6</sup>

To be sure, the Catholic Church attempted to reduce the violence through initiatives such as the *Peace of God* movement (which threatened divine sanctions against those who attacked noncombatants) and the *Truce of God* movement (which attempted to stop warfare on Sundays and holy days).<sup>7</sup> But, the Church had little control over the petty knights, barons, and mercenaries, however, and so Western Europe continued to be, in many respects, a barbaric, armed camp.

The *Reconquista* in Spain and Portugal (an effort to wrest the Iberian Peninsula back from the Islamic Moors) provided a temporary outlet for some European warriors. More significantly, it became the training ground for the theological and moral justification of the Crusades. Because Christianity had no well-defined

concept of a "holy war" before the Middle Ages, the *Reconquista* represented the first time Christians had coupled a cohesive military campaign with a holy pilgrimage.<sup>8</sup> In 1063, Pope Alexander II (died 1073) set a powerful precedent when he gave his blessing (or apparently did so) to Iberian Christians in their wars against Muslims, granting both a Papal standard and an indulgence to those killed in battle. The newly established Church-sanctioned warfare would soon be used to much greater effect.

In 1074, Byzantine Emperor Michael VII Doukas (1050–1090) appealed to Pope Gregory VII (c. 1020–1085) for assistance in fighting the (Muslim) *Seljuk* Turks. Perhaps not surprisingly, the Pope viewed the Byzantine plea for aid as an ideal opportunity to employ abundant Western European warriors in the service of God.<sup>9</sup> Not only would this effort provide a much-needed outlet for the armed men of Europe, it also would complement the evolving view of the Church of its role during the 11th century reform movement: it was the Pope, not kings and emperors, who wielded supreme power. A grand army led by the Pope against the enemies of Christ would be a dramatic way to solidify Church power. Additionally, Pope Gregory saw the enterprise as a method of shoring up relations between the Christians of the East and West, which had been strained over various theological and cultural differences and resulted in the Great Schism of 1054. However, the Papal plans never were put into action. The Church became pre-occupied with the Investiture Controversy, a struggle for power between the Holy Roman Empire and Papacy.<sup>10</sup>

In 1095, the Byzantines sent another request for assistance against the Turks, this time from Emperor Alexius I Comnenus (1056–1118) to Pope Urban II (c. 1035–1099). By 1092, the Papacy had gained the upper hand in its struggle against European imperial powers, and thus possessed the moral and political authority to effectuate the dream of Gregory VII.<sup>11</sup> For Pope Urban II, such an effort would serve to reunite Christendom, enhance the powers of the Papacy, and perhaps even bring the Eastern Church under his control. Indeed, from its inception, a Crusade represented a practical expression of Papal ideology and power.<sup>12</sup>

Fortunately for the Pope, there was a major renewal of Christian piety in the preceding years, as public interest in religious affairs had increased dramatically during the Investiture Controversy. With the right dose of religious propaganda, Western Europeans were ripe to be mobilized into a sustained, Church-led military effort. At the dawn of the 12th century, the Western Church finally developed a response to Islam, which took on a quasi-revolutionary form: a mass movement of intense religious revivalism and a call for holy war against the supposed enemies of Christianity.

<sup>3</sup> JOHN ESPOSITO, *ISLAM: THE STRAIGHT PATH*, at 59 (Oxford University Press, 1991). [Hereinafter, ESPOSITO.]

<sup>4</sup> ESPOSITO, *supra*, at 59.

<sup>5</sup> ESPOSITO, *supra*, at 59.

<sup>6</sup> TYERMAN, *supra*, at 38.

<sup>7</sup> THOMAS F. MADDEN, *THE NEW CONCISE HISTORY OF THE CRUSADES*, at 6 (Rowman & Littlefield Publishers, Inc., 2005). [Hereinafter, MADDEN.]

<sup>8</sup> MADDEN, *supra*, at 4.

<sup>9</sup> MADDEN, *supra*, at 6.

<sup>10</sup> See UTA-REINATE BLUMENTHAL, *THE INVESTITURE CONTROVERSY: CHURCH AND MONARCHY FROM THE NINTH TO THE TWELFTH CENTURY* (University of Pennsylvania Press, 1991).

<sup>11</sup> MADDEN, *supra*, at 7.

<sup>12</sup> TYERMAN, *supra*, at 38.

Pope Urban II parlayed the Byzantine request for military aid into a well-orchestrated recruitment drive, manifest in a preaching tour of his homeland, France, between August 1095 and September 1096.<sup>13</sup> At the Council of Clermont in November 1095, before a vast crowd of priests, knights, and peasants, Urban preached what became known as the First Crusade. No exact transcription of the homily of Urban at Clermont exists, and the four extant versions differ significantly from one another. Because all four versions were written after the First Crusade, the words put into the mouth of the Pope probably reflect what actually transpired during the Crusade, as well as what authors thought Urban should have said.<sup>14</sup> Nonetheless, taking the four versions together, along with the subsequent letters written by the Pope, he called for a Christian war of liberation. Less clear are the exact goals of that war, and precise type of liberation he sought.

The first writer to paraphrase the homily of Urban was Fulcher of Chartres (born c. 1059).<sup>15</sup> He was present at Clermont. Of the four versions, only his does not quote Pope Urban II as saying Jerusalem was a goal of the Crusade. He says Urban focused solely on liberating the Eastern Church from Muslim aggression.

The second writer was Robert of Rheims (also known as Robert the Monk). He, too, was present at Clermont. He recounts the Pope hurling insults at Muslims, describing them as the "accursed," "unclean," and a "vile" race.<sup>16</sup> Robert credits Urban with making a direct plea to liberate Jerusalem, quoting him thus: "Take the road to the Holy Sepulchre, rescue that land from a dreadful race and rule over it yourselves."<sup>17</sup>

The third writer was a Benedictine historian and theologian, Guibert of Nogent (c. 1055-1124). He probably was not present at Clermont. An unusual feature of his report is its emphasis on eschatology. He quotes Pope Urban II as putting the fight for Jerusalem in the context of "the approaching times of the Antichrist."<sup>18</sup> Unlike the other three writers, who contend Urban focused, at least in part, on the protection of Eastern Christians as cause for the mission, Guibert portrays Urban as exclusively concerned with the liberation of Jerusalem.<sup>19</sup>

The final writer, Baldric of Bourgueil (c. 1050-1130), attended the Council of Clermont. However, he wrote his account years later. He also credits Pope Urban II with a direct plea to take back Jerusalem by quoting Urban thusly: "Wage war for your own rights over Jerusalem and attack and throw out the Turks . . . [i]t ought to be a beautiful ideal for you to die for Christ in that city where Christ died for you."<sup>20</sup>

<sup>13</sup> TYERMAN, *supra*, at 39.

<sup>14</sup> LOUISE & JONATHAN RILEY-SMITH, *THE CRUSADES: IDEA AND REALITY* (Documents of Medieval History, volume 4) 40 (London, England: Edward Arnold Publishers Ltd., 1981). [Hereinafter, RILEY-SMITH.]

<sup>15</sup> See "Account of Fulcher of Chartres," RILEY-SMITH, *supra*, at 41.

<sup>16</sup> "Account of Robert of Rheims," quoted in RILEY-SMITH, *supra*, at 42-44.

<sup>17</sup> "Account of Robert of Rheims," quoted in RILEY-SMITH, *supra*, at 42-44.

<sup>18</sup> "Account of Guibert of Nogent," quoted in RILEY-SMITH, *supra*, at 47.

<sup>19</sup> "Account of Guibert of Nogent," quoted in RILEY-SMITH, *supra*, at 45.

<sup>20</sup> "Account of Baldric of Bourgueil," quoted in RILEY-SMITH, *supra*, at 51-52.

A more accurate reflection of the thoughts of Pope Urban II on crusading probably comes from four of his own letters written in the months after Clermont. The letters confirm he granted remission of sins to those undertaking a crusade in the name of the Church. One important contrast between the letters of Urban and the transcribed homilies of Robert, Guibert, and Baldric, is the lesser emphasis on Jerusalem. Only in his letter to Flanders does the Pope mention Jerusalem as a focus of his concern, saying:

they [the Turks, or perhaps more generally Muslims] have seized the Holy City of Christ and have sold her and her churches into abominable slavery.<sup>21</sup>

In his letter to partisans in Bologna, Urban indicates Jerusalem was more of a goal for the Crusaders than for the Church. Still, he seems to condone the mission. He writes:

We have heard that many of you have felt the longing to go to Jerusalem, which you should understand pleases us exceedingly.<sup>22</sup>

Thus, there is evidence suggesting Urban may have approved extending the Crusade to Jerusalem, but he unmistakably refers to liberating the Church as a whole rather than to re-conquering Jerusalem itself. His focus is on "the churches of God in the eastern regions,"<sup>23</sup> the "liberation of the Church,"<sup>24</sup> "liberating Christianity,"<sup>25</sup> and "go[ing] to the aid of the Asian Church."<sup>26</sup>

In reviewing the primary sources concerning preaching by Pope Urban II on the First Crusade, three points become clear. First, the Pope called for a war of liberation to defend the Christian Church. Second, the key objective of that war was supposed to be defending the Byzantine Empire from Muslim aggression. Third, the Pope may not have explicitly mentioned Jerusalem as a goal of the Crusade, but he offered at least a tacit endorsement of such a mission. It remains debatable whether Urban was partially misunderstood. Either way, the scene at Clermont was repeated all across Western Europe, and a tremendous wave of enthusiasm ensued. Thousands swore to undertake the journey to Jerusalem, receiving the ceremonial "signing of the cross" and, quite significantly, the promise by the Pope of remission of their sins.<sup>27</sup>

Notably, the Pope and his deputies advocated Just War to defend Christendom. While the Papacy had struggled before with the doctrinal validity of Church-sponsored violence, Urban seemed to set aside any reservations. Yet, lest there be doubters, Urban characterized the mission as a pilgrimage. Rather than nullify the

<sup>21</sup> "Urban to All the Faithful in Flanders," December 1095, quoted in RILEY-SMITH, *supra*, at 38.

<sup>22</sup> "Urban to His Partisans in Bologna," September 1096, quoted in RILEY-SMITH, *supra*, at 39.

<sup>23</sup> "Urban to All the Faithful in Flanders," December 1095, quoted in RILEY-SMITH, *supra*, at 38.

<sup>24</sup> "Urban to His Partisans in Bologna," September 1096, quoted in RILEY-SMITH, *supra*, at 39.

<sup>25</sup> "Urban to the Religious of the Congregation of Vallombrosa," October 1096, quoted in RILEY-SMITH, *supra*, at 39.

<sup>26</sup> "Urban to the Counts of Besalu, Empurias, Roussillon and Cerdana," January 1096/July 1099, quoted in RILEY-SMITH, *supra*, at 40.

<sup>27</sup> TYERMAN, *supra*, at 27-30.



Just War theory of Saint Augustine, Urban built on it by tying a call for a Crusade to the established practice of pilgrimage.<sup>28</sup> Each Crusader joined the cause by taking a pilgrim's vow, and each swore to make a pilgrimage (violent or not) to the Holy Sepulchre.<sup>29</sup> Thus, a Crusade was a peculiar enterprise: an armed pilgrimage, full of sword-bearing soldiers, farmers, clergy, and servants, setting off on an inevitably violent religious mission, prepared for conquest as much as defense, with overlapping allegiances to God, Pope, and self.

### § 7.03 FIRST CRUSADE

Launched in August 1096, the First Crusade was the largest and most ambitious military operation of Western Europe since the days of the Roman Empire. One of the most notable figures from this Crusade is Peter the Hermit (died 1115), a charismatic preacher whose speeches throughout France and Germany attracted thousands to the cause.<sup>30</sup> Peter led his inspired masses into Turkey months in advance of the official departure date, but his ragtag "People's Crusade" was slaughtered by Turks before even getting close to the Holy Land.<sup>31</sup> Other early misfires included brutal attacks against Jews living along the Rhine, who became easy targets for avaricious crusaders looking to plunder as they made their voyage to the east. Most of those "anti-Jewish crusades" never made it to the Holy Land either, simply evaporating along the way.

The main armies of the First Crusade arrived in Constantinople in late 1096 and early 1097. As various groups came through the city, their leaders were summoned by the clever Byzantine Emperor, Alexius, and asked to swear an oath of loyalty affirming they would give all conquests to the Byzantines. Though none of the crusading leaders were happy with this arrangement, only Raymond IV, Count of Toulouse (c. 1041/1042–1105) — by far the most powerful magnate to take up the cross — was able to avoid the oath.<sup>32</sup> Satisfied the Western Europeans would not carve up his empire, Alexius transported the crusaders across the Bosphorus, from where they would march to Antioch.

One of the most glorious cities of the ancient Roman Empire and once a cradle of Christianity, the imposing city of Antioch had long been ruled by Turkish Muslims, despite its predominantly Greek and Armenian Christian population.<sup>33</sup> The rich Christian history of Antioch was indisputable: Saint Peter had been its first bishop, and it was here that the disciples of Jesus were first called "Christians."<sup>34</sup> Painfully aware the ancient Church of Saint Peter had been converted into a mosque, the Crusaders felt a fervent duty to liberate the holy city. Their task was incredibly difficult; starving and outnumbered, overtaking the well-fortified city

seemed impossible. However, luck or divine intervention (as they believed) was on their side. An Armenian Christian inside the city who had converted to Islam but had since become disaffected sent word that he would let the Crusaders into the city.<sup>35</sup> After a bloody, protracted battle that lasted for days, the city leaders fled and the Franks<sup>36</sup> took control. God, they believed, had intervened and ensured their success.

The triumph of the Crusaders was brief. A large, well-equipped Turkish army, led by the great Kerbuqa, soon arrived outside Antioch's walls and began to besiege the city. Again it seemed impossible the exhausted and much-depleted Crusaders could survive, and their morale quickly sank. But, by another twist of fate, their fortunes changed again. Having heard the Holy Lance (the spear used to pierce the side of Christ) was buried inside the city, Peter Bartholomew (died 1099) jumped into a pit and began scrounging with his bare hands. Within minutes he cried in joy, and was pulled out of the ground holding a rusty lance head. Some of the leaders, of course, suspected Peter planted the spearhead before his dig, but nothing could restrain the excitement that swept throughout the ranks.<sup>37</sup> Completely rejuvenated, the Crusaders tore out of the city and miraculously defeated the superior Turkish army. Against all odds, Antioch was safely theirs.

In January 1099, the Crusaders set off to their ultimate destination, Jerusalem. But, word had reached the Christian leaders that the Egyptian army was mobilizing and would be ready to help defend the city. Some argued marching straight to Jerusalem was foolish, and that if the Holy Land ever were to be secure, the next step must be to destroy the Muslim power base in Egypt.<sup>38</sup> While that would have been a wise strategic policy, it did not square with the underlying role of the Crusaders as pilgrims. Their purpose was to reach the Holy Sepulchre, not the ancient pyramids. Convinced God had brought them this far, they could not lose faith now, and proceeded directly to Jerusalem.

The final march to Jerusalem was said to have been accompanied by miracles and visions, further solidifying the sense among the Crusaders that they were an instrument of Divine Providence.<sup>39</sup> On 7 June 1099, they arrived outside the great city's walls, and were greeted by the imposing mosques of Al Aqsa and Omar, and the calls to prayer echoing through the city.<sup>40</sup> Adopting a simultaneously pious and practical policy, the Crusaders built siege towers from which to attack the city, and sung hymns and visited the surrounding holy places: Mount Zion, the Garden of Gethsemane, and the Mount of Olives.<sup>41</sup> Finally, on 15 July, after weeks of preparation and days of attempts, the Crusaders forced entry into the city. The ensuing victory was accompanied by a vicious slaughter of thousands of Jews and

<sup>28</sup> MADDEN, *supra*, at 9.

<sup>29</sup> MADDEN, *supra*, at 9.

<sup>30</sup> MADDEN, *supra*, at 16.

<sup>31</sup> MADDEN, *supra*, at 17–18.

<sup>32</sup> MADDEN, *supra*, at 20–24.

<sup>33</sup> MADDEN, *supra*, at 26.

<sup>34</sup> KAREN ARMSTRONG, *THE CRUSADES AND THEIR IMPACT ON TODAY'S WORLD*, at 162 (Anchor Books, 2001). [Hereinafter, ARMSTRONG.]

<sup>35</sup> ARMSTRONG, *supra*, at 171.

<sup>36</sup> Muslims of the time tended to refer to all crusaders, and virtually all Western Europeans, as "Franks."

<sup>37</sup> MADDEN, *supra*, at 29.

<sup>38</sup> MADDEN, *supra*, at 32.

<sup>39</sup> TYERMAN, *supra*, at 43–44.

<sup>40</sup> ARMSTRONG, *supra*, at 177.

<sup>41</sup> ARMSTRONG, *supra*, at 177.

Muslims, which was, according to most sources, brutal even under the standard military practices at the time.<sup>42</sup> Women and children were among those massacred. The Crusaders also desecrated the Noble Sanctuary (*Haram al-Sharif*), converted the Dome of the Rock into a church, and made the *Al-Aqsa Mosque* (which they renamed the Temple of Solomon) into a residence for their king.<sup>43</sup>

After over four centuries of Muslim rule, Jerusalem and Antioch again were in Christian hands. The majority of Crusaders returned home to Europe, where they were extolled as heroes. Subsequent, minor crusades were launched (such as the Crusade of 1101), but since liberation had already been achieved, the emphasis, now, was on pilgrimage.<sup>44</sup> Those who remained in the Holy Land established four mini-states: the Kingdom of Jerusalem, the County of Edessa, the Principality of Antioch, and the County of Tripoli.<sup>45</sup> Clearly, the Crusaders did not plan to honor their oath to hand over their conquests to Byzantine Emperor Alexius I. But, Pope Urban II never directly addressed the issue of governing the new territories, so controversy arose as to who should lead the nascent Latin Kingdom.<sup>46</sup> The Christians had the luxury of worrying about politics, though, because a roughly 50-year period of relative peace between Christians and Muslims had begun.

#### § 7.04 RISE OF ZENGI AND SECOND CRUSADE

Christians and Muslims lived side-by-side in the newly-formed Crusader States, yet took minimal interest in each others' intellectual or religious backgrounds.<sup>47</sup> There was a fair amount of basic cultural exchange, however, and the two groups managed to maintain mostly peaceful relations. This *status quo* was possible largely because of disunity in the Muslim world under the *Seljuks*, *Fatimids*, and *Abbasids*; without unified opposition, the Latin Kingdom of Jerusalem was able to consolidate its power over the crusader principalities.<sup>48</sup>

A turning point came in 1128, when the Sultan of Rûm appointed Turkish commander Imad ad-Din Zengi (c. 1085–1146) as *Atabeg* of Mosul, and later gave Zengi undisputed authority over all of Syria and northern Iraq.<sup>49</sup> An intelligent and ruthless leader, Zengi preached a *jihad* and conquered the Christian city of Edessa in 1144, a victory which touched a deep nerve in the Muslim world. The buffer state that had provided a strong flank for Antioch was destroyed, and the feeling of Christian invincibility was crushed.

<sup>42</sup> Jane I. Smith, *Islam and Christendom*, in *The Oxford History of Islam* (John Esposito, ed.), at 338 (New York, New York: Oxford University Press, 1999). [Hereinafter, Smith.] But see MADDEN, *supra*, at 34 (offering a different account).

<sup>43</sup> Esposito, *supra*, at 60.

<sup>44</sup> ARMSTRONG, *supra*, at 181–182.

<sup>45</sup> TYERMAN, *supra*, at 44–47.

<sup>46</sup> MADDEN, *supra*, at 37.

<sup>47</sup> MADDEN, *supra*, at 46.

<sup>48</sup> Smith, *supra*, at 339.

<sup>49</sup> See ARMSTRONG, *supra*, at 191. "Atabeg" is a Turkish hereditary title of nobility literally meaning "father lord," and connoting a governor.

The barons of the Crusader States reported to Europe that the entire Latin East, including Jerusalem, was in grave danger. In response, Pope Eugenius III (died 1153) issued a papal bull, *Quantum Praedecessores*. It recited the glories of the First Crusade and called upon Christian knights again to take up the Cross.<sup>50</sup> Notably, the Bull detailed the privileges available to those who took the Cross, including protection of property and suspension of debt collection.<sup>51</sup> In contrast to Urban II, who relied entirely on the masses, Eugenius eagerly enrolled monarchs in his Crusade, including Louis VII of France (1120–1180) and Conrad III of Germany (1093–1152).<sup>52</sup> Created by Papal pronouncement and led by nobility, the Second Crusade was more businesslike than the First.

Recruiting efforts for the Second Crusade were led by Abbot Bernard of Clairvaux (1090–1153), a charismatic preacher akin to Peter the Hermit. Bernard realized that with a Christian kingdom already established at Jerusalem, the liberation sermons of the First Crusade were no longer appropriate. Bernard thus portrayed this Crusade as a means of redemption, an opportunity to demonstrate one's faith by taking the Cross.<sup>53</sup> Whereas the First Crusade was a vast collective enterprise on behalf of Christendom, the Second Crusade was a Divine invitation for each individual Crusader to save his soul.<sup>54</sup>

Despite solid political backing and well-articulated theological foundations, the Second Crusade was a disaster for the Europeans. The increasingly-united Muslims had solidified their hold of Edessa, forcing the Crusaders to abandon plans to recapture the city. Instead, they decided to attack Damascus, even though that city was an ally of Christian Jerusalem. Evidently the kings and leaders of the Crusade saw no reason to honor a treaty signed with infidels.<sup>55</sup> This move proved foolish. The Christians were handily defeated, and thus gained nothing from the Crusade but the enmity of an ally.

King Louis blamed the Byzantines for their lack of support, establishing the perception, later to become widespread, that the Eastern Christians were part of the problem.<sup>56</sup> Bernard claimed the Crusade failed because of the sins of Europe; if the Crusades were to succeed, he argued, Europe must purify itself. For their part, the Muslims were extremely encouraged. Most importantly, the successful defense of Damascus gave rise to a new leader, Nur ad-Din (or Nur al-Din, the son of Zengi) (1118–1174), who would now commence his own Holy War effort.

<sup>50</sup> See TYERMAN, *supra*, at 47.

<sup>51</sup> See MADDEN, *supra*, at 52.

<sup>52</sup> See TYERMAN, *supra*, at 47.

<sup>53</sup> See MADDEN, *supra*, at 53.

<sup>54</sup> See ARMSTRONG, *supra*, at 201.

<sup>55</sup> See MADDEN, *supra*, at 60.

<sup>56</sup> See MADDEN, *supra*, at 61.



## § 7.05 RISE OF SALADIN, FALL OF JERUSALEM, AND THIRD CRUSADE

The theology of *jihād*, as developed in the *Shari'a* movement of the 8th century A.D., had been mostly absent from Muslim discourse for years. Under the leadership of Nur ad-Din, the concept of *jihād* was revived, this time as a defensive response to Crusader aggression.<sup>57</sup> Nur ad-Din reminded his brethren that while the Qur'an forbids Muslims to initiate war, it also instructs that "persecution is worse than slaughter."<sup>58</sup> For half a century the Franks had killed Muslims and driven them from their homes. Muslim apathy and disunity simply made matters worse. The *jihād* of Nur ad-Din began with a propaganda campaign: scholars advanced the theology of *jihād* and spread the word to *imāms* in Muslim cities, from where the clergy transmitted the teachings to people in Friday sermons.<sup>59</sup> By effectively re-introducing *jihād*, Nur ad-Din took the first step toward developing a strategic response to Christian aggression.

The second step was taken by Salāh ad-Din Yūsuf ibn Ayyūb (i.e., Salah ad-Din, or Salah al-Din, or transliterated in English, Saladin) (c. 1138-1193), a Kurdish commander born in Tikrit, Iraq, who defeated the Sevens *Shi'ite Fatimids* in Egypt and took control of Syria following the death of Nur ad-Din. The *Abbasid* Caliph appointed Saladin overlord of both territories, and the worst fears of the Crusaders were realized: their Christian cities were surrounded by a united Muslim kingdom.<sup>60</sup> A deeply religious man, Saladin was fiercely adamant that his state function according to the laws of Islam. He abolished unlawful taxes and spent freely on building new mosques and libraries.<sup>61</sup> Saladin was also tremendously devoted to *jihād*, and set his sights on expelling the Christians once and for all.

Knowing the armies of Saladin were on the march toward Jerusalem, Christian forces set off to thwart the threat. This was a colossal mistake. On the scorching afternoon of 3 July 1187, the two sides met at Hattin, where the forces of Saladin demolished the Christians. The Battle of Hattin marked the greatest defeat in Crusader history; almost half the fighting men in the Latin Kingdom were lost, leaving Christian cities virtually defenseless.<sup>62</sup> After taking Acre and Ascalon without a battle, Saladin marched easily to Jerusalem, which capitulated almost immediately. In contrast to the brutal violence with which the Crusaders had captured that city during the First Crusade, Saladin ordered that no Christian be killed, and forbid his troops from plundering the city.<sup>63</sup> Though many of his men were desperate to avenge the 1099 massacre, Saladin, having signed a peace treaty with Balian of Ibelin (c. 1140s-1193), the Christian commander of Jerusalem at the time, reminded his troops that Muslims must observe the legalities of the Qur'an,

which mandated that oaths and treaties be kept to the letter.<sup>64</sup> Though a number of churches were turned into mosques, Saladin left the Church of the Holy Sepulchre untouched.<sup>65</sup> Unashamed of his merciful ways, Saladin is said to have proclaimed: "Christians everywhere will remember the kindness we have done them."<sup>66</sup> Regrettably, that memory has proven quite faulty.

Impressed as they were with Saladin's humane and reasonable treatment of the Christian population of Jerusalem, Western Europeans were shocked and horrified over the loss of their holy city. They clamored for a major crusade to recover Jerusalem and restore Christian glory in the Near East. Within one month of losing Jerusalem, Pope Gregory VIII issued *Audita Tremendi*, an articulately-crafted papal bull imposing a seven-year truce throughout Europe so that rulers could focus on organizing troops for another crusade. Echoing Bernard from years earlier, the bull argued the success of a crusade was linked to the spiritual well-being of Christendom, and called on all Europeans to contribute to the cause through purification, fasting, and prayer.<sup>67</sup> A profits tax — called the "Saladin Tithe" — was imposed across many lands, a measure which greatly helped fund the effort.<sup>68</sup>

The Third Crusade marked the height of the crusading era: Europe's religious faith and chivalric virtue were mobilized into the largest military expedition of the Middle Ages, and the entire affair was led by kings and elites, most notably Richard I of England (Richard the Lionheart) and Philip II of France. The focal point of the effort of the Crusaders was the city of Acre, which they besieged for many months before Saladin surrendered. Saladin and Richard agreed that in return for the lives of a captured Muslim garrison, Saladin would pay 200,000 *dinars*, release all his hostages, and give the city back to the Christians.<sup>69</sup> Despite their agreement, soon thereafter Richard ordered 2,700 Muslims executed in full view of Saladin and his army.<sup>70</sup>

The Crusaders continued south along the Mediterranean Sea coast, defeating Muslims again at Arsuf and Jaffa. Richard then led his troops to within 12 miles of Jerusalem. He decided against an attack, as he did not have enough men to hold the city even if it were captured.<sup>71</sup> A military stalemate ensued: Richard could not take Jerusalem or attack the Muslim power base in Egypt, and Saladin was unable to take back Jaffa. The two practical-minded leaders concluded the Treaty of Jaffa on 2 September 1192. The treaty left the Franks in control of the coast from Acre to Jaffa, allowed access to Jerusalem for pilgrims, and gave freedom of movement

<sup>64</sup> ARMSTRONG, *supra*, at 258-259.

<sup>65</sup> MADDEN, *supra*, at 78.

<sup>66</sup> Quoted in FRANCESCO GABRIELI, *ARAB HISTORIANS OF THE CRUSADES* 141 (1989), and cited in ARMSTRONG, *supra*, at 259.

<sup>67</sup> MADDEN, *supra*, at 79.

<sup>68</sup> TYERMAN, *supra*, at 50.

<sup>69</sup> MADDEN, *supra*, at 88.

<sup>70</sup> There is considerable disagreement over the explanation of the mass killing by Richard. Thomas Madden writes Richard was upset because Saladin had not made his promised payments. See MADDEN, *supra*, at 88. But, Karen Armstrong writes Richard simply felt financially burdened by the large number of prisoners. See ARMSTRONG, *supra*, at 265.

<sup>71</sup> See TYERMAN, *supra*, at 54.

<sup>57</sup> ARMSTRONG, *supra*, at 194-195.

<sup>58</sup> THE QUR'AN — A New Translation by M.A.S. Abdel Haleem 2:217, at 24 (Oxford, England: Oxford University Press, 2004).

<sup>59</sup> ARMSTRONG, *supra*, at 195.

<sup>60</sup> MADDEN, *supra*, at 69.

<sup>61</sup> MADDEN, *supra*, at 69.

<sup>62</sup> MADDEN, *supra*, at 75-78.

<sup>63</sup> Smith, *supra*, at 339.

between Muslim and Christian territories.<sup>72</sup> The Third Crusade was partially successful for the Christians, but the armies of Saladin deprived the Crusaders of their ultimate objective, Jerusalem.

## § 7.06 FINAL FIVE CRUSADES

The thin strip of Palestinian coast restored to Christians during the Third Crusade provided a commercially important base for a renewed Kingdom of Jerusalem. The holy city itself would return to Christian rule only briefly, however, and that was years ahead. The Fourth Crusade, initiated in 1202 by Pope Innocent III, chose Egypt as the target of the expedition.<sup>73</sup> Innocent III regarded recovery of the Holy Land as an urgent objective.

But, this Pope was not as effective as his predecessors at recruiting elites to the cause. His failure to recruit the Kings of Europe denied the Crusaders access to national taxes and fleets, and they were consequently forced to arrange transport from Venice.<sup>74</sup> Lacking the provisions to pay for their contracted fleets, the Crusaders were forced to accept an offer from the Venetian doge, Enrico Dandolo, in which they would help Venice capture the Christian port of Zara in return for a moratorium on their debt.<sup>75</sup> Despite the obvious Papal disapproval over an attack on fellow Christians, the Crusaders had no choice if they wished to pursue their ultimate objective. The fall of Zara marked the first, but not only, time crusading forces would sacrifice Christian brethren for their greater cause.

Another diversion was right around the corner. Alexius Angelus, son of the deposed Byzantine Emperor Isaac II, offered to subsidize the crusaders' voyage to Egypt if they helped him recapture the Byzantine throne from his usurping uncle, Alexius III. Though many Crusaders were thoroughly disgusted with the plan, the bulk of the army went forward and one month later attacked the great Christian city of Constantinople.<sup>76</sup> After a series of misunderstandings and occasional outbreaks of violence, the Crusaders sacked the city in 1204 and established the so-called Latin Empire.<sup>77</sup>

Successive Popes expressed disappointment at Greek failures to help recover the Holy Land, and animosity increased as a result. However, the Byzantine capital was never the ultimate objective of the Fourth Crusade. Nevertheless, hopes of continuing on to Egypt gradually faded, and the Fourth Crusade ended without a single force entering Muslim lands.

Two specific events launched the Fifth Crusade: issuance of the papal bull *Quia Maior* in 1213, and promulgation of a comprehensive plan to recover the Holy Land

by the Fourth Council of the Lateran in 1215.<sup>78</sup> More than any other before it, the Fifth Crusade was designed to be an enterprise administered and managed by the Church.<sup>79</sup> A well-devised campaign of recruitment, propaganda, and finance produced missions to the Near East between 1217 and 1229. In the early phases, Crusader forces achieved the remarkable feat of capturing Damietta, a key Egyptian town. The Egyptians then made an intriguing proposal: a straight-up exchange of Damietta for Jerusalem. Astonishingly, the offer was rejected by the Papal legate, Pelagius.<sup>80</sup> Instead, the Christian army attacked Cairo in July 1221, where Sultan Al Kamil, ruler of Egypt, led a brilliant counterattack, resulting in surrender by the Christians and an 8-year peace agreement.<sup>81</sup>

Despite the setback in Egypt, recruiting continued in Europe and a new expedition, led by Emperor Frederick II of the Holy Roman Empire, set off in 1228. Deftly exploiting the rivalries between the rulers of Egypt and Syria, Frederick forged a treaty with Al Kamil of Egypt that restored Jerusalem, Nazareth, and Bethlehem to the Christians for a period of 10 years.<sup>82</sup> Under the terms of the treaty, Jerusalem was to be ruled by Christians but open to all, and the Temple Mount was to be controlled by the Islamic religious authorities.<sup>83</sup> Jerusalem remained in Christian hands until 1244, when it was sacked by Turkish raiders. The city would remain under Muslim control until 1917.<sup>84</sup>

After 1229, the popularity of the Crusades waned, and they "progressed from the pragmatic to the optimistic to the desperate."<sup>85</sup> The Church decreased its role in the Crusades and focused its energies on initiatives closer to home. Truces with quarreling Muslim neighbors helped to sustain Frankish outposts, but practical-minded Christians realized their territories were barely clinging to life. The Crusade of Louis IX, launched in 1248, intended to conquer Egypt and change the balance of power in the region. Despite being one of the best prepared and most lavishly funded of all Crusades, it ended in disaster when his army was cut off from its supplies and routed in the Nile Delta.<sup>86</sup>

The arrival of the Mongols in the 1250s gave the Crusaders renewed hope. Ferocious and merciless fighters, the Mongols had stormed through the Muslim world, conquering Persia, Mesopotamia, and even the once-mighty *Abbasid* Caliphate in Baghdad.<sup>87</sup> Christians were not the least bit distressed to see the most opulent areas of Islam destroyed, and they prayed the Mongols were their long-awaited rescuers. The Christians formed an alliance with the Mongols against the militant *Mamluk* sultans of Egypt, but the Mongols were defeated soon

<sup>78</sup> See TYERMAN, *supra*, at 60.

<sup>79</sup> See MADSEN, *supra*, at 144.

<sup>80</sup> See TYERMAN, *supra*, at 60.

<sup>81</sup> See TYERMAN, *supra*, at 61.

<sup>82</sup> See TYERMAN, *supra*, at 61.

<sup>83</sup> See TYERMAN, *supra*, at 61.

<sup>84</sup> See TYERMAN, *supra*, at 61.

<sup>85</sup> See TYERMAN, *supra*, at 62.

<sup>86</sup> See TYERMAN, *supra*, at 63.

<sup>87</sup> See MADSEN, *supra*, at 177–178.

<sup>72</sup> See TYERMAN, *supra*, at 54.

<sup>73</sup> See TYERMAN, *supra*, at 56–57.

<sup>74</sup> See TYERMAN, *supra*, at 57.

<sup>75</sup> See TYERMAN, *supra*, at 58.

<sup>76</sup> See TYERMAN, *supra*, at 58.

<sup>77</sup> These events often are regarded as critical breaking points in the Great Schism between the Eastern Orthodox Church and the Roman Catholic Church.



thereafter. The Crusaders were then vulnerable to the new Egyptian Sultan, Baibars, who was fervently committed to eradicating all Frankish settlements.

Egypt now took center stage in the Islamic world, with Baibars at the helm of power. For the first time since Saladin, the *Ayyubid* Empire was united under a single ruler, and Egypt and Syria became renewed centers of learning and cultural growth.<sup>88</sup> Baibars was focused on security, however, and was intent on pre-empting any possibility of a new crusade from the West. He thus turned his full attention to the Christians and waged a *jihād* aimed at removing, once and for all, their presence in Muslim lands. From 1263 to 1266, Baibars systematically conquered Nazareth, Caesarea, Arsuf, Jaffa, and Antioch, doing his best to massacre Christians so as to prevent any further re-building of the settlements.<sup>89</sup> After the fall of Acre in 1291, most remaining Christian outposts were evacuated without resistance. Those Christians unable to leave were massacred or enslaved, and the last vestiges of Christian rule in the Near East disappeared.

## § 7.07 IMPACTS AND PERCEPTIONS

During the two centuries in which the Crusaders occupied parts of the Near East, Muslims and Christians formed shifting alliances, traded with each other, and carried out mutually beneficial commercial activities.<sup>90</sup> The two societies often cooperated, and those who were not directly engaged in fighting lived normal lives. Still, the scale of warfare and atrocities cannot be ignored. Most historians consider it impossible to estimate the exact number of Muslims, Christians, and Jews killed during the Crusades, but the figure would certainly be in the millions.<sup>91</sup>

The extent to which the Crusades impacted the Muslim world continues to be hotly debated. Many modern scholars contend the Crusades did not have a profound influence on the development of Muslim societies. In contrast to Crusades in Europe — such as in Spain, where the *Reconquista* decisively changed the direction of the region — the Crusades in the Near East left few physical traces, as the Western presence dried up by the fourteenth century.<sup>92</sup> Moreover, it must be remembered that with few exceptions, Muslim unity was a charade; the *Abbasid* Empire comprised a loose confederation of city states, the *Shi'ite* *Fatimid* Caliphate of Egypt was in constant struggles with Turks, and the entire region was characterized by ethnic diversity and alienation from rulers.<sup>93</sup> Amidst such volatility, the arrival of Western armies may have been just one more military presence in an area already crowded with competing rulers. Indeed, while Zengi, Nur ad-Din, and Saladin cast their wars in the language of *jihād*, much of their energies were materially and ideologically directed against other Muslims.

<sup>88</sup> See ARMSTRONG, *supra*, at 448.

<sup>89</sup> See MADDEN, *supra*, at 180–181.

<sup>90</sup> See Smith, *supra*, at 341.

<sup>91</sup> See ARMSTRONG, *supra*, at 454.

<sup>92</sup> See TYERMAN, *supra*, at 81.

<sup>93</sup> See TYERMAN, *supra*, at 87.

However, it is clear that Muslims of the time were horrified by the Crusaders' brutality and embittered by the broken promises of Christian commanders such as Richard the Lionheart (1157–1199). When Muslims compared the actions of the Crusaders to Saladin's reputation as a man of honor, they probably concluded the Franks were motivated more by politics and greed than true religious devotion. Some scholars say the scars caused by the Crusades led to the creation of an Islamic mentality that imposed intellectual barriers and sought a retreat into isolation. One author writes: "Assaulted from all quarters, the Muslim world turned in on itself. It became oversensitive [and] defensive."<sup>94</sup>

If there is such an Islamic mentality, is it accurate to say the Crusades caused it? Most scholars say no, pointing out that the Crusades were virtually unknown to most Muslims until a century ago, and thus cannot be blamed for a lack of progress in the Muslim world.<sup>95</sup> As evidence, they note the first Arabic history of the Crusades was not published until 1899. Many argue there was nothing to differentiate the Crusades from any other wars fought against infidels, and that in any case, the Crusades "were unsuccessful and thus irrelevant."<sup>96</sup> The conclusion of irrelevance is probably too strong, though it is true that the Crusades were an obscurity in Muslim perceptions until the early 20th century. It was not until European colonial powers descended upon the Middle East in the wake of the collapse of the Ottoman Empire that a renewed Muslim awareness of the Crusades began.

To Muslims of the time, the Crusades were Western invasions motivated by Christian greed and hatred of Islam. To Christians of the time, the Crusades were religiously justified expeditions to reclaim the land taken by the armies of Islam. To the vast majority of modern people, the Crusades represent the abhorrent consequences of fanatical religious intolerance.

Echoing the modern view, in March 2000 Pope John Paul II apologized for "infidelities to the Gospel committed by [Christians]," and asked forgiveness:

for the violence used in the service of the truth and for the distrustful and hostile attitudes sometimes taken towards the followers of other religions.<sup>97</sup>

Many believe the words of John Paul II are a formal apology for the Crusades. But, some scholars argue they should not be construed as such. The Pope chose his words carefully, apologizing for infidelities and violence. Though not specifically referencing the Crusades of the 11th through 13th centuries, presumably he intended to cover them.<sup>98</sup>

<sup>94</sup> PETER MASSFIELD, *A HISTORY OF THE MIDDLE EAST*, at 21 (New York, New York: Penguin Group, 2003).

<sup>95</sup> See MADDEN, *supra*, at 217.

<sup>96</sup> MADDEN, *supra*, at 218.

<sup>97</sup> Pope John Paul II, *Homily of the Holy Father: Day of Pardon* (12 March 2000).

<sup>98</sup> See Andrew Holt, "Apology for the Crusades," December 2005, posted at [www.crusades-encyclopedia.com/apologyfortheCrusades.html](http://www.crusades-encyclopedia.com/apologyfortheCrusades.html) (analyzing the apology, and citing many opinions on it).





## Chapter 8

### SUNNI-SHĪ'ITE SPLIT (632-680 A.D.)

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The Prophet said to 'Alī, "O 'Alī,  
Thou art the Lion of God, a hero most valiant;  
Yet confide not in thy lion-like valour,  
But seek refuge under the palm-trees of the 'Truth.'  
Whoso takes obedience as his exemplar Shares its proximity to the ineffable  
Presence.  
Do thou seek to draw near to Reason; let not thy heart  
Rely, like others, on thy own virtue and piety.  
Come under the shadow of the Man of Reason  
[i.e., the *Pir*, or Perfect *Shaikh*, or Spiritual Director],  
Thou canst not find it in the road of the traditionists.

. . .

Having chosen thy [Spiritual] Director, be not weak of heart,  
Nor yet sluggish and lax as water and mud;  
But if thou takest umbrage at every rub,  
How wilt thou become a polished mirror?"

Mawlāna Jalālu-'D-Dīn Muhammad I Rūmī (1207-1273 A.D.),  
TEACHINGS OF RUMI — THE MASNAVI, Book I, Story X, *Submission to the  
Spiritual Director in MASNAVI I Ma'NAVI 45-47* (London: The Octagon  
Press, 1979) (E.H. Whinfield trans.)

#### SYNOPSIS

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## § 8.05 'ĀSHŪRĀ

## § 8.01 DIVERSITY WITHIN UNITY AND DEMOGRAPHIC REALITIES

Islam, like Christianity, is characterized not only by unity within diversity, but also by diversity within unity. There are core principles and practices, historical understandings, and future perspectives, upon which all Muslims agree, and likewise for Christians. These unifying features are like centripetal forces in physics, bringing Muslims toward a center. The belief in the authenticity and content of Message of the Qur'ān, and in the Messenger, and the Five Pillars of Islam, are the obvious centripetal forces. Indeed, at the outset, it is vital to appreciate that differences between *Shī'a* and *Sunni* Muslims do not yield disparate legal systems. In fact, for *Shī'ites* and *Sunnīs*, the vast majority of *Sharī'a* theory, jurisprudence, and black-letter rules is substantively identical. Professor Fysee explains:

Islamic law is not a systematic code, but a living and growing organism; nevertheless there is amongst its different schools a large measure of agreement, because the starting point and the basic principles are identical. The differences that exist are due to historical, political, economic and cultural reasons, and it is, therefore, obvious that this system cannot be studied without a proper regard to its historical development.<sup>1</sup>

But, there are differences — centrifugal forces, which move out from that center — that give Islam its diversity, and likewise for Christianity.

Islam, particularly *Sunni* Islam, is a decentralized religion. Thus, interpretations of the Qur'ān are variegated, as diverse as the attire of Muslim women, from bikinis on Lebanese beaches to *burkas* in the *Old Souk* of Riyadh. America itself is home to the most diverse Muslim community in the world. Just as there are Catholic and Protestant Christians, and a large number of Protestant denominations, and Eastern Orthodox Churches, there is more than one branch of Islam. In the *Sharī'a*, there are distinctions between *Shī'a* and *Sunni* on certain issues, such as the independent reasoning (*ijtihād*) as a source of law, and in certain subject areas, such as Family Law and Inheritance.

The most basic distinction among the branches of Islam, of course, is between *Sunni* and *Shī'ite*. Among *Sunni* Islam, there are Four Major Schools: *Hanafi*, *Māliki*, *Shāfi'i*, and *Hanbali*. Likewise, *Shī'ism* is no monolith. Within *Shī'ite* Islam, there are three major distinctions:

- Twelver *Shī'ites*, also known as "*Ja'fari*," "*Imāmi*," or "*Ithna 'Ashari*" *Shī'ites*.
- Sevener *Shī'ites*, also known as "*Ismā'ili*" *Shī'ites*.

<sup>1</sup> ARIF A.A. FYSEE, OUTLINES OF MUHAMMADAN LAW 1 (3rd ed., 1964), quoted in Faisal Kutty, *The Sharī'a Factor in International Commercial Arbitration*, 28 LLOYD'S OF LOS ANGELES INTERNATIONAL & COMPARATIVE LAW REVIEW 565, 579-580 (SUMMER 2006).

- Fiver *Shī'ites*, also known as "*Zaydi*" *Shī'ites*.

Within each of these delineations, there are yet more delineations.<sup>2</sup> For example, among the Twelver *Shī'ites*, a predominant line are the *Usulis*.

Notably, in August 2010 in Iran, which is a Twelver *Shī'ite* nation and the only officially *Shī'ite* nation in the world, the Supreme Leader, *Āyatollāh* Ali Khamenei took the unprecedented step of publicly rebuking senior officials, including his political allies:

Unity and solidarity among the country's officials is a religious duty, and the intentional rejection [of unity] is, especially in the upper echelon, against religious teachings.<sup>3</sup>

The *Āyatollāh* was reacting to an open split among conservative and radical fundamentalists in the government. At issue was:

a highly controversial interpretation of the Shia faith advanced by close allies of Mr. [Mahmoud] Ahmadi-Nejad [President of Iran], who advocate a radical mixture of Islam and nationalism.

Allies of Mr. Ahmadi-Nejad allegedly hold that Muslims do not need the clergy — a pillar of the Shia faith — to connect with God, and that direct links can be made with the last [12th], or "Hidden Imam" [Al Māhdi]. . . .

Some prominent fundamentalists, who describe themselves as moderates, have warned about the emergence of a "deviant" religious group around the President. In a theocratic regime, dedicated to upholding the message of Islam, disputes of this nature are of crucial importance.<sup>4</sup>

The *Āyatollāh* also was reacting to Esfandiar Rahim-Mashaie, Chief of Staff to the President, who advocated establishment of an "Iranian School of Islam," and added that were it not for Iranians, "no Islam would have remained."<sup>5</sup> For the *Āyatollāh*, that signaled too much diversity within unity, and undermined the claim of Islam to universality. The factions paid little heed to the *Āyatollāh*, and continued their infighting.<sup>6</sup>

Some observers, both Muslim and non-Muslim, regard *Shī'ism* in all of its diversity as a religion separate from Islam.<sup>7</sup> The truth or falsehood of that

<sup>2</sup> See JAMES A. BILL & JOHN ALDEN WILLIAMS, ROMAN CATHOLICS & SHI'ITE MUSLIMS: PRAYER, PASSION AND POLITICS 17 (Chapel Hill, North Carolina: The University of North Carolina Press, 2002). [Hereinafter, BILL.]

<sup>3</sup> Quoted in Monavar Khalaq, *Ayatollah Rebukes Warring Factions*, FINANCIAL TIMES, 24 August 2010, at 1.

<sup>4</sup> Najmeh Bozorgmehr, *Shia Split Deepens Ahmadi-Nejad's Woes*, FINANCIAL TIMES, 24 August 2010, at 3. [Hereinafter, Bozorgmehr.]

<sup>5</sup> Quoted in Bozorgmehr, *supra*.

<sup>6</sup> See Monavar Khalaq, *Tehran Regime Fails to Contain Infighting*, FINANCIAL TIMES, 31 August 2010, at 2.

<sup>7</sup> See [http://islamicweb.com/beliefs/cults/shia\\_population.htm](http://islamicweb.com/beliefs/cults/shia_population.htm).



proposition notwithstanding, any treatment of Islam is incomplete without a discussion of *Shīism*. Demographic realities are one reason: *Shī'as* constitute a sizeable 10-13 percent of the worldwide population of persons identifying themselves as "Muslim." At least 23 countries have populations of *Shī'ite* Muslims in excess of 100,000. The majority of *Shī'a* reside in India, Iran, Iraq and Pakistan.\* In the United States, there are between 200,000 and 400,000 *Shī'ites*. Table 8-1 presents the global distribution of *Shī'as*.<sup>9</sup>

Among the different categories of *Shīism*, over 85 percent of all *Shī'a* are Twelver.<sup>10</sup> Table 8-2 presents the country-specific distribution of Twelver *Shī'ites*, and estimates of their percentage among the *Shī'ite* Muslim population in each country.<sup>11</sup> The countries in this Table are further testimony to the diversity within *Shī'ite* Islam.

Table 8-1:  
*Shī'ite* Demographics

Rank	Country	Population of <i>Shī'a</i> Muslims (as of 2009)	<i>Shī'a</i> as a Percentage of Total Muslim Population of Coun- try
1	Iran	66-70 million	90-95 %
2	Pakistan	17-26 million	10-15 %
3	India	16-24 million	10-15 %
4	Iraq	19-22 million	65-70 %
5	Turkey	7-11 million	10-15 %
6	Yemen	8-10 million	35-40 %
7	Azerbaijan	5-7 million	65-70 %
8	Afghanistan	3-4 million	10-15 %
9	Syria	3-4 million	15-20 %
10	Saudi Arabia	2-4 million	10-15 %
11	Nigeria	Less than 4 mil- lion	Less than 5 %
12	Lebanon	1-2 million	45-55 %
13	Tanzania	Less than 2 mil- lion	Less than 10 %
14	Kuwait	500,000-700,000	20-25 %
15	Germany	400,000-600,000	10-15 %
16	Bahrain	400,000-500,000	65-75 %

\* See THE PEW FORUM ON RELIGION AND PUBLIC LIFE, PEW RESEARCH CENTER, MAPPING THE GLOBAL MUSLIM POPULATION 8, 10 (October 2009), downloaded from <http://pewforum.org/docs/DocID=450>. [Hereinafter, PEW FORUM.]

<sup>9</sup> The statistics mentioned above and presented in the Table are from the Pew Forum on Religion and Public Life and are as of October 2009. See PEW FORUM, *supra*, at 10 (October 2009).

<sup>10</sup> *Shīa Islam*, Wikipedia, posted at [http://en.wikipedia.org/wiki/Shīa\\_Islam](http://en.wikipedia.org/wiki/Shīa_Islam).

<sup>11</sup> *Worrying Times*, THE ECONOMIST, 25 September 2010, at 60 [hereinafter, *Worrying Times*]; *Shīa Islam*, Wikipedia, posted at [http://en.wikipedia.org/wiki/Shīa\\_Islam](http://en.wikipedia.org/wiki/Shīa_Islam). The statistics in this Table are as of 2010. Note there is a statistical problem in that most countries, with the exception of Iran, either do not count *Shī'ites* or vastly underreport their numbers.

Rank	Country	Population of <i>Shī'a</i> Muslims (as of 2009)	<i>Shī'a</i> as a Percentage of Total Muslim Population of Coun- try
17	Tajikistan	Approximately 400,000	Approximately 7 %
18	United Arab Emirates (UAE)	300,000-400,000	Approximately 10 %
19	United States	200,000-400,000	10-15 %
20	Oman	100,000-300,000	5-10 %
21	United Kingdom	100,000-300,000	10-15 %
22	Bulgaria	Approximately 100,000	10-15 %
23	Qatar	Approximately 100,000	Approximately 10 %

For example, Iran is an avowedly Islamic theocracy, and regards itself as the protector of *Shī'ites* worldwide. This self-appointed role reflects both the long history of *Shī'ism* in Persia, and the persistence of discrimination against *Shī'ites*, as *The Economist* observes:

Conditions for Shias vary among the Gulf monarchies but had until recently [2010] been broadly improving. In relaxed and relatively liberal Kuwait, where Shias account for a third of the ultra-rich citizenry, they have long been prominent in business and in government. Some hold high office in Bahrain, too, but proportionately far fewer than their two-thirds share of the island kingdom's population.

Saudi Arabia has the largest number of Shias [in the Gulf outside of Iran] at 2m-odd, but they are thinly diluted in a population ten times bigger and are subject to more systematic discrimination. No Shia has become a cabinet minister or general — or even a headmistress in a state school, reflecting the Saudis' severe Wahhabism, in effect the kingdom's official doctrine. Still, in recent years the Saudi government has loosened some strictures on Shia worship and forced extremists Sunni clerics to lessen their anti-Shia vitriol.<sup>12</sup>

In contrast to Iran, Azerbaijan is a secularized democratic country, with separation of mosque and state, a legacy of respect for its Jewish minority, and a legal system in which the *Shari'a* does not predominate. As another contrast, Bahrain is an Emirate in which a *Sunni* ruling family presides over a majority *Shī'ite* population.

The diversity within the *Shī'ite* world has implications for international relations, but, the pattern is not entirely clear. Iran and the United States are on chronically hostile terms. Azerbaijan and America enjoy good relations, whereas Azerbaijan and Iran do not. Bahrain hosts the 5th Fleet of the United States Navy. Likewise,

<sup>12</sup> *Worrying Times*, *supra*.

the extent to which *Shī'ism* itself, as distinct from other factors, affects whatever pattern exists is unclear.

Table 8-2:  
Twelver *Shī'ite* Demographics

Rank	Country	Twelver <i>Shī'a</i> as a Percentage of <i>Shī'ite</i> Muslim Population of Country (Estimated)
1	Iran	90 %
2	Azerbaijan	85 %
3	Bahrain	75 %
4	Iraq	65 %
5	Yemen	45 %
6	Lebanon	35 %
7	Kuwait	35 %
8	Turkey	25 %
9	Albania	20 %
10	Pakistan	20 %
11	Afghanistan	20 %
12	Saudi Arabia	10 %

## § 8.02 SUCCESSION PROBLEM CATALYZING SCHISM

### [A] Nature of Authority

What exactly does it mean to be *Shī'a*? One way to respond is a *Shī'ite* has an essentially different view of authority than a *Sunni*. The word "*Shī'a*" is the short form of the Arabic phrase "*Shīat-u-'Alī*," meaning "Party of 'Alī."<sup>13</sup> The schism between *Shī'ite* and *Sunni* Islam dates to the time of the Prophet Muhammad. Its catalyst was a problem that plagues most religious communities after their founder dies, that bedeviled Ancient Rome, and that recurs in many contexts throughout history: succession.

When the Prophet died in 632 A.D., the first Islamic community (*ummah*) faced three key issues:

- (1) Who should be the first successor to Muhammad?
- (2) Upon what criteria should successors be selected?
- (3) What is the role of a successor? That is, would the successor to the Prophet be religious in character, or merely political and military?<sup>14</sup>

<sup>13</sup> See JOHN L. ESPINOSA, *ISLAM: THE STRAIGHT PATH* 39 (New York, New York: Oxford University Press, expanded ed., 1991). [Hereinafter, STRAIGHT PATH.]

<sup>14</sup> Mohammed Fadel, *The True, the Good, and the Reasonable: The Theological and Ethical Roots of Public Reason in Islamic Law*, 21 CANADIAN JOURNAL OF LAW & JURISPRUDENCE 5, 21 (January 2008). [Hereinafter, Fadel.]

On these issues, depending on the source, there was nearly universal agreement in the *ummah*, violent disagreement between sizeable factions, or something in between.

*Sunnis* believe the proper first successor to Muhammad was Abū Bakr, who indeed filled that role. For them, personal qualities such as piety, wisdom, and experience — not blood ties to the Prophet — are what matter in choosing a successor. As to the job, as it were, of a successor, no one can match Muhammad as the Prophet of Allāh. Hence, there is no element of religious authority in succession. Rather, leadership of the *ummah* is about taking on the political and military roles Muhammad played. That is, after Muhammad, leadership is a secular matter, as successors inherited only the political and military dimensions of the office. Note the difference on religious authority has profound implications for doctrine and change. Religious authority in the *Shī'ite* world is more centralized and hierarchical than in the *Sunni* world. Depending on the leader, the development and elaboration of doctrine may be top-down rather than bottom-up, and change can come rapidly through the order of a single individual.

In contrast, *Shī'a* believe Muhammad designated his cousin and son-in-law, Abū al Hasan 'Alī ibn Abī Ṭalīb, to be his successor, and that a blood relationship between Muhammad and a prospective successor is vital.<sup>15</sup> For them, a successor holds not only political and legal authority, but also religious authority. That is, *Shī'a* accept 'Alī as the proper successor in matters of both religion and state.

Their credence becomes vitally important once 'Alī and his family lose the Caliphate. *Shī'a* believe that notwithstanding the end of the *Rashidun* era in 660, the descendants of 'Alī (who, by blood connection, are tied to Muhammad) still retain their religious authority, which is inherited. *Shī'ites* reject the disjunctive nature of the *Sunni* interpretation. They argued the religious and political character of the successor to the Prophet is indistinguishable. As the supreme religious leader, a successor is necessarily the political leader as well — as was Muhammad. In brief, there is both a sacred and secular aspect to succession: the leader has that dominion, plus leads the Islamic community (*ummah*) on political and military matters.

The competing interpretations between *Shī'ites* and *Sunnis* on the nature of authority are more than an academic point. Rather, they continuously inform the hierarchy of Islamic governments. Consider Article 2 of the Constitution of the Islamic Republic of Iran:

The Islamic Republic is a system based on belief in:

- (1) the One God (as stated in the phrase "There is no god except Allāh"), His exclusive sovereignty and the right to legislate, and the necessity of submission to His commands;
- (2) Divine revelation and its fundamental role in setting forth the laws;
- (3) the return to God in the Hereafter, and the constructive role of this belief

<sup>15</sup> See ROY JACKSON, *FIFTY KEY FIGURES IN ISLAM* 16-21 (New York, New York: Routledge, 2006). [Hereinafter, JACKSON.]



in the course of man's ascent towards God;

- (4) the justice of God in creation and legislation;
- (5) continuous leadership (*imamah*) and perpetual guidance, and its fundamental role in ensuring the uninterrupted process of the revolution of Islam;
- (6) the exalted dignity and value of man, and his freedom coupled with responsibility before God; in which equity, justice, political, economic, social, and cultural independence, and national solidarity are secured by recourse to:
  - (1) continuous *ijtihād* of the *fukahā'* possessing necessary qualifications, exercised on the basis of the Qur'ān and the *Sunnah* of the *Ma'sumun*, upon all of whom be peace;
  - (2) sciences and arts and the most advanced results of human experience, together with the effort to advance them further;
  - (3) negation of all forms of oppression, both the infliction of and the submission to it, and of dominance, both its imposition and its acceptance.<sup>16</sup>

There is no similar provision based in the Constitution of the Kingdom of Saudi Arabia (i.e., the Basic Law, which is a charter containing 83 articles, and which was adopted on 2 March 1992 by a Royal Decree of King Fahd), nor in the Constitution of any other *Sunni* state.

### [B] Tribal Consensus or Blood Lineage?

The standard but by no means universally accepted historical narrative is that in 632, when the Prophet Muhammad died, the Muslim community (*ummah*) divided over the method by which the successor to the Prophet should be chosen. The Arabic term for "successor" or "representative," is "*Khalifa*," which in English is transliterated as "Caliph." Synonyms are "*Amir al-Mu'minin*," which means "Leader of the Faithful," as well as "*Imām al-Mu'minin*" and "*Imām al-Ummah*." The essential idea is the Caliph is the leader of an Islamic community, head of an Islamic state, and possibly both. In the debate over two methods, tribal consensus or blood line, three factions in the *ummah* emerged.

The majority faction favored the method of tribal consensus. Surely any Meccan aristocrat could assume the leadership of Islam through the process of consensus among the early converts of Mohammad.<sup>17</sup> These Muslims, of course, became known as "*Sunnīs*."

<sup>16</sup> Islamic Republic of Iran Constitution, Article 2, posted at [www.iranonline.com/iran/iran-info/Government/constitution.html](http://www.iranonline.com/iran/iran-info/Government/constitution.html). To be sure, reliance on *Shīte* ideology is not necessarily the sole cause of the hierarchical government in Iran. A case can be made the supremacy of *Shī'a* was a historical consequence of the 1978-79 Islamic Revolution, and the dynamics of the Revolution contributed to the hierarchy.

<sup>17</sup> See SANDRA MACKAY, *THE IRANIAN PERSIA, ISLAM AND THE SOUL OF A NATION* 50 (New York, New York: Plume, 1996). [Hereinafter, MACKAY.]

Members of the *ummah* in favor of the bloodline method believed a Caliph must be a direct descendant of Mohammad in order to possess the piety and wisdom of the Prophet that is needed to be a worthy successor and, in effect, representative of God (Allāh).<sup>18</sup> These Muslims, who were the minority faction, became known as "*Shītes*." The *Shītes* asserted (and still do) God chose the Prophet; the people did not appoint him. Likewise, they argued, God, not the people, should select his successor. Blood lineage is not exactly the same as a direct Divine appointment. But, when that lineage is traced back to a person who was Divinely appointed, the connection to the Almighty is less tenuous than an appointment resulting from a consensus of largely unrelated men.

Notably, there was a third faction, the *Khārijites*. The *Khārijites* believed any male believer possessed the right to assume leadership of Islam, regardless of whether he was a direct descendant of Mohammad or belonged to the elite class of Mecca.<sup>19</sup>

### [C] Fātimah and Children of 'Ali

'Ali was, of course, the first cousin of the Prophet with whom the Prophet had been raised, for instance, in the home of Abū Talib, the father of 'Ali and Uncle of the Prophet.<sup>20</sup> Because each had been raised for a time in the house of Abū Talib, their relationship has been characterized as one of "foster brothers."<sup>21</sup> Further, 'Ali is reputed to be one of the first converts to Islam following Khadyja, the very first to convert.<sup>22</sup> Indeed, many *Shītes* believe 'Ali was the first man to convert to Islam and follow the Prophet, and was both the person closest to Muhammad and his most trustworthy confidant. They also assert Mohammad died in the arms of 'Ali, and 'Ali bathed the body of Muhammad and buried him. In brief, of the four Rightly Guided Caliphs (*Rashidun*), 'Ali was the only one who was directly related to Muhammad.

Yet, a cousin is not a son. The succession problem might well have been less controversial had Muhammad been survived by a son. Yet, when Muhammad died, he left no direct male to become successor. When he passed away, only one of his four daughters was alive: Sayyida Fātimah Zahra, known as "Fātimah" (also spelled "Fatimah" or "Fatima.") She, the youngest child of Muhammad and Khadyja, was married to 'Ali, the son of Abū Talib.<sup>23</sup> It is believed the Archangel Gabriel arranged the marriage between 'Ali and Fātimah.<sup>24</sup> Further, *Shī'a* believe

<sup>18</sup> See MACKAY, *supra*, at 50.

<sup>19</sup> See MACKAY, *supra*, at 50, 53.

<sup>20</sup> See MOJIB MOHEN, *AN INTRODUCTION TO SHĪ'Ī ISLAM: THE HISTORY AND DOCTRINES OF TWELVE SHĪ'ĪSM* 11 (London, United Kingdom: Yale University Press, 1985). [Hereinafter, MOHEN.]

<sup>21</sup> MOHEN, *supra*, at 11. But see JACKSON, *supra*, at 17, in which the author states although Muhammad had been raised by Abū Talib, the relationship of 'Ali to Muhammad was in Muhammad's own house, and was a relationship more similar to that of father and son. See also BILL, *supra*, at 29.

<sup>22</sup> See BILL, *supra*, at 29; MOHEN, *supra*, at 11; JOHN L. ESPINOSA ED., *THE OXFORD DICTIONARY OF ISLAM* 15 (New York, New York: Oxford University Press, 2003). [Hereinafter, OXFORD DICTIONARY OF ISLAM.]

<sup>23</sup> See BILL, *supra*, at 52.

<sup>24</sup> See BILL, *supra*, at 28, 52-53.

that at the wedding of 'Ali and Fātima, Muhammad overheard the Angel Gabriel proclaim "Allāh Akhbar!" (God is Great), and repeated the exclamation, which has been used by Muslims ever since.<sup>25</sup>

Fātimah was a woman of great compassion. Even though early in her life her family was poor, she is reported to have given what little she had to those in greater need.<sup>26</sup> To help Fātimah and 'Ali cope with their poverty, Muhammad taught them the prayers now prayed by some Muslims with the use of prayer beads.<sup>27</sup> Indubitably, Fātimah was beloved by Muhammad, who reportedly said:

The contentment of Fatima is my contentment, her anger is my anger. Whosoever loves my daughter Fatima loves me. Whosoever makes Fatima content makes me content. Whosoever makes Fatima unhappy makes me unhappy. Fatima is part of my body. Whosoever hurts her, has hurt me, and whosoever hurts me has hurt God.<sup>28</sup>

The life of Fātimah was filled with suffering. She experienced great poverty, the deaths of her mother and father, and saw 'Ali "lose the mantle of Muslim leadership . . . to Abū Bakr."<sup>29</sup> She is remembered, perhaps most of all, because she represents the genealogical line of the Prophet Muhammad.<sup>30</sup>

In fact, it is difficult to overstate the importance of Fātimah in *Shī'ism*.<sup>31</sup> Without her, *Shī'ism* simply would not exist, at least not as it has come to be known today. Each one of the Twelve *Shī'ite Imāms* is a direct descendant of Fātimah and 'Ali.<sup>32</sup> Manifestly, 'Ali was the son-in-law of the Prophet, and his children with Fātimah were grandchildren of the Prophet. Therefore, each *Shī'ite Imam* is a direct descendant of — has a blood tie to — the Prophet. Consequently, Fātimah is known by *Shī'ites* as the "Mother of the *Imāms*," and revered by them for this Motherhood, and for her personal virtue.<sup>33</sup> To underscore her importance, she is to *Shī'ites* as the Blessed Virgin Mary is to Catholic Christians. Notably, Fātimah is not alone among women who occupy special places of honor in *Shī'ism*. Mary herself, along with Khadyja, and Asiya, the caregiver of Moses, are revered as well.<sup>34</sup>

With Fātimah, 'Ali had three children: two sons, Hasan (also spelled "Hisan"), the eldest, who was born in 625 A.D. (3 A.H.), and Hussein (also spelled "Husayn"), plus a daughter, Zaynab.<sup>35</sup> Sadly, Fātimah died only 6 months after the Prophet,

<sup>25</sup> See BILL, *supra*, at 28.

<sup>26</sup> See BILL, *supra*, at 54.

<sup>27</sup> See BILL, *supra*, at 28.

<sup>28</sup> BILL, *supra*, at 52. See also STRAIGHT PATH, *supra*, at 112 (discussing the relationship between Muhammad and Fātimah).

<sup>29</sup> BILL, *supra*, at 52. See also STRAIGHT PATH, *supra*, at 112 (discussing the life of Fatimah).

<sup>30</sup> See BILL, *supra*, at 52.

<sup>31</sup> See BILL, *supra*, at 52.

<sup>32</sup> See BILL, *supra*, at 28-29.

<sup>33</sup> OXFORD DICTIONARY OF ISLAM, *supra*, at 84.

<sup>34</sup> See BILL, *supra*, at 55; OXFORD DICTIONARY OF ISLAM, *supra*, at 15.

<sup>35</sup> See BILL, *supra*, at 28-29; OXFORD DICTIONARY OF ISLAM, *supra*, at 292.

and was buried in Medina.<sup>36</sup> 'Ali remarried a woman named Fātimah bint Hizam al-Qilabiyya. She is known as "Umm ul-Banīn," or "Umm Banīn," meaning "Mother of Several Sons." With her, 'Ali had four sons: 'Abbās (the eldest), Abdullah, Jafar, and 'Uthmān.

## § 8.03 'ALI AND SUCCESSION CRISIS

### [A] Public Anointing?

Succinctly put, *Shī'a* believe Muhammad designated 'Ali to be his successor, and that 'Ali was fit to succeed Muhammad because of his faith and piety, his close relationship with Muhammad, not merely as one of the Companions of the Prophet (*Ṣaḥābah*), but more profoundly because of his blood relationship with Muhammad as his cousin. Further, 'Ali served Muhammad as a soldier and scribe. He is said to have slept in the bed of Muhammad on the eve of the *Hijrah*, thereby making it possible for Muhammad to escape his persecutors and complete his journey to Medina.<sup>37</sup>

Did Muhammad make an unequivocal, public declaration of a successor? Certainly that would have resolved any succession problem. *Shī'ites* urge that he did, and cite sayings attributed to Muhammad in which he purportedly designated 'Ali as his successor.

First, *Shī'ites* believe the Prophet told his relatives and friends during the first days of his prophecy that whoever would be the first to accept his teachings would become his successor. Muhammad voiced this intention when 'Ali was still young, at the tender age of 13. Muhammad called upon his fellow clansmen (and women) to follow God (Allāh). The young 'Ali promptly stepped forward and announced his intention to support Muhammad and live a life according to the Will of Allāh.<sup>38</sup> Touched by the enthusiasm and loyalty of 'Ali, Muhammad reportedly said:

This is my brother, my trustee and my successor among you, so listen to him and obey.<sup>39</sup>

"This," argue *Shī'ites*, surely must refer to 'Ali. 'Ali was the first man to believe the authenticity of the message delivered by Muhammad, and accept it. Hence, 'Ali was the rightful successor.

Second, *Shī'ites* contend that Muhammad believed 'Ali possessed special knowledge about Islamic leadership, specifically religious and spiritual leadership, and the insights should be transferred down to the sons and subsequent descendants of 'Ali. Therefore, Muhammad named and appointed 'Ali as his successor on 10 March 632 A.D. at a place known as "Ghadir Al Khumm" (or simply "Khum," "Khur," or

<sup>36</sup> See BILL, *supra*, at 40.

<sup>37</sup> BILL, *supra*, at 29; MOMEN, *supra*, at 12.

<sup>38</sup> See CYRIL GLASSÉ, THE NEW ENCYCLOPEDIA OF ISLAM 39 (Lanham, Maryland: AltaMira Press, 2002); MOMEN, *supra*, at 12.

<sup>39</sup> AL-TABARĪ, TA'RIKH, vol. I, at 1172-73, quoted in MOMEN, *supra*, at 12.



"Khu").<sup>40</sup> This spot, an oasis, is in Saudi Arabia near the city of Al-Juhfah. During a sermon he delivered at Khumm, Muhammad revealed his intentions:

If I was anyone's *mawla* [protector], then 'Ali is his *mawla*.<sup>41</sup>

Shī'ites assert that what happened was nothing short of the investiture of 'Ali by the Prophet as the next leader of the *ummah*. Consequently, a key annual event for Shī'ites is *Eid al Ghadir*, or the Festival of *Ghadir*, in which they celebrate this investiture.<sup>42</sup> Annually, on the 18th day of *Dhu Al-Hijja*, the last of the 12 months in the Islamic calendar, Shī'ites celebrate this Festival.<sup>43</sup>

Sunnīs have a different interpretation of the sermon. They do not believe Muhammad meant to designate 'Ali as his successor.<sup>44</sup> Rather, the Prophet simply was defending 'Ali against unjust criticism.

### [B] 'Ali Passed Over Thrice

It was around 'Ali that the *Shiat-u-'Ali* (Party of 'Ali) coalesced and pressed the case he should be the Caliph, because he boasted both religious credentials and family ties. Yet, Abū Bakr, the closest confidant of Muhammad, and also arguably the first convert, was tapped for the position. Abū Bakr was much older than 'Ali, thereby rendering Abū Bakr the choice conforming with Arab tradition favoring elder male leaders.<sup>45</sup> Thus, in the first test, the consensus-method prevailed. Significantly, Abū Bakr was named as successor to the temporal, but not religious, authority of Muhammad.<sup>46</sup>

Note that apparently no group ever seriously entertained, or considered at all, the possibility of a female successor to the Prophet. Note, too, that "consensus" did not necessarily mean unanimity. Lost to history is whether any individual voting, or secret balloting, occurred. More likely, "consensus" simply meant an agreement among the persons engaged in the selection on a candidate, with no single individual or significant group objecting and blocking that selection. (Interestingly, that is the meaning of "consensus" used in modern-day International Trade Law and the operation of the World Trade Organization (WTO).) As for the persons identifying, vetting, and debating about potential successors, they — like the candidates — were men.

To avoid any uncertainty after his death, Abū Bakr designated as his successor Umar, a member of the *Quraysh*, the old, aristocratic tribe around Mecca to which

the Prophet had belonged.<sup>47</sup> For a second time, though, 'Ali was passed over for the title of "Caliph." During the 10-year reign of Umar, 'Ali refrained from participation in the wars the Caliph waged in the name of Islam, including the invasion of Persia.<sup>48</sup> Partly through these conflicts, Islam spread far beyond the Arabian Peninsula, leading to a great Arab-Islamic, or Muslim, Empire. Eschewing battle, 'Ali devoted himself to teaching his growing number of followers the importance of self-sacrifice, justice, piety, and equality.<sup>49</sup> The personal attributes of 'Ali were appealing, and the number of his followers grew, as did his knowledge of the sacred texts of Islam.

Nevertheless, for a third time, 'Ali was passed over for the position of Caliph. A Persian slave murdered Umar.<sup>50</sup> 'Uthmān, another of early converts won by Muhammad, and a member of the *Umayyad* clan within the *Quraysh* tribe, became the third Caliph.<sup>51</sup> Predictably, the designation of 'Uthmān over 'Ali deepened the discontent already existing in a segment of the *ummah* on the topic of leadership.<sup>52</sup> Muslims in this faction strengthened in their view that only a bloodline descendant of Mohammad possessed the knowledge and wisdom of the Prophet needed to be the Caliph.<sup>53</sup> By this time, the *Shiat-u-'Ali* (Party of 'Ali) distinguished itself, as these Muslims designated themselves the "Shī'a 'Ali," or "supporters of 'Ali."<sup>54</sup>

As the era of the *Rashidun* and years of the Caliphate of 'Uthmān continued, other groups within the Arab-Islamic Empire gravitated towards 'Ali. They were more than just dissatisfied with various aspects of the rule of 'Uthmān. They were attracted by the teachings of piety and equality advanced by 'Ali:

'Ali's "life is shrouded in myth and legend and he is widely acknowledged, even by his critics, as a pious and devout individual as well as a just and well-meaning leader."<sup>55</sup>

Arab soldiers of Islam were proud of their tribal genealogies and believed they were racially superior to non-Arabs.<sup>56</sup> Opposing this tradition, 'Ali taught his followers all believers are created equal, and only through virtue is one dearer to God than another.<sup>57</sup>

From these teachings, among others, 'Ali gained support among non-Arabs, including Persians, who chafed at the second-class status elite Arabs imposed on them. Impoverished Arabs, benefitting the least from Islamic conquests, also joined

<sup>40</sup> See *Hadith of the Pond of Khumm*, WIKIPEDIA, posted at [http://en.wikipedia.org/wiki/Hadith\\_of\\_the\\_pond\\_of\\_Khumm](http://en.wikipedia.org/wiki/Hadith_of_the_pond_of_Khumm).

<sup>41</sup> Quoted in BELL, *supra*, at 14-15. For further treatments of this sermon, see, e.g., MOMEN, *supra*, at 15; AYATULLAH JĀYAR SOBĀNI, DOCTRINES OF SHĪ' ISLAM: A COMPENDIUM OF ISMA'Ī BELIEFS AND PRACTICES 104-105 (Reza Shah-Kazemi ed. & trans. (London, England: I.B. Tauris Publishers, 2001).

<sup>42</sup> See OXFORD DICTIONARY OF ISLAM, *supra*, at 15.

<sup>43</sup> See OXFORD DICTIONARY OF ISLAM, *supra*, at 15, 292-293; MOMEN, *supra*, at 15.

<sup>44</sup> See JACKSON, *supra*, at 17.

<sup>45</sup> See JACKSON, *supra*, at 17.

<sup>46</sup> See MACKAY, *supra*, at 49.

<sup>47</sup> See MACKAY, *supra*, at 50.

<sup>48</sup> See MACKAY, *supra*, at 50.

<sup>49</sup> See MACKAY, *supra*, at 51.

<sup>50</sup> See MACKAY, *supra*, at 50.

<sup>51</sup> See MACKAY, *supra*, at 50.

<sup>52</sup> See MACKAY, *supra*, at 50.

<sup>53</sup> See MACKAY, *supra*, at 50.

<sup>54</sup> See MACKAY, *supra*, at 50.

<sup>55</sup> JACKSON, *supra*, at 17.

<sup>56</sup> See MACKAY, *supra*, at 50.

<sup>57</sup> See MACKAY, *supra*, at 51.

the group of followers of 'Alī. When dissidents appealed to 'Uthmān to rectify injustices perpetrated by his governors, the Caliph responded by having an *Umayyad* Governor, Muawiyah, persecute the protestors.<sup>58</sup> In 656, protestors marched on Medina calling the name of 'Alī.<sup>59</sup> 'Alī responded by leading a reform movement to depose 'Uthmān by withdrawing his mandate.<sup>60</sup> Unfortunately, 'Alī could not contain the hatred of all of the opponents of 'Uthmān. 'Uthmān, the third Caliph, was assassinated.<sup>61</sup>

### [C] Battles of Camel (656 A.D.) and Siffin (657 A.D.)

With the death of 'Uthmān in 656, 'Alī finally was designated Caliph. 'Alī reigned during a time when the Muslim community experienced serious internal turmoil and division. He believed in the unity of Islam, and taught that only if all believers challenged elitism and strictly adhered to justice and equality could harmony in the *ummah* be preserved.<sup>62</sup> Yet, his concern and advocacy for marginalized groups in society created opposition to 'Alī in the power elite of Islam, especially the *Quraysh* aristocracy in Mecca and the *Umayyad* clan in Damascus. In effect, from a *Shī'ite* perspective, 'Alī is an anti-Establishment figure battling through peaceful words and deeds Muslims gripped by tribal loyalties and besotted with the privileged status of ethnic Arabs.<sup>63</sup>

In such battles, the result, if not the precise path to it, often is foreseeable. Here, the *Umayyad* governor, Muawiyah, attempted to unseat 'Alī and vest the Caliphate in the family of the *Umayyads*.<sup>64</sup> Vowing vengeance against 'Alī for the death of 'Uthmān, the youngest wife of the Prophet, 'Ā'isha, and two of the Companions of the Prophet (*Ṣaḥābah*), Talha ibn Ubaydallah and Al Zubayr ibn al-Awwam, joined the *Umayyad* usurpers and formed an army against 'Alī. She and her forces were defeated at the Battle of the Camel, which occurred in 656 at modern-day Basra, Iraq.<sup>65</sup> The two Companions were killed.<sup>66</sup> Though 'Alī captured 'Ā'isha, he treated her with respect and returned safely to her friends in Medina, where she lived until her death.<sup>67</sup> And, though 'Alī prevailed in the Battle of Camel, he never returned to Medina, nor did he ever firmly establish himself as the head of the Islamic state.<sup>68</sup>

Indeed, the Caliphate of 'Alī continued to be marred by the violence of a divide between *Sunnis* and *Shī'ites* that was a civil war — First Muslim Civil War, or First

<sup>58</sup> See Mackey, *supra*, at 51.

<sup>59</sup> See Mackey, *supra*, at 51.

<sup>60</sup> See Mackey, *supra*, at 52.

<sup>61</sup> See Mackey, *supra*, at 51.

<sup>62</sup> See Mackey, *supra*, at 52.

<sup>63</sup> See Mackey, *supra*, at 52.

<sup>64</sup> See Mackey, *supra*, at 52.

<sup>65</sup> See Mackey, *supra*, at 52.

<sup>66</sup> See Jackson, *supra*, at 19.

<sup>67</sup> See Ruqayyah Waris Maqsood, *TEACH YOURSELF ISLAM 26* (Chicago, Illinois: Contemporary Books, 2003). [Hereinafter, Maqsood.]

<sup>68</sup> See Mackey, *supra*, at 52.

*Fitna*, which lasted from 656-661. (The Second *Fitna* lasted from about 680/683 to 685/692) In Arabic, the full term is "*Fitnat Maqtal 'Uthmān*," which means the "*Fitna* of the Killing of 'Uthmān." Obviously, the *Fitna* was over who had the legitimate right to be the Caliph. A key event in the First *Fitna* was the Battle of Siffin, which occurred between May and July 657 A.D. (37 A.H.). 'Alī was forced to fight the Governor of Syria on the banks of the Euphrates River in what is now Ar-Raqqa, Syria.<sup>69</sup> That Governor was Muawiyah, who happened to be the cousin of the second *Rashidun* Caliph, 'Uthmān.<sup>70</sup> Muawiyah contested the rule of 'Alī, and accused him of sheltering the killers of 'Uthmān.<sup>71</sup> The forces of 'Alī and Muawiyah clashed, but their battle ended in religious arbitration.<sup>72</sup> A group from the army of 'Alī was unimpressed with the arbitration, formally separated themselves, and became known as the *Khārijites* (Secessionists).<sup>73</sup> The arbitration which ended the Battle of Siffin<sup>74</sup> would ultimately lead to the assassination of 'Alī, and the loss of the Caliphate by his family.

### [D] Assassination and Martyrdom of 'Alī

Thus, after the Battles of the Camel and Siffin, 'Alī continued to face opposition not only from the *Umayyads*, but also from the *Khārijites*. The *Khārijites* felt excluded from leadership, because they were neither the blood descendants of the Prophet nor the elite of Mecca.<sup>75</sup> During the month of *Ramaḍān* in 661 A.D. (40 A.H.), 'Alī was assassinated by a *Khārijite* leader, Abd Al-Rahman ibn Muljam (commonly referred to as "Ibn Muljam"), who struck the Caliph across the head with a sword.<sup>76</sup> It took 3 days for 'Alī to die, during which he protected and fed his assassin. 'Alī ordered that the assassin should be spared if he ('Alī) lived, and killed with only one stroke if he died.<sup>77</sup> The death of 'Alī sealed the fate of Ibn Muljam.

*Shī'ites* regard the death of 'Alī — their first *Imām* — as that of a martyr. *Imām* 'Alī is buried in Najaf, 86 miles south of Baghdad. The shrine over his grave is the *Imām* 'Alī Holy Shrine (also called the "*Masjid* 'Alī," or "Mosque of 'Alī.") The third holiest site in *Shī'ism*, after Mecca and Medina, it is a major place of pilgrimage.<sup>78</sup> *Shī'ites* believe the remains of Adam and Noah are buried next to those of 'Alī. To *Shī'ites*, 'Alī left a prodigious and splendid legacy. In the political realm, his discourses, sermons, letters, and sayings are the framework for *Shī'ite*

<sup>69</sup> See Momen, *supra*, at 25.

<sup>70</sup> See Jackson, *supra*, at 19. But see STRAIGHT PATH, *supra*, at 40, in which the author lists Muawiyah as the nephew, rather than cousin, of 'Uthmān.

<sup>71</sup> See Momen, *supra*, at 24.

<sup>72</sup> See Jackson, *supra*, at 19-20.

<sup>73</sup> See Momen, *supra*, at 25.

<sup>74</sup> See OXFORD DICTIONARY OF ISLAM, *supra*, at 294.

<sup>75</sup> See Mackey, *supra*, at 53.

<sup>76</sup> See Mackey, *supra*, at 51; Momen, *supra*, at 25; Jackson, *supra*, at 16; MALISE RUTHVEN, *HISTORICAL ATLAS OF ISLAM 34* (Cambridge, Massachusetts: Harvard University Press, 2004). [Hereinafter, Ruthven.]

<sup>77</sup> See Maqsood, *supra*, at 26.

<sup>78</sup> See Jackson, *supra*, at 20. But see Momen, *supra*, at 26, in which the author points out there exists minor disagreement concerning the site of the remains of 'Alī.



Islamic government.<sup>79</sup> In the religious realm, he is said to have compiled a version of the Qur'ān used by *Shī'a*, which purportedly differs from that commissioned by 'Uthmān in that it is longer and bears references to 'Ali.<sup>80</sup>

## § 8.04 BATTLE OF KARBALA (680 A.D.)

### [A] Abdication by Hasan, Usurpation by Yazid

With the death of 'Ali, the era of the Four Rightly Guided Caliphs (*Rashidun*) ended. Never again would Islam be unified under one Caliph governing from its birthplace on the Arabian Peninsula. The next two Caliphates, led by their family namesakes, *Umayyads* (660-750 A.D.) and *Abbasids* (750-1258), would retain the unity, but their headquarters were in Damascus and Baghdad, respectively. After the *Abbasid* Caliphate collapsed, the unity, too, would be lost. Not surprisingly, these three Caliphates, and that of the *Rashidun* in particular, are the "Golden Age" of Islam.

Yet, even during the Golden Age, the unity was parlous and tenuous at best, if it ever really existed after the Prophet died. The *Shī'ites* never greeted Abū Bakr, Umar, or 'Uthmān as *Imāms*. Even as political and military leaders, they were usurpers.<sup>81</sup> After the death of Caliph and *Imām* 'Ali, the *Sunni* — *Shī'ite* controversy persisted, even worsened. Abū Muhammad Hasan ibn 'Ali the eldest son of 'Ali and Fātimah, succeeded 'Ali as Caliph. His reign was short-lived.

Soon after ascending to the position, Hasan abdicated it — in 661 A.D. (41 A.H.) — to the nemesis of his father, Muawiyah. Hassan had little choice: Muawiyah was militarily stronger than Hasan.<sup>82</sup> Thus, Hasan abdicated to save his fellow *Shī'a* from suffering further bloodshed.<sup>83</sup> (By some accounts, Hasan surrendered his claim to continue as Caliph on the understanding he would retake the position, after Muawiyah.) After abdicating as Caliph, Hasan was forced into retirement in Medina, where he lived piously and generously. The capital of Islam moved to Damascus under *Umayyad* rule.<sup>84</sup>

Critically for *Shī'ites*, Hasan retained the mantle of *Imām*.<sup>85</sup> Herein lies an example of the *Shī'ite* distinction between political and military authority, vested in the Caliph, and religious authority, embodied in the *Imām*. Reportedly, Hasan "married and divorced perhaps as many as sixty noble women."<sup>86</sup> Hasan died around 675 A.D. (49 A.H.), and was poisoned by his wife at the prompting of

<sup>79</sup> See JACKSON, *supra*, at 20.

<sup>80</sup> See JACKSON, *supra*, at 20.

<sup>81</sup> See ALBERT HOURANI, THE HISTORY OF THE ARAB PEOPLES 181 (New York, New York: MJF Books, 1991); MOMEN, *supra*, at 20; JACKSON, *supra*, at 18.

<sup>82</sup> See BILL, *supra*, at 36.

<sup>83</sup> See BILL, *supra*, at 36; MOMEN, *supra*, at 27.

<sup>84</sup> See MACKAY, *supra*, at 54.

<sup>85</sup> See BILL, *supra*, at 36.

<sup>86</sup> BILL, *supra*, at 37.

Muawiyah.<sup>87</sup> At that juncture, the *Imāmate* passed to the younger brother of Hasan, Hussein, making Hussein the third *Shī'ite Imām*.

*Sunnis* recognize Muawiyah as the rightful *Umayyad* Caliph following the abdication by Hasan. Yet, Muawiyah and his followers returned the favor done them by Hasan by persecuting the *Shī'ites*.<sup>88</sup> To be sure, Muawiyah faced opposition from followers of 'Ali, *Khārījites*, and other subject peoples. The *Shī'a* rejected the claim of Muawiyah as Caliph, because he was not a direct descendant of the Prophet. The *Khārījites* rejected the authority of Muawiyah as Caliph: he was not chosen by the community of the faithful (*ummah*).<sup>89</sup> In their mutual repudiation of the Caliph, the followers of 'Ali and *Khārījites* allied against the *Umayyads*. Joining the opposition were subject peoples, including Persians, who embraced Islam but whose social standing remained relegated to the aristocratic *Umayyad* family and Arabs descended from illustrious tribes of the Arabian Peninsula.<sup>90</sup>

### [B] Martyrdom of *Imām* Hussein

The year 680 A.D. (61 A.H.) was a watershed in Islamic history. Twenty years after the death of 'Ali, Hussein, the second son of 'Ali and Fātimah, led a rebellion against the *Umayyads* that would turn the *Sunni* — *Shī'ite* split into a schism that has yet to be healed. Sometime before the Caliph Muawiyah died in 680, Hussein and his supporters were told they would get to take over the Caliphate once Muawiyah passed away. Yet, the promise was not kept, as Yazid, the son of Muawiyah, seized power.

Predictably, Hussein opposed the seizure, and the *Umayyads*, now led by Yazid, responded to the opposition.<sup>91</sup> Arguably, the intention of Hussein was to lead not a violent revolt, but a religious reawakening. Regardless, if there had been a deal between Muawiyah and Hussein as to who the next Caliph would be, then the son — Yazid — certainly was not respectful of it, or of the *Shī'ites*. He coveted the position for himself. The *Umayyad* troops, commanded by Yazid, met Hussein, his family, and his followers at Karbala, a hot, dry desert area about 46 miles southwest of present-day Baghdad on what is called the "Plain of Sorrow and Misfortune." Today, Karbala lies at the edge of the Iraqi desert, and is surrounded by beautiful greenery, fruit orchards, and palm groves. It is home to more than 100 mosques, 23 religious schools, a large *souk* (market), and Karbala University. In 680 A.D., at that location, the Battle of Karbala ensued. Hussein was *en route* from Mecca to Kufa to meet his supporters.

Attacked by the *Umayyads* at Karbala, Hussein never reached his destination. Leading up to the Battle, there are significant religious events. *Shī'a* believe that

<sup>87</sup> See BILL, *supra*, at 37; MOMEN, *supra*, at 28.

<sup>88</sup> See OXFORD DICTIONARY OF ISLAM, *supra*, at 110.

<sup>89</sup> See MACKAY, *supra*, at 54.

<sup>90</sup> See MACKAY, *supra*, at 54.

<sup>91</sup> See OXFORD DICTIONARY OF ISLAM, *supra*, at 120.

during their journey, Hussein "was tested by God but overcame all temptation."<sup>92</sup> Further, Hussein is reputed to have known he and his companions were riding toward their death. Although he gave leave to his companions, many of them chose to stay with him.<sup>93</sup>

The *Umayyad* army boasted thousands of troops. The forces of Hussein were led by 'Abbās, the half-brother of Hussein. They numbered only 72, including women and children. Hussein was warned of the extreme odds against victory, but he echoed the passion of 'Alī for social justice, stating:

O people, the Apostle of God [Muhammad] said during his life, "He who sees an oppressive ruler violating the sanctions of God, reviling the covenant of God, opposing the *Sunnah* of the Apostle of God, dealing with the servant of God sinfully and cruelly; [If a man sees such a ruler] and does not show zeal against him in word or deed, God would surely cause him to enter his abode in the fire."<sup>94</sup>

The *Umayyads* slaughtered Hussein, 'Abbās, 'Uthmān, and all of their companions. 'Abbās was ambushed while trying to get badly needed water to Hussein and the others. Hussein was the last to die, beheaded on the tenth day of the battle.<sup>95</sup>

[Husayn] accepted the inevitable slaughter that ensued. This behavior is best described by the term *mazlum*, which means wronged or unjustly oppressed. In everyday Persian, however, *mazlum* refers to "a person who is unwilling to act against others, even when he is oppressed, not out of cowardice or diffidence but because of generosity and forbearance."<sup>96</sup>

In his book *The Origins and Early Development of Shī'a Islam* (1989), S.M.H. Jafri writes that Hussein employed this sacrificial strategy deliberately.<sup>97</sup> Hussein knew a military victory, "achieved by the force of arms" would be fleeting, if it occurred at all. But, he also believed the suffering he, his family, and his compatriots endured, coupled with their unjust deaths, would "awaken the consciousness" of the Muslim community. Indeed, news of the brutality towards the grandson of the Prophet inflamed anger and anguish among the supporters of Hussein. Hussein, 'Abbās, and 'Uthmān became martyrs for *Shī'ites*, with Hussein meriting fame as the "Prince of Martyrs."<sup>98</sup>

Notably, the fact women and children participated and died in the fighting is enlightening in view of the position of some contemporary Islamist extremist groups condoning female and child suicide bombers. Moreover, there are dichotomous accounts of what precisely happened at Karbala. On the one hand, some

<sup>92</sup> STRAIGHT PATH, *supra*, at 111.

<sup>93</sup> See BILL, *supra*, at 38-39.

<sup>94</sup> Quoted in MACKAY, *supra*, at 54.

<sup>95</sup> See DAVID HARRIS, *THE CRISIS 40* (New York, New York, Little, Brown and Company, 2004). [Hereinafter, HARRIS.]

<sup>96</sup> BILL, *supra*, at 49 (emphasis original).

<sup>97</sup> MOMEN, *supra*, at 31-32 quoting S.M.H. JAFRI, *The Origins and Early Development of Shī'a Islam* 200-204 (Qum, Iran: 2nd ed., 1409 A.H./1989).

<sup>98</sup> MOMEN, *supra*, at 28.

versions emphasize the hopelessness of the position of Hussein and the tragedy of the events in a manner that evokes a sense of mourning and repentance, at least among *Shī'ites*: For example, Moojen Momen writes:

One by one Husayn's supporters fell and then the members of his family until only he and his half-brother 'Abbas . . . were left of the fighting men. 'Abbas was killed trying to obtain water for the thirsty women and children . . . Carrying his infant son in his arms, Husayn pleaded for water for the babe but an arrow lodged in the baby's throat killing him. As the troops closed around him, Husayn fought valiantly until at last he was struck a severe blow that caused him to fall face down on the ground. Even then the soldiers hesitated to deal the final blow . . . until Shimr ordered them on, and, according to some accounts himself came forward and struck the blow that ended Husayn's life.<sup>99</sup>

On the other hand, there are more antiseptic versions that portray the martyrdom of Hussein as the death of an efficient religious warrior. For example:

[Husayn] mowed down his enemies like a fire raging through the tall grass of the savannah. The earth grew bloodied and the sky grew dark as if the Day of Judgment had begun. Dark clouds veiled the sun even in Mecca so that its people wondered what caused this gloom which covered Arabia, Syria, and Egypt, reaching as far as Iran and Khurasan. . . . A voice was heard: Husayn! The enemy has overrun your tent! / The women have been taken and the children killed! / . . . He turned his horse and hurried back to the camp. There in the shrubs the enemy were waiting. They shot at him without their faces showing Hundreds of arrows flew into his face / Seventy arrows hit his tender body / and pierced the skin and spilled his precious blood / He knew that he did not have long to live / Just enough time to say: There is no god but God and Muhammad is his prophet. / His soul flew up into the cloudless sky where it was met by those who love him most: / His parents and his brother and his sons. . . . Here ends the sad account of Prince Husayn / Who lived and died a witness for the faith / A ransom for his people, for mankind.<sup>100</sup>

To be sure, both versions present Karbala as a tragedy, but in the latter account, the martyrdom of Hussein is the death of a super-human warrior, not a weebegone figure.

*Imām* Hussein was buried in Karbala, as was 'Abbās. Above their tombs are major mosques, the Shrine of Hussein ibn 'Alī (or *Imām* Hussein Shrine), and close to it, the Hadrat 'Abbās Shrine (or Al 'Abbās Mosque). They are major pilgrimage destinations for *Shī'ites*. Indeed, by one account:

pilgrimage to his [*Imām* Hussein's] tomb in Karbala [is] second in importance only to the *hajj*.<sup>101</sup>

<sup>99</sup> MOMEN, *supra*, at 30.

<sup>100</sup> Quoted in STRAIGHT PATH, *supra*, at 112.

<sup>101</sup> OXFORD DICTIONARY OF ISLAM, *supra*, at 120.



Thus, a battle that occurred nearly 1,400 years ago is crucial in defining what it means to be a "Shī'ite," and as with *Imām* 'Alī and Fātimah, it is impossible to overstate the importance of Hussein to *Shī'ites*. To underscore the point, the martyrdom of *Imām* Hussein is to *Shī'ites* as the Crucifixion of Jesus Christ is to Christians.

To *Shī'ites*, what does it mean to die a "martyr's death," and why does the martyrdom of *Imām* Hussein matter?

"A leading *Shi'i* intellectual and cleric has explained the essence of martyrdom in the following words: 'The *Shahid* [martyr] can be compared to a candle whose job it is to burn out and get extinguished in order to shed light for the benefit of others.'<sup>102</sup>

For three reasons, this martyrdom is the seminal experience in *Shī'ite* history.

First, the violent death of Hussein is seen by *Shi'a* to have been a sacrifice for the living.<sup>103</sup>

It thus seemed clear to many Muslims that Imam Husayn had poured out his life on this day and resisted iniquity until death as an atonement for the grave sins his grandfather's people had committed by disregarding the will of their Prophet.<sup>104</sup>

There is a direct analogy to the Crucifixion: just as Christians (both Catholic and Protestant) hold that Christ died on the Cross for the sins of all mankind, and to redeem mankind with God after the Fall of Adam and Eve, *Shī'ites* believe Hussein was martyred to make reparation with God after Muslims strayed from the Message He mercifully sent through Muhammad.

Second, the martyrdom of Hussein is testimony to the illegitimacy of all other Islamic authority. A loose analogy might be the persecution of Christians by the Ancient Romans before the conversion of Emperor Constantine the Great (c. 272-337 A.D.) to Christianity and his issuance of the Edict of Milan in 313 A.D., in which he established religious toleration throughout the Ancient Roman Empire. Following the martyrdom, and to the present day, *Shī'ites* reject not only Muawiyah, Yazid, and the other *Umayyad* Caliphs as licit successors to Muhammad. They also repudiate the *Abbasid* Caliphs and Ottoman Sultans. *Shi'a* recognize only 'Alī and his 11 descendants as rightful successors to the Prophet Muhammad and legitimate leaders of Islam. 'Alī and the 11 descendants are the 12 *Imāms*, and spawn the name "Twelver *Shī'ism*." (Of course, they recognize Muhammad himself as the first leader.)

The history of the Twelver *Shī'ite Imāms* is not entirely tranquil. Most of the first 11 *Imāms* — that is, 'Alī and his 10 successors — were assassinated, persecuted, or endured some hardship. *Shī'ites* believe the 12th *Imām*, Mohammad ibn al Hassan al Māhdi, the son of the 11th *Imām*, Hassan ibn Muhammad Al 'Askari, is alive, but has been in occultation (hiding) since 873, when he was 5 years old. Thus, the

<sup>102</sup> Quoted in BILL, *supra*, at 62 (emphasis added).

<sup>103</sup> See BILL, *supra*, at 37-39.

<sup>104</sup> BILL, *supra*, at 39.

occultation of the 12th *Imām*, the Al Mahdi, ended *Imāmate* succession. *Shī'ites* believe he will appear on the Day of Judgment in apocryphal triumph with Jesus Christ, and bring justice to the world.

Third, the martyrdom bespeaks a collective failure of the *Shī'ites*. All except a handful of partisans failed to rally to their *Imām* at Karbala. Consequently, they failed to mark their opposition to tyranny and injustice, and bring about legitimate Islamic rule. There is a loose analogy: the failure to stand up for their religious leader is akin to the three-fold denial of Christ by Saint Peter. There is a haunting question every *Shī'ite* and Christian faces: would I have risen to the defense of the faith at the risk of self-sacrifice?

In sum, whether and to what extent there was a *Sunni* — *Shī'ite* divide before 680 A.D. may be a matter of debate. Likewise, dating the birth of *Shī'ism* to before 680 is contested, and perhaps wrong. But, it is not possible to gainsay disunity within Islam after the Battle of Karbala. The Battle divided Islam into its two great branches: orthodox *Sunnis*, who accepted the *Umayyad* Caliphate, and breakaway *Shi'a*, the followers of 'Alī and Hussein.<sup>105</sup> During the in the 8th, 9th, and 10th centuries A.D., the *Shi'a* movement grew and flourished, albeit underground, in opposition to the established political order of the Islamic World. And, after Karbala, *Shī'ites* developed their own distinctive religious practices, including 'Ā *shūrā*, which is a hallmark of the birth of a separate sect.

## § 8.05 'ĀSHURĀ

For the *Shi'a*, the Battle of Karbala is the tragic event during which piety sacrificed itself for justice, while many of the faithful stood idle in a conflict between the light of good and darkness of evil.<sup>106</sup> Both 'Alī and Hussein died the death of a martyr. 'Alī personified devotion, religious zeal, self-sacrifice, and strict adherence to Islamic principles. Hussein embodied the example of 'Alī and applied the faith in his life.<sup>107</sup> In turn, the martyrdom of Hussein "gave *Shi'is* the ethos of suffering and martyrdom."<sup>108</sup> It led to a movement of repentance.<sup>109</sup> So important, then, is the Battle of Karbala that *Shī'ites* developed their first distinctive religious practice to commemorate it: a mourning ceremony to mark the martyrdom of *Imām* Hussein: the Festival of 'Ā *shūrā*.

The ceremony actually is a series of events that begins on the first day of *Muharram*, which is the first month of the Islamic calendar, during which the Battle of Karbala occurred. In early years, the Festival lasted 10 days, the tenth day being the most important as it marked the day Hussein was martyred.<sup>110</sup> The tenth day remains the highlight of 'Ā *shūrā*, and is the most emotional, publicly religious, and

<sup>105</sup> See MACKAY, *supra*, at 55.

<sup>106</sup> See MACKAY, *supra*, at 54-55.

<sup>107</sup> See MACKAY, *supra*, at 56.

<sup>108</sup> OXFORD DICTIONARY OF ISLAM, *supra*, at 120.

<sup>109</sup> See RUTHVEN, *supra*, at 34.

<sup>110</sup> See BILL, *supra*, at 38-39; DAVID HARRIS, THE CRISIS 39-40 (New York, New York, Little, Brown and Company, 2004). [Hereinafter, HARRIS].

holy day of the year for *Shītes*.<sup>111</sup> Indeed, the word "*Āshūrā*" means "tenth."<sup>112</sup> Interestingly, Muhammad originally designated the tenth day of 10 *Muharram* as one of fasting, but because of its relationship to *Yom Kippur* (the Day of Atonement, which is the holiest day of the year for Jews), fasting on this day is a voluntary practice among *Sunnis*.<sup>113</sup>

Today, the martyrdom of Hussein is commemorated during the entire month of *Muharram*, and even the following month, *Ṣafar*, is one of mourning. Essentially, the Festival involves recitations of the story of Hussein in both private homes and mosques.<sup>114</sup> But, there are several features to '*Āshūrā*'.<sup>115</sup> Initially, mourning began in private homes. A few individuals went from house to house, retelling the events of Karbala and martyrdom of Hussein in exchange for money or food. Subsequently, the recitations occurred in public places, in front of small but ever-enlarging groups of listeners. Recitations also started in mosques. A mourning chant, *latmiya*, again recalling these events, was sung in homes and mosques.

These features remain part of the Festival. Further, there are dramatic presentations of the Battle in public and during parades.<sup>116</sup> The martyrdom of Hussein is re-enacted in "passion plays" called "*ta'ziyyas*."<sup>117</sup> There is a loose analogy to Christianity: theatrical presentations of the Nativity (the birth of Jesus) at Christmas and the Paschal Mystery (the Passion, Crucifixion, and Resurrection) during Holy Week. To non-Muslim observers, the most dramatic feature is self-flagellation: some *Shītes* publicly, often in marching in a parade, beat themselves, even to the point of drawing blood. Thus, in Iran, the faithful observe '*Āshūrā*, in their homes, mosques, streets, squares, the countryside, and any other public place.<sup>118</sup>

<sup>111</sup> See HARRIS, *supra*, at 40.

<sup>112</sup> See HOGGINS, *supra*, at 184.

<sup>113</sup> See <http://www.britannica.com/EBchecked/topic/38434/Ashura>.

<sup>114</sup> See HARRIS, *supra*, at 40.

<sup>115</sup> Interview of Colonel Azizallah Delkhal, conducted in person by Ms. Elena Delkhal, 28 October 2009. [Hereinafter, Delkhal Interview.]

Azizallah Delkhal was born in Iran and graduated in 1965 from its four-year Military College, the Iranian equivalent of West Point, having successfully completed many high-level military courses. For 25 years, he served in the Iranian Armed Forces. He obtained the rank of a full Colonel at a time when this status was the highest military rank in the Armed Forces of the Islamic Republic of Iran. As a Colonel, he was a Counselor (i.e., member) of the Iranian Supreme Defense Council, and a Counselor and Operational Officer of the Iranian Joint Staff Army. In the latter capacity, he was responsible for coordinating operations of the separate branches of the Iranian Armed Forces during the Iran-Iraq War of 1980-1988.

Among the jobs Mr. Delkhal performed in the Armed Forces were (1) Coast Guard Commander and Political Analyst (in charge of Iran's borders with Afghanistan, Iraq, Pakistan, Turkey, and the former Soviet Union), (2) Legal Agent of Iran (responsible for resolving problems between Iran and its neighbors), (3) Military Judge, (4) Director and Assistant Director of the Secret Service, and (5) Counselor and Operational Officer of the Gendarmerie Command Headquarters. Mr. Delkhal came to the United States in 1988, and is now an American citizen. He has studied English, Paralegal Studies, and Political Science at the Johnson County Community College (Kansas).

<sup>116</sup> See HARRIS, *supra*, at 40.

<sup>117</sup> BELL, *supra*, at 70; SYKAGORT PATH, *supra*, at 112.

<sup>118</sup> The mourning ceremony for *Imām* Hussein in Iran has interesting historical roots. Before the

advent of Islam, Iranians had a similar mourning ceremony every year called *Marge Siyāvash*, or the "Death of Siyāvash," to commemorate the passing of a legendary Persian prince. The *Shah-nameh*, or "Book of Kings," is a 60,000 line epic poem written by a legendary poet in the 10th century A.D. that recounts thousands of years of Persian history, from the Achaemenid Empire (550-330 B.C.) and Parthian Empire (247 B.C.-224 A.D.), to the last pre-Islamic Empire, the Sassanid Empire (224-651 A.D.). The story of Siyāvash is contained in the *Shah-nameh*.

Siyāvash was the son of Keykavous, a Persian King, about 3,000 years ago, and a popular, beloved Persian prince. Problems Siyāvash had with his stepmother compelled him to move to Turan, where he was welcomed and held dearly by Afrāsiyāb, the King of Turan, who was an enemy of the Persians. Siyāvash married the daughter of King Afrāsiyāb, and lived a good life, until the brother of King Afrāsiyāb became jealous of Siyāvash and convinced the King to kill Siyāvash.

Devastated by the death of Siyāvash, Persians dubbed him a martyr, and mourned his passing. Annually, on the anniversary of his death, Persians commemorated the martyrdom. According to the *Shah-nameh*, the death of Siyāvash occurred in 1,000 B.C., more than 1,500 years before *Shī'a* Islam and Battle of Karbala. Arguably, '*Āshūrā* is the Islamic incarnation of the glorious ancient commemoration, *Marge Siyāvash*. Delkhal Interview, *supra*.



## Chapter 9

### SHĪ'ĪSM AND ITS IMĀMS (680–940 A.D.)

Wise people, after they have listened to the laws, become serene, like a deep, smooth, and still lake.

DHAMMAPADA

(The Path of Dharma, *i.e.*, of The Buddha's Teachings)

Chapter VI — The Wise Man (*Pandita*), verse 82

#### SYNOPSIS

##### § 9.01 SHĪ'ĪTE CONCEPT OF IMĀM

##### § 9.02 TWELVER SHĪ'ĪSM

[A] *Safavid* Dynasty (1501-1702 A.D.) and Iran

[B] Summary Table

[C] Brief Biographies of *Imāms*

##### § 9.03 SEVENER SHĪ'ĪSM

[A] Split Over 7th *Imām*

[B] *Fatimid* Caliphate (909-1171 A.D.)

[C] *Nizārītes* and *Druze*

##### § 9.04 FIVER SHĪ'ĪSM

[A] Split Over 5th *Imām*

[B] Distinctive Beliefs

##### § 9.05 COMPARISONS WITH CATHOLIC CHRISTIANITY

##### § 9.01 SHĪ'ĪTE CONCEPT OF IMĀM

To be a *Shī'īte* is to revere 'Alī as the first *Imām*, and likewise to revere his descendants as the subsequent *Imāms*. Overall, there are 15 key figures honored by Twelver *Shī'a*. These figures are:

- First and foremost, the Prophet Muhammad,
- Then 'Alī,
- Thereafter, Fātimah, youngest daughter of Muhammad, wife of 'Alī, and mother of *Imām* Hasan and *Imām* Hussein.
- 12 blood-line descendants of the Muhammad, through Fātimah and her two sons.

Each of these historical figures has a fascinating biography and is known for making distinct contributions to *Shī'ism*.

Because *Shī'a* believe religious authority resides with the descendants of 'Alī, the controversy surrounding 'Alī is more complex than the issue of a contested succession in a Caliphate. Twelver *Shī'a* believe 'Alī was the first in a line of 12 significant religious figures, called "*Imāms*." For *Sunnīs*, the term "*imām*" simply refers to a leader of prayer. But, the term "*Imām*" as used by *Shī'ites* — with a deliberately capitalized "I" — has a markedly different connotation:

According to the theory of the *imamate* which was gradually developed from the tenth century onwards, God has placed the *imām* as His proof (*hujja*) in the world at all times, to teach authoritatively the truths of religion and govern mankind in accordance with justice. The *imāms* were descendants of the Prophet through his daughter Fātimah and her husband 'Alī, the first *imām*; each was designated by his predecessor; each was infallible in his interpretation of the Qur'an and the *sunnah* of the Prophet, through the secret knowledge given him by God; each was without sin.<sup>1</sup>

To *Shī'a*, an "*Imām*" is not simply a man who leads prayers at a mosque. He (and invariably, the *Imām* is a male) is a servant chosen by God (Allāh) wielding unique religious and political authority. Professors Bill and Williams observe:

The Twelver Imam is not selected by the community but comes to his exalted position by virtue of divine appointment, which is then made known through an infallible source.<sup>2</sup>

Similarly, Professor Esposito writes:

[T]he Imam . . . though not a prophet, is the divinely inspired, sinless, infallible, religiopolitical leader of the community . . . Whereas after the death of Muhammad, Sunni Islam came to place final religious authority for interpreting Islam in the consensus . . . the Shīi believe in the continued divine guidance through their divinely inspired guide, the Imam.<sup>3</sup>

To be sure, neither the Prophet nor any of the 12 *Shī'ite Imāms* is Divine, and the 12 *Imāms* are not like Muhammad — they were not chosen by God (Allāh) to carry a prophetic message.

But, the 12 *Imāms*, plus their family member Fātimah, who *Shī'ites* regard as the "Mother of the *Imāms*,"<sup>4</sup> share special attributes that mark them as selected by Allāh. In particular, all *Shī'ites* agree there is a succession and transmission of divine

<sup>1</sup> ALBERT HOURANI, *THE HISTORY OF THE ARAB PEOPLES 181-182* (New York, New York: MJF Books, 1991). [Hereinafter, HOURANI.]

<sup>2</sup> JAMES A. BILL & JOHN ALDEN WILLIAMS, *ROMAN CATHOLIC & SHI' MUSLIM PRAYER, PASSION AND POLITICS* 56 (Chapel Hill, North Carolina: The University of North Carolina Press, 2002). [Hereinafter, BILL.]

<sup>3</sup> STRAIGHT PATH, *supra*, at 45.

<sup>4</sup> JOHN L. ESPOSITO ED., *THE OXFORD DICTIONARY OF ISLAM* 84 (New York, New York: Oxford University Press, 2003). [Hereinafter, OXFORD DICTIONARY OF ISLAM.]

sources of knowledge (*aql*) through the lineage of the Prophet. This process began with 'Alī, the cousin and son-in-law of Muhammad.<sup>5</sup>

The distinctive attributes of the *Imāms* include sinlessness, and in the case of Fātimah, freedom from the corruption Muslims attribute to menstruation and childbirth. Not unlike the Catholic Christian view of the Blessed Virgin Mary, in *Shī'ite* Islam, Fātimah is seen as immaculate,<sup>6</sup> in the sense of being free from sin. There is no direct analogy in *Shī'ite* dogma to a virgin birth. But, early *Shī'a* writers emphasized the miraculous nature of the births of the *Imāms*:

The baby Imam[s were] born already circumcised and with [their] umbilical [cords] already severed; . . . they spoke immediately on birth (and sometimes from within their mother's womb) praising God; . . . each was specifically designated by the preceding Imam (or in the case of 'Alī by Muhammad); and . . . each performed miracles and was possessed of supernatural knowledge.<sup>7</sup>

During their lives, the *Imāms* acted as spiritual lodestars for humanity.<sup>8</sup> Each *Imām* guided his followers in the interpretation of the Qur'an, and each is:

thought to exist in a state of permanent grace and divine guidance that renders them infallible and impeccable (*ma'sum*).<sup>9</sup>

The lives of the *Imāms* were replete with suffering, which they patiently endured on behalf of all Muslims who had become sinful and had strayed from the path of God. Through their suffering, the *Imāms* "opened wide the gates of intercession."<sup>10</sup> *Shī'ites* believe each of the 12 *Imāms* was martyred by their enemies.

## § 9.02 TWELVER SHĪ'ISM

### [A] Safavid Dynasty (1501-1702 A.D.) and Iran

There are three principal delineations among *Shī'ites*: Twelvers (also called "*Jafaris*," "*Imāmīs*," or "*Ithna 'Ashari*"), the dominant branch, plus two minority branches, Seveners (i.e., "*Ismā'īlīs*"), and Fivers (i.e., "*Zaydis*"). Iran is the only officially *Shī'ite* nation in the world, and adheres to Twelver *Shī'ism*. Indeed, the first *Shī'a* regime in the world was in Iran, namely, the *Safavid* Dynasty (1501-1702 A.D.).

<sup>5</sup> *Twelver*, WIKIPEDIA, posted at <http://en.wikipedia.org/wiki/Twelver>.

<sup>6</sup> See BILL, *supra*, at 53. See also OXFORD DICTIONARY OF ISLAM, *supra*, at 84, STRAIGHT PATH, *supra*, at 112.

<sup>7</sup> MOJIB MOJIB, AN INTRODUCTION TO SHI' ISLAM: THE HISTORY AND DOCTRINES OF TWELVER SHI'ISM 23 (London, United Kingdom: Yale University Press, 1985). [Hereinafter, MOJIB.]

<sup>8</sup> See BILL, *supra*, at 56.

<sup>9</sup> BILL, *supra*, at 56.

<sup>10</sup> BILL, *supra*, at 65.



The *Safavid* family patronized *Shī'ism*, and codified Twelver doctrine as law.<sup>11</sup> Ever since, Iran has been a *Shī'ite* nation. Table 9-1 summarizes the *Safavid* Shahs and their principal achievements. In a sense, the *Safavid* monarch was not entirely legitimate. Because Al Māhdi (the 12th and Hidden *Imām*) was the true *Shī'a* leader, the monarch was the most valid ruler while awaiting the return of the Al Māhdi.<sup>12</sup>

Table 9-1:  
The *Safavid* Dynasty<sup>13</sup>

Shah	Reign (A.D.)	Most Notable Aspect of Reign
Ismail I	1501-1524	In 1501, took Tabriz, in Northern Iran. Assumed the title of "Shah." Founded the <i>Safavid</i> dynasty. Declared Twelver <i>Shī'ism</i> the official faith of Persia.
Tahmasp	1524-1576	Introduced converted slaves into court and military, with female slaves entering the harem, becoming the mother of princes. Encouraged carpet weaving as a state industry.
Ismail II	1576-1578	Reign marked by brutality and pro-Sunni policy. Poisoned to death with the participation of his sister.
Muhammad Khadabandeh	1578-1587	Weak leader. Initially dominated by wife until her death, and then by the <i>Qizilbash</i> (literally, "Crimson Heads" or "Red Heads," who were <i>Shī'ite</i> militant groups).

<sup>11</sup> See *Shia Islam*, WIKIPEDIA, posted at [http://en.wikipedia.org/wiki/Shia\\_Islam](http://en.wikipedia.org/wiki/Shia_Islam). [Hereinafter, *Shia Islam*.]

<sup>12</sup> See *Shia Islam*, *supra*.

<sup>13</sup> See Shapour Ghasemi, *History of Iran: Safavid Empire 1502-1736*, Iran Chamber Society, posted at [www.iranchamber.com/history/safavids/safavids.php](http://www.iranchamber.com/history/safavids/safavids.php); SANDRA MACKEN, *THE IRANIAN: PERSIA, ISLAM AND THE SOUL OF A NATION* 87 (New York, New York, Plume, 1996).

Shah	Reign (A.D.)	Most Notable Aspect of Reign
Abbas I	1587-1629	Moved the capital to Esfahan. Patronized the arts. Built palaces, mosques and schools, and paid considerable attention to welfare institutions. Encouraged international trade. Formed a strong army. Fought back the Ottomans, thereby regaining old territories of the Persian Empire. United Persia under Twelver <i>Shī'ism</i> . In long term, weakened the <i>Safavid</i> state due to his fear of revolt by his sons, which led him to abandon the practice of employing princes to govern provinces and instead confined the princes within the palace gardens; the new practice, followed by his successors, produced poorly-educated, indecisive Shahs of less competence who were easily dominated.
Safi I	1629-1642	Known for his cruelty. First of <i>Safavid</i> Shahs to be raised in the palace gardens. Put to death potential rivals including family relatives. Established peace treaty with the Ottomans, which established the Ottoman-Safavid frontier and ended over 100 years of conflict.
Abbas II	1642-1666/7	Attempted to eliminate corruption in the bureaucracy. Achieved modest peace with the Ottoman and Moghul Empires. Last fully competent period of rule by a <i>Safavid</i> Shah. Increased central authority of the state by expanding royal lawns. Intervened in provincial affairs on the side of the peasants. Adhered to the dogma that a <i>Safavid</i> ruler was sacred and perfect.
Safi II (Soleyman)	1666/7-1694	Incompetent ruler. Retreated into the harem and left his Grand Vizir to manage affairs of state. Shortly after his accession, food prices soared and famine and disease spread throughout the Persian Empire.

Shah	Reign (A.D.)	Most Notable Aspect of Reign
Hussein	1694-1722	Most incompetent <i>Safavid</i> Shah. Especially influenced by <i>Shī'a</i> religious establishment. Issued decrees forbidding alcohol consumption and banning <i>Sufism</i> in Esfahan at the insistence of <i>Shī'ite</i> clergy. Re-conquered Bahrain. Last <i>Safavid</i> Shah; surrendered <i>Safavid</i> territories to Afghan tribesmen, thus ending the <i>Safavid</i> dynasty

Interestingly, the *Safavid* Dynasty was comparatively more secular to the current regime in Iran, which took power through the 1978-79 Islamic Revolution. The theoretical underpinnings of the regime, indeed its foundational religious tenet, lie in the *Shī'ite* theory of guardianship, "*Velayat-e faqih*" (Persian), or "*Wilayāt al faqih*" (Arabic). This theory developed following the occultation of the 12th *Imām*. It is articulated in a book published in 1970 by Grand *Āyatollah* Ruhollah Moosavi Khomeini, *Velayat-e fiqh* ("Governance of Jurist"). The phrase "*Velayat-e faqih*" connotes guardianship, or governance, by jurists, the "Jurists" being Islamic legal scholars (*fukahā*). In his book, *Āyatollah* Khomeini offers a theory of *Shī'ite* governance in which there is a Supreme Leader who is both the spiritual and political guarantor of the citizens.<sup>14</sup> This book inspired the drafting of the Constitution of the Islamic Republic of Iran, though not every one of the ideas from the book was inserted into the Constitution.

As for the basic jurisprudence of Twelver *Shī'ism*, it is based on the *Ja'fari* fiqh, hence the reason "Twelvers" also are called "*Ja'faris*." The *Ja'fari* School of thought is named after the 6th *Imām*, Abū 'Abdu'llah Ja'far ibn Muhammad, commonly known as Ja'far Al Sādiq.<sup>15</sup>

## [B] Summary Table

Table 9-2 provides a brief description of each of the Twelver *Imāms*. The first column states the name of the *Imām*. The second column states the names of the father and (if known) mother of the *Imām*. With the exception of Hussein, whose father was *Imām* 'Alī, each *Imām* was the son of the previous *Imām*. The third and fourth columns, respectively, list the date and place of birth, and the date and location of the shrine, of each *Imām*. The final column summarizes the contributions of the *Imāms* to *Shī'ism*.

<sup>14</sup> See *Hokumat-e Islami: Velayat-e faqih* (book by Khomeini), WIKIPEDIA, posted at [http://en.wikipedia.org/wiki/Hokumat-e\\_Islami\\_-\\_Velayat-e\\_faqih\\_\(book\\_by\\_Khomeini\)](http://en.wikipedia.org/wiki/Hokumat-e_Islami_-_Velayat-e_faqih_(book_by_Khomeini))

<sup>15</sup> See *Ja'fari Jurisprudence*, WIKIPEDIA, posted at [http://en.wikipedia.org/wiki/Ja%27fari\\_jurisprudence](http://en.wikipedia.org/wiki/Ja%27fari_jurisprudence).

Table 9-2:  
The Twelver *Imāms*

Number	Full Name and Common Name(s) <sup>16</sup>	Mother and Father <sup>17</sup>	Date and Place of Birth <sup>18</sup>	Date of Death and Place of Shrine <sup>19</sup>	Major Contributions to Shī'ism <sup>20</sup>
1	Abū al Hasan 'Alī ibn Abī Talib	'Alī Fātimah bint Asad <sup>21</sup>	598/599 A.D.	660 A.D.	Shī'a believe Muhammad designated him to be his successor. His descendants are the <i>Imāms</i> . Has reputation of a warrior, but allowed Battle of Siffin to end in religious arbitration.
	'Alī	Abū Talib	Mecca	Najaf	
2	Al Hasan Ibn 'Alī	Fātimah	625 A.D. (3 A.H.)	669 A.D. (49 A.H.)	Avoided further civil war and its bloodshed and suffering by abdicating his position as Caliph to Muawiyah I.
	Hasan	Imām 'Alī	Medina	Al Bāqi cemetery in Medina	

<sup>16</sup> See BILL, *supra*, at 29, 36, 37, 39, 40, 41, 42, 43, 44, 45.

<sup>17</sup> See MOMEN, *supra*, at 2, 35, 37, 38, 39, 42, 43, 44, 161; BILL, *supra*, at 28, 29, 42, 43.

<sup>18</sup> See MOMEN, *supra*, at 2, 26, 28, 35, 37, 38, 39, 41, 43, 44, 161; BILL, *supra*, at 28, 40.

<sup>19</sup> See BILL, *supra*, at 36, 39; MOMEN, *supra*, at 28, 29-30, 36-37, 37-38, 39, 40, 42, 43, 44; ROY JACKSON, FIFTY KEY FIGURES IN ISLAM 20 (New York, New York: Routledge, 2006). (Hereinafter, JACKSON.)

<sup>20</sup> See OXFORD DICTIONARY OF ISLAM, *supra*, at 294, 347; JACKSON, *supra*, at 16-21, 19-20, 25-26; MOMEN, *supra*, at 12, 15, 27, 28, 30, 36, 37, 39, 41, 42, 43, 44, 155-157, 161-162, 166; BILL, *supra*, at 14-15, 28-29, 36, 38, 39, 40, 41, 42, 43, 44, 45, 57, 58; ĀYATOLLAH JĀFAR SORHANI, DOCTRINES OF SHĪ'Ī ISLAM: A COMPENDIUM OF IMĀMI BELIEFS AND PRACTICES 104-105 (Reza Shah-Kazemi ed. & trans.) (London, England: I.B. Tauris Publishers, 2001); RUTHVEN, *supra*, at 34 (Cambridge, Massachusetts: Harvard University Press, 2004); ESPOSITO, *supra*, at 46.

<sup>21</sup> See ALI, WIKIPEDIA, posted at <http://en.wikipedia.org/wiki/Alī>.



Number	Full Name and Common Name(s) <sup>16</sup>	Mother and Father <sup>17</sup>	Date and Place of Birth <sup>18</sup>	Date of Death and Place of Shrine <sup>19</sup>	Major Contributions to Shi'ism <sup>20</sup>
3	Abū Abdullāh Hussein ibn 'Alī  Al Hussein ibn 'Alī, i.e., Hussein, also spelled Husayn	Fātimah  <i>Imām 'Alī</i>	626 A.D. (4 A.H.)  Medina	680 A.D. (61 A.H.)  Karbala	Known as the "Prince of Martyrs." Killed at Karbala, and his death ushered in a time of repentance for <i>Shī'a</i> .
4	'Alī ibn Hussein  Zayn Al 'Ābidīn, Al 'Ābidīn	Shahrbānū  <i>Imām Hussein</i>	658 A.D. (38 A.H.)  Medina	713 A.D. (94/95 A.H.)  Al Bāqī cemetery in Medina	Known for his piety and scholarship. Wrote <i>Psalms of the Family of the Prophet</i> .
5	Muhammad Al Bāqir ibn 'Alī Zayn Al 'Ābidīn Muhammad Al Bāqir, Al Bāqir	Fātimah (daughter of <i>Imām Hasan</i> )  <i>Imām Al 'Ābidīn</i>	676 A.D. (57 A.H.)  Medina	732-743 A.D. (114-126 A.H.)  Al Bāqī cemetery in Medina	Esteemed legal scholar taught Abū Ḥanīfah. Scholarship influenced the development of the <i>Ḥanafī</i> School.

Number	Full Name and Common Name(s) <sup>16</sup>	Mother and Father <sup>17</sup>	Date and Place of Birth <sup>18</sup>	Date of Death and Place of Shrine <sup>19</sup>	Major Contributions to Shi'ism <sup>20</sup>
6	Abū 'Abdu'llah Ja'far ibn Muhammad  Ja'far Al Sādiq, Ja'far As Sādiq, Al Sādiq	His mother was a great grand daughter of Abū Bakr  <i>Imām Al Bāqir</i>	699-705 A.D. (80-86 A.H.)  Medina	765 A.D. (148 A.H.)  Al Bāqī cemetery in Medina <sup>22</sup>	Renowned legal scholar.  Fully developed the <i>Shī'a</i> doctrines of <i>nass</i> , and <i>taqīya</i> , and <i>ilm</i>
7	Abū Al-Hasan Mūsā ibn Ja'far  Mūsā Al Kāzīm, Al Kāzīm	Hamida  <i>Imām Al Sādiq</i>	737-746 A.D. (120-129 A.H.)  Medina	799 A.D. (183 A.H.)  Kāzīmāyān, Baghdad	Focused his life on prayer, refused to rebel against unjust Caliphs, and instead taught that <i>Shī'a</i> could cooperate with Caliphs in matters of mutual concern.
8	Abū Al-Hasan 'Alī ibn Mūsā  'Alī Al Ridhā, Al Ridhā	Ummul Banīn Najmah <sup>23</sup>  <i>Imām Al Kāzīm</i>	765 A.D. (148 A.H.)  Medina	818 A.D. (203 A.H.)  <i>Imām Al Ridhā</i> is buried near Tūs, in Mashhad, Iran. <sup>24</sup>	Appointed by the Caliph to be his heir. Never inherited the Caliphate due to his poisoning and death.

<sup>22</sup> See [www.al-islam.org/shrines/baqi.htm](http://www.al-islam.org/shrines/baqi.htm).<sup>23</sup> See *Alī ar-Ridhā*, WIKIPEDIA, posted at [http://en.wikipedia.org/wiki/Alī\\_ar-Ridhā](http://en.wikipedia.org/wiki/Alī_ar-Ridhā).<sup>24</sup> See *Imam Reza Shrine*, WIKIPEDIA, posted at [http://en.wikipedia.org/wiki/Imam\\_Reza\\_shrine](http://en.wikipedia.org/wiki/Imam_Reza_shrine).

Number	Full Name and Common Name(s) <sup>16</sup>	Mother and Father <sup>17</sup>	Date and Place of Birth <sup>18</sup>	Date of Death and Place of Shrine <sup>19</sup>	Major Contributions to Shī'ism <sup>20</sup>
9	Abū Ja'far Muhammad ibn 'Alī Muhammad Al Jawād, Al Jawād, Al Taqī	Sadika  <i>Imām Al Ridhā</i>	810 A.D. (195 A.H.)	835 A.D. (220 A.H.)  Kāzimayn, Baghdad	First child <i>Imām</i> .  Known as "The Generous" (Al Jawād) and "The God Fearing" (Al Taqī).
10	Abū Al Hasan 'Alī ibn Muhammad  Al Hādī, Al Naqī	Samānah  <i>Imām Al Jawad</i>	827-830 A.D. (212-215 A.H.)  Medina	868 A.D. (254 A.H.)  Al 'Askari Mosque, Sāmarrā, Iraq	Known as "The Guide" (Al Hādī) or "The Pure" (Al Naqī). Also a child <i>Imām</i> .  Summoned to Sāmarrā by the Caliph where he remained a prisoner.
11	Hasan ibn Muhammad Al 'Askari  Al 'Askari, Al Samit	Saleel, Haditha, Sawsan, Sūsan, Hareebah (disagreement on name of Mother) <i>Imām Al Hādī</i>	844-846 A.D. (230-232 A.H.)  Medina	874 A.D. (260 A.H.)  Sāmarrā, Iraq	Many miracles attributed to him.  Father of the 12 <sup>th</sup> <i>Imām</i> , the Mahdī.

Number	Full Name and Common Name(s) <sup>16</sup>	Mother and Father <sup>17</sup>	Date and Place of Birth <sup>18</sup>	Date of Death and Place of Shrine <sup>19</sup>	Major Contributions to Shī'ism <sup>20</sup>
12	Abū Al Qāsim Muhammad ibn Hasan ibn 'Alī Al Mahdī	Khātūn Narjis  <i>Imām Al 'Askari</i>	868 A.D. (255 A.H.)  Sāmarrā, Iraq	Did not die.  Rather, went into the greater occultation in 940 A.D.	Went into occultation when he was 5 years old. Believed to be hidden on earth, and will return just before the Last Judgment.

### [C] Brief Biographies of Imāms

Aside from the Prophet, three figures loom the largest in *Shī'ite* Islam: the first *Imām*, 'Alī, his wife, the daughter of Muhammad, Fātimah, and the third *Imām*, Hussein, the second son of 'Alī and Fātimah. They are dubbed the "*Shī'a* Holy Family," loosely analogous to the Christian Holy Family, Jesus, Mary, and Joseph in the sense of the inimitable reverence *Shī'ites* and Christians accord each by Muslims and Christians, respectively.<sup>25</sup> Thereafter in significance are the remaining *Shī'ite Imāms* — numbers 4 through 12. A sketch of their fascinating lives and remarkable contributions to *Shī'ism* is set out below. Reflecting their special status, pilgrimage to their shrines is important.<sup>26</sup>

#### • 4th *Imām*: 'Alī ibn Hussein Zayn Al 'Ābidin

The common name of the 4th *Shī'ite Imām*, Zayn Al 'Ābidin, means "The Ornament," "Beauty," or "Best" "of the Worshipers." He was the only son of *Imām* Hussein to survive the massacre at Karbala in 680 A.D.<sup>27</sup> By placing her own life in jeopardy, his Aunt, Zaynab, saved Al 'Ābidin from being killed with Hussein and his companions.<sup>28</sup>

<sup>25</sup> Quoted in BILL, *supra*, at 47 (emphasis added).

<sup>26</sup> See HOURANI, *supra*, at 183-184.

<sup>27</sup> MOMEN, *supra*, at 35.

<sup>28</sup> See MOMEN, *supra*, at 31, who presents the following account:

Zaynab, the sister of Husayn [Hussein], bore herself with dignity and answered 'Ubaydu'llāh [ibn Ziyād] [the Umayyad Governor of Basra, ordered by the Caliph Yazid to take control of Kufa, which he did with force and intimidation] firmly and fearlessly. At first, 'Ubaydu'llāh wanted to put 'Alī to death also, but Zaynab protested, saying: "O Ibn Ziyād! You have spilled enough of our blood," and then she put her arms around 'Alī's neck and said: "By God! I will not be parted from him, and so if you are going to kill him, then kill me with him." And so 'Ubaydu'llāh imprisoned the captives and after a while sent them on to Damascus with the head of Husayn.

Concerning the actions of Zaynab, see also OXFORD DICTIONARY OF ISLAM, *supra*, at 347; BILL, *supra*, at 39.



*Imām* Al 'Ābidin was born in 658, the early years of the *Umayyad* Caliphate.<sup>29</sup> He lived a quiet and pious life away from the intrigue of politics.<sup>30</sup> Al 'Ābidin was a jurist and scholar, plus:

the author of a collection of prayers that are so beautiful they are sometimes called the *Psalms of the Family of the Prophet*, the "*Sahifa Sajjadiyya*."<sup>31</sup>

Al 'Ābidin died in 713 and is buried in Medina. Some believe the *Umayyad* Caliph Al Walid I poisoned him.<sup>32</sup>

• **5th Imām: Muhammad Al Bāqir ibn 'Alī Zayn Al 'Abidin**

Al Bāqir, known as "One who splits open knowledge," was the 5th *Imām*, and the son of the 4th *Imām*, Al 'Ābidin.<sup>33</sup> He also was the grandson of both Hasan and Hussein, which means he "joined in himself the two lines of descent from Fātimah and 'Alī."<sup>34</sup> Significantly, then, *Imām* Al Bāqir linked the otherwise separate lines of descendants of Hasan and Hussein. Unification of these two lines in the person of Al Bāqir ought to have made it difficult to challenge his status, and solidified his *Imāmate*.

Yet, challenge came from the Fiver *Shī'ites*, who followed Zayd ibn 'Alī and became known as *Zaydi Shī'a*, against the other *Shī'ites*, who would become known as Twelvers and Seveners. The split of the Fivers occurred, then, despite the strong blood-line claim of Al Bāqir to be the authentic *Imām*. Thus, the death of the 4th *Imām* marked the last time when the *Shī'ite* world was unified. Disunity did not end with the split of the Fivers over the legitimacy of the 5th *Imām*. Later, with a controversy over the legitimacy of the 7th *Imām*, Seveners broke away. Those left — the majority — were the Twelvers.

As for the 5th *Imām*, whom both Twelvers and Seveners recognize, Al Bāqir was a noted jurist who, interestingly, has been described as the teacher of the renowned legal scholar Abū Ḥanifa, founder of the *Ḥanafī* School, one of the Four *Sunnite* Schools of jurisprudence.<sup>35</sup> Two doctrines espoused by *Imām* Al Bāqir are especially notable. First, he held that each *Imām* specifically designates his successor (*nass*).<sup>36</sup> Second, Al Bāqir:

taught his followers that *taqiyya*, or prudent dissimulation [hiding of the truth] of *Shī'ism*, was mandatory if life or limb was in danger.<sup>37</sup>

<sup>29</sup> See MOMEN, *supra*, at 35.

<sup>30</sup> See MOMEN, *supra*, at 36; OXFORD DICTIONARY OF ISLAM, *supra*, at 347.

<sup>31</sup> BILL, *supra*, at 39.

<sup>32</sup> See BILL, *supra*, at 39; MOMEN, *supra*, at 37.

<sup>33</sup> BILL, *supra*, at 40.

<sup>34</sup> MOMEN, *supra*, at 37.

<sup>35</sup> See BILL, *supra*, at 40; JACKSON, *supra*, at 25–26. But see MOMEN, *supra*, at 38 (London, United Kingdom: Yale University Press, 1985), in which the author states that *Imām* Ḥanifa was a student of the 6th *Imām*, Al Ṣādiq.

<sup>36</sup> See MOMEN, *supra*, at 37.

<sup>37</sup> BILL, *supra*, at 40.

Additionally, it was during the *Imāmate* of Al Bāqir that *Shī'a* began to rely on the teachings of the *Imāms*, not just the pronouncements of the first three *Rashidun* Caliphs and other Traditionist Muslim scholars. This shift on the crucial matter of sources of the *Sharī'a* signaled the commencement of the legal split between *Shī'ites* and *Sunnis*.<sup>38</sup>

There is disagreement concerning when Al Bāqir died. The commonly cited date is 735. Many *Shī'a* believe he was poisoned and, therefore, is a martyr, like his predecessors.<sup>39</sup>

• **6th Imām: Abū 'Abdu'llah Ja'far ibn Muhammad**

Known as Ja'far Al Ṣādiq, meaning "The Truthful," the 6th *Imām* is one of the most important of the *Shī'ite* religious leaders.<sup>40</sup> *Imām* Al Ṣādiq was born between 699–705.<sup>41</sup> He was a renowned jurist in his own lifetime and taught many well known *Sunni* and *Shī'a* scholars.<sup>42</sup> He taught that each *Imām* must be the descendant of 'Alī, and that each is designated by his father.<sup>43</sup> He held to the view that the *Imām* is the only person able to interpret authoritatively the Qur'ān and *ḥadīth*.<sup>44</sup> *Shī'a* regarded Al Ṣādiq:

as the only authoritative teacher of the age . . . [and his legal ideals were so supported by *Shī'a* Muslims that] Twelver [*Shī'ites*] therefore call their school of Islamic law the Ja'fari School.<sup>45</sup>

Further, *Imām* Al Ṣādiq developed fully the doctrines of *naṣṣ* (designation by Divine decree, i.e., that each *Imām* is chosen by such a decree), and *taqiyya* (simulation, or hiding one's faith in times of risk or danger), as well as that of 'ilm (the special religious knowledge of the *Imāms*).<sup>46</sup>

*Imām* Al Ṣādiq died in 765. His death is attributed to poisoning ordered by the *Abbasid* Caliph Al Mansūr.<sup>47</sup> He was buried in Al Bāqir cemetery in Medina.<sup>48</sup>

<sup>38</sup> See MOMEN, *supra*, at 37.

<sup>39</sup> See BILL, *supra*, at 40; MOMEN, *supra*, at 37.

<sup>40</sup> MOMEN, *supra*, at 38.

<sup>41</sup> See MOMEN, *supra*, at 38; HEINZ HALM, *SHI'ISM* (Janet Watson & Marian Hill trans., New York, New York: Columbia University Press, 2nd ed., 2004). (Hereinafter, HALM.)

<sup>42</sup> See MOMEN, *supra*, at 38–39.

<sup>43</sup> See OXFORD DICTIONARY OF ISLAM, *supra*, at 271–272. But see STRAIGHT PATH, *supra*, at 45, in which Professor Esposito states the *Imām* must be the direct descendant of 'Alī, and Muhammad, and therefore it is likely the *Imām* must also be descended from Fātimah.

<sup>44</sup> See OXFORD DICTIONARY OF ISLAM, *supra*, at 272.

<sup>45</sup> BILL, *supra*, at 40.

<sup>46</sup> See MOMEN, *supra*, at 39, 155–157.

<sup>47</sup> See MOMEN, *supra*, at 39; BILL, *supra*, at 40 (Chapel Hill, North Carolina: The University of North Carolina Press, 2002); OXFORD DICTIONARY OF ISLAM, *supra*, at 271.

<sup>48</sup> See [www.al-islam.org/shrines/baqi.htm](http://www.al-islam.org/shrines/baqi.htm).

• 7th *Imām*: Abū Al Hasan Mūsā ibn Jaʿfar

*Imām* Abūʿl-Hasan Mūsā ibn Jaʿfar was born between 737-746.<sup>49</sup> During his *Imāmate*, *Shīʿites* faced persecution by the *Abbasid* Caliphs Mansūr and Al Mahdī (who reigned from 754-775 and 775-785, respectively), and to a much greater extent by the son of Al Mahdī, Harūn Al Rashīd (786-809).<sup>50</sup> Nevertheless, the 7th *Imām* lived a life “focused on prayer, withdrawal, and teaching his disciples.”<sup>51</sup> He refused to revolt against what *Shīʿa* viewed as tyranny under the Caliphs, and taught his followers to cooperate with the government “in matters of mutual concern” so long as cooperation could be justified in religious terms.<sup>52</sup> Thus, this *Imām* is known as “Al Kāẓim,” which means “the forbearing,” “one who restrains himself,” or “the silent.”<sup>53</sup>

Al Kāẓim was imprisoned by Al Rashīd, was poisoned, and died in 799 A.D.<sup>54</sup> Some *Shīʿites* believe Al Kāẓim “voluntarily offered his life as a ransom for the sins of the *Shīʿites*, whom he believed God would soon punish for their lack of *taqīyya* [*taqīyya*, i.e., for their not hiding their faith during danger] and loyalty to the *Imām* in this time of trial.”<sup>55</sup>

• 8th *Imām*: Abū Al Hasan ʿAlī ibn Mūsā

*Imām* ʿAlī ibn Mūsā was born in Medina in 765.<sup>56</sup> The *Abbasid* Caliph Maʾmun appointed the *Imām* as one of his heirs, and gave him the name “Al Ridhā,” which means “the well pleasing,” or “the approved.”<sup>57</sup> This appointment appears to have been an effort to unite the Muslim world, which continued to face the threat of civil war.<sup>58</sup> Yet, Al Ridhā was also poisoned, and died in 818.<sup>59</sup>

• 9th *Imām*: Abū Jaʿfar Muhammad ibn ʿAlī

The 9th *Imām* was born in 810. His father, the 8th *Imām*, died when he was a young boy. Thus, at 7 years old, he succeeded Al Ridhā to the *Imāmate*, making him the first child to become an *Imām*. The succession of a youngster caused some controversy. Ultimately, it was dispelled by stories about the youngster, namely, that he had “extraordinary knowledge at a young age,” and by “referring to the fact that the Qurʾān states that Jesus was given his mission while still a child.”<sup>60</sup> He was

given the names Al Jawād, meaning “The Generous,” and Al Taqī, meaning “The God Fearing.”<sup>61</sup>

*Imām* Al Jawād had been married to Umm Al Fadl, one of the daughters of the *Abbasid* Caliph Maʾmun (who reigned from 813-833). But, the successor to the 9th *Imām* was born of a previous relationship. Al Jawād died in 835. Some *Shīʿa* accounts claim he was poisoned, but there is disagreement regarding the circumstances of his death.<sup>62</sup>

• 10th *Imām*: Abū Al Hasan ʿAlī ibn Muhammad

Abū Al Hasan ʿAlī ibn Muhammad is known as *Imām* Al Hādī, meaning “The Guide,” and also as Al Naqī, meaning “The Pure.”<sup>63</sup> He was born between 827 and 829. Like his father, he was just 7 years old when he became *Imām*.<sup>64</sup> As a young man, Al Hādī was summoned by the *Abbasid* Caliph Mutawakkil (who reigned from 847-861) to live in Sāmarrā, a city in northwest Iraq, on the east bank of the Tigris River, about 78 miles north of Baghdad. There he was treated with respect, but was kept under surveillance and not free to leave.<sup>65</sup>

*Imām* Al Hādī died in 868. Some, but not all, *Shīʿites*, believe Mutawakkil poisoned him.<sup>66</sup>

• 11th *Imām*: Abū Muhammad Hasan ibn ʿAlī

The 11th *Imām* was born between 844 and 846. Known as Al ʿAskarī, which means “The Camp,” this name was given to him because of the many years he was detained in Sāmarrā. He also is known as Al Samī, “The Silent.”<sup>67</sup> A number of miracles are attributed to Al ʿAskarī. Further, *Shīʿa* believe he concealed the birth of his son, the 12th *Imām*, to hide him from the *Abbasid* authorities. They also believe the Caliph Muʿtamid (who reigned from 870-892) killed Al ʿAskarī, by poisoning him, in 874.<sup>68</sup>

• 12th, Final, and Hidden *Imām*: Abū Al Qāsim Muhammad ibn Hasan ibn ʿAlī

*Shīʿa* believe Al ʿAskarī left a young son who succeeded him to the *Imāmate* after his death. This son, the 12th *Imām*, was born in 869. *Shīʿa* further believe his birth was kept secret so as to hide him from the *Abbasid* authorities.<sup>69</sup> The 12th *Imām*, Abū Al Qāsim Muhammad ibn Hasan ibn ʿAlī, came to be called Al Mahdī, which

<sup>49</sup> See MOMEN, *supra*, at 39.

<sup>50</sup> See BILL, *supra*, at 41; MOMEN, *supra*, at 39-40.

<sup>51</sup> BILL, *supra*, at 41.

<sup>52</sup> BILL, *supra*, at 41.

<sup>53</sup> BILL, *supra*, at 41; MOMEN, *supra*, at 39.

<sup>54</sup> See MOMEN, *supra*, at 40; BILL, *supra*, at 41-42.

<sup>55</sup> BILL, *supra*, at 42.

<sup>56</sup> See MOMEN, *supra*, at 41; BILL, *supra*, at 42.

<sup>57</sup> BILL, *supra*, at 42; MOMEN, *supra*, at 41.

<sup>58</sup> See BILL, *supra*, at 42; MOMEN, *supra*, at 41.

<sup>59</sup> See MOMEN, *supra*, at 42; BILL, *supra*, at 43.

<sup>60</sup> MOMEN, *supra*, at 42-43; BILL, *supra*, at 43.

<sup>61</sup> MOMEN, *supra*, at 42.

<sup>62</sup> See BILL, *supra*, at 43; MOMEN, *supra*, at 43.

<sup>63</sup> MOMEN, *supra*, at 43; BILL, *supra*, at 44.

<sup>64</sup> See MOMEN, *supra*, at 43.

<sup>65</sup> See BILL, *supra*, at 44; MOMEN, *supra*, at 44.

<sup>66</sup> See BILL, *supra*, at 44; MOMEN, *supra*, at 44.

<sup>67</sup> BILL, *supra*, at 44; MOMEN, *supra*, at 44.

<sup>68</sup> See BILL, *supra*, at 44; MOMEN, *supra*, at 44.

<sup>69</sup> See BILL, *supra*, at 45; HALL, *supra*, at 34; MOMEN, *supra*, at 161.



means “The Guided One.”<sup>70</sup> As a child, Al Māhdi remained hidden from the Muslim people, and appeared only at the funeral of his father in 874.<sup>71</sup>

When his father died, Al Māhdi was just 5 years old, and he became *Imām* — the third child *Imām*, along with the 9th and 10th *Imāms* (Al Jawād and Al Hādī), but younger than them by 2 years. After the funeral, *Imām* Al Māhdi again disappeared from view. It was at this time, in 874, that Al Māhdi entered into the “Lesser Occultation,” or *ghayba*.<sup>72</sup> It is believed the new, 5-year old *Imām* disappeared down a well in what is now a golden-domed *Shī'ite* shrine called Al ‘Askariyyayn, in Sāmarrā, Iraq.<sup>73</sup> The word “” means the “two Al ‘Askaris,” and refers to the 10th and 11th *Imāms*, where they are buried.

Following the Lesser Occultation, there are reports of Muslims who “had dealings with” Al Māhdi, but he communicated primarily — while remaining hidden — to the *Shī'ite* community through four men known as “*safirs* (emissaries), *babs* (doors), or *nā'ibis* (deputies).”<sup>74</sup> These men were, in order of their appointments:

- ‘Uthmān al-Amrī
- Abū Ja‘far Muhammad ibn ‘Uthmān
- Abū Al Qasim Husayn ibn Ruh an-Nawbakhti
- Abū Al Husayn ‘Alī ibn Muhammad as-Samarrī.<sup>75</sup>

During the Lesser Occultation, these four *safirs* not only communicated messages from *Imām* Al Māhdi to the *Shī'a*, but also collected the *khums* tax (i.e., the annual one-fifth wealth tax among *Shī'ites*), as well as *zakāt* (the Third of the Five Pillars of Islam for all Muslims)<sup>76</sup>

The year 940 A.D. was a watershed in *Shī'ite* history. Then, just before the death of the fourth *bab*, *Imām* Al Māhdi “told” *Shī'ites* he no longer would have a messenger on Earth, and he would not appear again until the beginning of the Last Judgment.<sup>77</sup> From 940 to the present day, and until he re-appears, the 12th *Imām* has been in what is known as “the Greater Occultation.”<sup>78</sup>

Since that time [940], it is said that the hidden Imam will be seen only in visions until he comes to restore true Islam, convert the world with the help of Jesus, and fill the earth with justice and abundance instead of iniquity and need. He will rule for a period of seven, or some say nineteen, years. Human history will have achieved its apogee and its purpose, and the Day

<sup>70</sup> MOMEN, *supra*, at 45; HOURANI, *supra*, at 181.

<sup>71</sup> See MOMEN, *supra*, at 161.

<sup>72</sup> BILL, *supra*, at 45; MOMEN, *supra*, at 161.

<sup>73</sup> See BILL, *supra*, at 57; MOMEN, *supra*, at 161–162; HALM, *supra*, at 34; STRAIGHT PATH, *supra*, at 46.

<sup>74</sup> BILL, *supra*, at 45.

<sup>75</sup> See MOMEN, *supra*, at 162–164.

<sup>76</sup> See MOMEN, *supra*, at 162–163.

<sup>77</sup> See MOMEN, *supra*, at 164.

<sup>78</sup> See MOMEN, *supra*, at 165.

of Judgment will be ushered in . . .<sup>79</sup> Faithful Twelvers meanwhile lead their lives with the full conviction that the twelfth Imam, Muhammad the Mahdi, observes them and is generally aware of their actions.<sup>80</sup>

Thus, since he entered the Greater Occultation, contact with him has ceased.<sup>81</sup> But, *Shī'ites* believe he and Jesus will return, and Christ will assist him to convert the world to *Shī'ism*. Indeed, his chosen ones — presumably all of the *Imāms*, and Islamic saints — will re-appear along with Jesus.<sup>82</sup>

The Hidden Imam, the Imam Māhdi, is in occultation awaiting the time that God has decreed for his return. This return is envisaged as occurring shortly before the final Day of Judgment. The Hidden Imam will then return as the Mahdi with a company of his chosen ones and there will also return his enemies . . . The Imam Māhdi will lead the forces of righteousness against the forces of evil in one final apocalyptic battle in which the enemies of the Imam will be defeated.<sup>83</sup>

In brief, the re-emergence of the Hidden *Imām*, along with Jesus, will be marked by apocalyptic triumph.

## § 9.03 SEVENER SHĪ'ISM

### [A] Split Over 7th *Imām*

Sevener *Shī'ism* is more mystical than Twelver *Shī'ism*, and concentrates on esoteric issues in Islam, known as “*batin*.”<sup>84</sup> Yet, the emergence of Sevener *Shī'ism* was less over theological doctrine than religious succession. There was a dispute among *Shī'ites* regarding the 7th *Imām*, specifically, about who was the true 7th *Imām*. The 6th *Imām* was Abū ‘Abdu’llah Ja‘far ibn Muhammad, known as Ja‘far Al Šādiq. His sons were Ismā‘īl ibn Ja‘far (the eldest), ‘Abdallah (middle), and Musa Al Kāzim (youngest).

It was anticipated the eldest son, Ismā‘īl, would be the successor to his father, Al Šādiq. However, Ismā‘īl pre-deceased his father. Likewise, ‘Abdallah died during the lifetime of Al Šādiq. Twelver *Shī'ites* believe the younger brother of Ismā‘īl, Musa Al Kāzim was the true *Imām*.<sup>85</sup> In contrast, with the deaths of Ismā‘īl and ‘Abdallah, one sect of *Shī'ites*, coalesced around his teachings and became the Seveners, or *Ismā‘īlis*, after Ismā‘īl.<sup>86</sup> This sect — the *Ismā‘īlis* — believed, and still believes, that *Imām* Ja‘far Al Šādiq designated his son Ismā‘īl to be his

<sup>79</sup> BILL, *supra*, at 45.

<sup>80</sup> BILL, *supra*, at 58.

<sup>81</sup> HALM, *supra*, at 36.

<sup>82</sup> See MOMEN, *supra*, at 166.

<sup>83</sup> MOMEN, *supra*, at 166.

<sup>84</sup> See OXFORD DICTIONARY OF ISLAM, *supra*, at 151; *Shia Islam*, *supra*; *Isma'ilism*, WIKIPEDIA, posted at <http://en.wikipedia.org/wiki/Isma'ilism>. (Hereinafter, *Isma'ilism*).

<sup>85</sup> See *Shia Islam*, *supra*.

<sup>86</sup> See *Shia Islam*, *supra*.

successor. With *Imāmate* succession going through Ismā'il, then, the *Ismā'ilis* contend the subsequent legitimate leader was the son of Ismā'il, namely, Muhammad ibn Ismā'il. Indeed, Seveners believe Ismā'il, before he died, rightfully designated as the next *Imām* before Ismā'il himself died.<sup>87</sup>

### [B] *Fatimid Caliphate (909–1171 A.D.)*

A significant period in the history of *Ismā'ilī* Islam was the *Fatimid* Caliphate (known in Arabic as "*Al-Fātimīyyūn*"). It was led by 'Abdullāh al-Mahdī Billah, who claimed to be the legitimate successor of the first *Imām*, 'Alī.<sup>88</sup> The *Fatimids* originated in what is now Eastern Algeria and modern-day Turkey, and in 909 A.D. established what became an *Ismā'ilī* Empire. In 969, they built a new capital, Cairo (in Arabic, *Al Qāhira*), and it is in this year that the famed city enters Middle Eastern history.<sup>89</sup>

At its zenith, the *Fatimid* Caliphate stretched across North Africa, east to Palestine, Syria, the Hejaz (Western Saudi Arabia) and Yemen, south to the Red Sea coast of Africa, and north to Sicily.<sup>90</sup> The *Fatimids* were great traders, with routes across the Mediterranean Sea and Indian Ocean, and diplomatic ties extending to China. They also were known for their religious tolerance towards Christians and Jews (which, to be sure, could advance the commercial and financial needs of the Caliphate), and for their emphasis on merit over blood lineage in doling out positions and patronage. The Caliph Muizz established *Al Azhar* University, the first in the Middle East and one of the oldest, if not the oldest, in the world.

But, by the 1040s, the Empire was in decline, unable to contain independence movements by local leaders, and incapable of repelling invaders, who grabbed pieces of *Fatimid* territory.<sup>91</sup> After 1070, those invaders included Turks and Crusaders, who pushed the *Fatimids* back into Egypt. In 1169, enemies seizing the power base in Cairo, Egypt. In 1171, the forces of Salah ad-Din (Salah al-Din, or typically in English, Saladin) sacked the *Fatimid* Empire, and it collapsed.<sup>92</sup> Nonetheless, to this day the *Fatimid* Caliphate is the only *Sevener Shī'ite* regime, much less Empire, the world has seen.

<sup>87</sup> See Momen, *supra*, at 39; Bill, *supra*, at 40; Oxford Dictionary of Islam, *supra*, at 271; *Ismailism*, *supra*.

<sup>88</sup> See *Fatimid Caliphate*, Wikipedia, posted at [http://en.wikipedia.org/wiki/Fatimid\\_Empire](http://en.wikipedia.org/wiki/Fatimid_Empire). [Hereinafter, *Fatimid Caliphate*.] See generally Paul E. Walker, *Succession to Rule in the Shi'ite Caliphate*, 32 JOURNAL OF THE AMERICAN RESEARCH CENTER IN EGYPT 239–264 (1995) (discussing succession issues in the *Fatimid* Caliphate).

<sup>89</sup> *Fatimid Caliphate*, *supra*.

<sup>90</sup> See Oxford Dictionary of Islam, *supra*, at 84–85; *Shīa Islam*, *supra*.

<sup>91</sup> *Fatimid Caliphate*, *supra*.

<sup>92</sup> See New Encyclopedia of Islam, *supra*, at 226; John L. Esposito, *Islam: The Straight Path* 48 (New York, New York: Oxford University Press, Expanded Edition, 1991). [Hereinafter, *Straight Path*.]; *Fatimid Caliphate*, *supra*.

### [C] *Nizārītes and Druze*

During the reign of the *Fatimids*, various branches of *Sevener Shī'ism* emerged. The *Nizārītes*, or *Nizārīs*, are the dominant branch, by number, claiming two-thirds of all *Ismā'ilīs*.<sup>93</sup> The *Nizārī* take their name from Nizār, the son of a *Fatimid* Caliph. In 1094 A.D. (487 A.H.) an Armenian General named Badr al-Jamāl disinherited Nizār from the throne of the Caliphate.<sup>94</sup> That action prompted the *Nizārīs* to break away from the mainstream of *Ismā'ilī Shī'ism* around 1100. In their early days, the *Nizārīs* were known as "Assassins" (*Tulimīyyah*).<sup>95</sup> Because they fought against both Muslims and Christians. They survived the sacking of the *Fatimid* Empire by the forces of Saladin in 1171, and no less impressively, survived the onslaught of the Mongols in 1256 A.D. (654 A.H.).<sup>96</sup>

The *Nizārī* understanding of *Shī'ism* is closest to that of the original *Ismā'ilīs* who split from Twelver *Shī'ism*.<sup>97</sup> In this sense, the *Nizārītes* might be dubbed "Orthodox" *Ismā'ilīs*. A key feature of *Nizārīte Shī'ism* is belief in the actual, "physical decent" of the *Imāmate*.<sup>98</sup> That means in every era, there is a living *Nizārī Imām* who is an authentic descendant of 'Alī and Fātimah, and who is visible to all. The *Nizārī Imāms* have been known as "Aga Khans" since the early 19th century A.D., when Hasan Ali Shah Mehalatee became the first Aga Khan.<sup>99</sup>

The current *Nizārī Imām* is Aga Khan IV.<sup>100</sup> He is Prince Karim Al Hussein, who was born in 1936, and who became *Imām* in 1957.<sup>101</sup> He lives near Paris, France.<sup>102</sup> Each individual *Nizārī* is spiritually bound to the extant *Imām*, but each one also is encouraged to accord due respect to the preceding *Imām* (e.g., Aga Khan III).<sup>103</sup> In consequence, there is a sense of continuity and allegiance among the *Nizārītes*.

Today, there are over 1 million *Nizārīs*.<sup>104</sup> Most of them live in the Middle and Near East and Indian Subcontinent, particularly Afghanistan, India, Iran, Pakistan, Syria, Yemen, plus China and several East African countries. Their geographic spread perhaps reflects in part the trade and diplomatic links of the old

<sup>93</sup> See *Nizārī*, Wikipedia, posted at <http://en.wikipedia.org/wiki/Nizari>. [Hereinafter, *Nizārī*.]

<sup>94</sup> See Cyril Glasse, *The New Encyclopedia of Islam: Revised Edition of the Concise Encyclopedia of Islam* 225 (Singapore: Tien Wah Press, 2002). [Hereinafter, *New Encyclopedia of Islam*.]

<sup>95</sup> *Straight Path*, *supra*, at 48; Momen, *supra*, at 56; *New Encyclopedia of Islam*, *supra*, at 225.

<sup>96</sup> See *New Encyclopedia of Islam*, *supra*, at 226; John L. Esposito, *Islam: The Straight Path* 48 (New York, New York: Oxford University Press, Expanded Edition, 1991). [Hereinafter, *Straight Path*.]

<sup>97</sup> See *Ismailism*, *supra*.

<sup>98</sup> See *New Encyclopedia of Islam*, *supra*, at 226.

<sup>99</sup> See *New Encyclopedia of Islam*, *supra*, at 37; *Aga Khan*, *supra*.

<sup>100</sup> See *Nizārī*, *supra*.

<sup>101</sup> See *New Encyclopedia of Islam*, *supra*, at 37; *Aga Khan*, Wikipedia, posted at [http://en.wikipedia.org/wiki/Aga\\_Khan](http://en.wikipedia.org/wiki/Aga_Khan). [Hereinafter, *Aga Khan*.]

<sup>102</sup> See *New Encyclopedia of Islam*, *supra*, at 37.

<sup>103</sup> See *Ismailism*, *supra*.

<sup>104</sup> See *New Encyclopedia of Islam*, *supra*, at 227.



Fatimid Caliphate.<sup>105</sup> India, where the *Nizāris* are known as "*Khojas*," is home to the largest *Nizāri* community.<sup>106</sup>

The *Druze* are a second significant branch of *Sevener Shī'ism* that emerged during the *Fatimid* Caliphate. They broke away from the *Ismā'īlis* in 1017, seeking to purge the *Seveners* of corruption from within.<sup>107</sup> The *Druze* incorporate secular philosophy, particularly that of Ancient Greece, and Gnosticism, into their religious beliefs and practices. Consequently, some Muslims have denigrated them, even dubbing them non-Muslims.<sup>108</sup> There are only about 1 million *Druze* globally, with most of them living in the Levant (specifically, Lebanon, Jordan, Syria, and Israel) or other parts of the Eastern Mediterranean.<sup>109</sup> They are a relatively closed community.

## § 9.04 FIVER SHĪ'ISM

### [A] Split Over 5th *Imām*

The pattern should be clear by now: "Twelver" *Shī'ites* believe in a particular succession of 12 *Imāms*, ending with the Hidden *Imām*, the *Al Māhdi*, who in 940 A.D. went into the greater occultation. "Sevener" *Shī'ites* agree with Twelvers on the first 6 *Imāms*, but thereafter depart from the Twelvers. With "Fivers," the common ground is reduced further. *Fiver Shī'ites* agree with Twelvers on only the first 4 *Imāms*. Thus, *Shī'ite* Islam is a schism with *Sunni* Islam, Fivers, like *Seveners*, are a schism within the schism, and a dispute over succession of religious leadership catalyzed each schism.

The 5th Twelver *Shī'ite Imām* was Muhammad Al Baqir ibn 'Ali Zayn Al 'Abidin. Fivers dispute the succession of Muhammad Al Baqir as the *bona fide Imām*.<sup>110</sup> Fivers, also called "*Zaydis*," contend Al Baqir failed to take action against corrupt government, in contrast to the first three *Imāms* 'Ali, Hasan ibn 'Ali, and Hussein ibn 'Ali.<sup>111</sup> *Zaydi Shī'a* take their name from Zayd ibn 'Ali (695-740), the half-brother of Al Baqir and grandson of *Imām* Hussein (who, of course, was the grandson of the Prophet).<sup>112</sup>

Zayd successfully attracted followers from among the *Shī'ite* community, because of his willingness to oppose militarily the injustice of the Caliphs in open rebellion.<sup>113</sup> Zayd led an open rebellion against the *Umayyad* Caliph Hishām, but

was killed in 740 A.D. (122 A.H.) during the month of *Ṣafar*.<sup>114</sup> Among Fivers, his end led to his renown as "Zayd the Martyr." Following the footsteps of his father, Yahya, the son of Zayd was killed soon thereafter.<sup>115</sup> Fivers emphasize a hallmark of the life of a *bona fide Imām* is resisting, in one manner or another, corrupt rule.<sup>116</sup> A true *Imām*, they urge, is not only a descendant of 'Ali and Fātimah, but also is willing to fight for his people.

### [B] Distinctive Beliefs

While championing the rights of the people and campaigning, even with force, for good government are hallmarks of *Fiver Shī'ism*, in a religious sense, Fivers are considered the most moderate of the three branches of *Shī'a* Islam.<sup>117</sup> Two reasons justify this reputation. First, *Zaydis* do not regard their *Imāms* as infallible. Second, they do not believe the *Imāms* receive Divine guidance.<sup>118</sup> In brief, a *Fiver Imām* is not an inerrant, "supernaturally endowed" religious leader free from sin.<sup>119</sup>

Indeed, Fivers believe any descendant of 'Ali and Fātimah is eligible to be *Imām*, as long as that man is pious, refrains from major sins, and is willing to fight for *Shī'ites*.<sup>120</sup> Of course, the *Zaydi* belief in the *Imām-as-warrior* is incongruous with the Twelver belief that *Imāms* are willing to endure patiently the hardships that attend injustice. There is a crucial religious implication of the *Zaydi* belief: if an *Imām* must be a willing warrior ready to defend his people, battle-ready, as it were, then there can be no *Imām* in occultation, nor can there be any child *Imām*.<sup>121</sup> Here again, the contrast with Twelver *Shī'ism* is stark. *Zaydis* further believe, differently from Twelvers, that there can be more than one *Imām* in the world at the same time, as long as they exist in "widely separated regions."<sup>122</sup>

*Zaydi Shī'a* are not as widespread as Twelver *Shī'ites*. The *Seveners* reside mostly in Yemen, Iraq, and certain parts of Africa.<sup>123</sup> They are most pronounced in Yemen, where they comprise 40-45 percent of the total population.<sup>124</sup> Within Yemen, they are located mainly in the northwest. From there, and Southern Saudi Arabia, they lead an active revolt against the government.<sup>125</sup> This movement is known as "*Shabab Al Moumineen*," which means "Believing Youth" or "Youthful

<sup>105</sup> See *Ismailism*, *supra*.

<sup>106</sup> See *Momen*, *supra*, at 56; *New Encyclopedia of Islam*, *supra*, at 227.

<sup>107</sup> See *Druze*, *Wikipedia*, posted at <http://en.wikipedia.org/wiki/Druze>. [Hereinafter, *Druze*.]

<sup>108</sup> See *Druze*, *supra*.

<sup>109</sup> See *Ismailism*, *supra*; *Druze*, *supra*.

<sup>110</sup> See *Shia Islam*, *supra*.

<sup>111</sup> *Shia Islam*, *supra*.

<sup>112</sup> See *Momen*, *supra*, at 49.

<sup>113</sup> See *Momen*, *supra*, at 49; *Bill*, *supra*, at 16; *Oxford Dictionary of Islam*, *supra*, at 347.

<sup>114</sup> See *Momen*, *supra*, at 50.

<sup>115</sup> See *Momen*, *supra*, at 50.

<sup>116</sup> See *Shia Islam*, *supra*.

<sup>117</sup> See *Zaidi*, *Wikipedia*, posted at <http://en.wikipedia.org/wiki/Zaidi>. [Hereinafter, *Zaidi*.]

<sup>118</sup> See *Zaidi*, *supra*.

<sup>119</sup> *Oxford Dictionary of Islam*, *supra*, at 347.

<sup>120</sup> See *Bill*, *supra*, at 16; *Oxford Dictionary of Islam*, *supra*, at 347.

<sup>121</sup> See *Oxford Dictionary of Islam*, *supra*, at 347.

<sup>122</sup> *Bill*, *supra*, at 16.

<sup>123</sup> *Oxford Dictionary of Islam*, *supra*, at 292.

<sup>124</sup> See *Shia Islam*, *supra*.

<sup>125</sup> *Deaths in Yemeni Mosque Blast*, posted at <http://english.ajazeera.net/news/middleeast/2008/05/200805150252961138.html>; Sarah Phillips, *Cracks in the Yemeni System*, 28 July 2005 posted at <http://www.merip.org/mero/mero072805.html>

Believers," or simply, the "Houthis" (from the name of their former commander, Hussein Badreddin Al Houthi, who Yemeni forces reportedly killed in September 2004).<sup>126</sup>

## § 9.05 COMPARISONS WITH CATHOLIC CHRISTIANITY

In the spring of 1999, recognizing the difficulties between the two faiths, Muhammad Khatami, then President of Iran and leader of the officially *Shī'ite* state, visited Pope John Paul II at the Vatican for a private audience. The two religious leaders spoke of mutual admiration and common ground between their faiths, and explored ways to foster dialog, rather than mistrust and violence, between *Shī'ite* Muslims and Catholic Christians. This meeting was a significant step toward understanding between the two communities throughout the world.<sup>127</sup>

The two faiths differ in many ways. Yet, Roman Catholicism shares several fundamental characteristics in belief and practice with Twelver *Shī'ism*. Both religions are headed by an ordered succession of infallible leaders who can and do issue binding interpretations of dogma and religious law. In Catholicism, that succession is apostolic; in *Shī'ism*, it is linked to the Prophet Muhammad. Both faiths place significant weight on philosophy and metaphysics. And, both are founded on (and by) comparable martyred figures (Jesus Christ and *Imām* Hussein) and their mothers (Mary and Fātimah).<sup>128</sup>

As regards leadership, authority, and hierarchy, the Catholic Church and Twelver *Shī'ism* are characterized by a top-down, Divinely guided clergy. (To be sure, in practice, much development occurs from the bottom up, and from the laity, as senior figures in both faiths not only recognize, but also are eager to point out.) In Roman Catholicism, the Supreme Pontiffs are the final part of the Petrine Supremacy, that is, the succession of Saint Peter to Jesus as the head of the Church. (To date, there have been 265 Popes, including Saint Peter (who served from 32-47 A.D.), making it the longest-standing, continual office in history.) The Pope is able to claim supreme leadership of the Church through the first Pope, Saint Peter, who draws authority through Jesus and ultimately God.<sup>129</sup> Popes are chosen by the divinely guided College of Cardinals (meeting in the Sistine Chapel).

When declared so, their specific teachings on matters of faith and morals are regarded as infallible.<sup>130</sup> "Infallibility," in the Catholic sense, means:

The gift of the Holy Spirit to the Church whereby the pastors of the Church, the pope and bishops in union with him, can definitively proclaim a doctrine of faith or morals for the belief of the faithful. . . . This gift is

<sup>126</sup> See *Houthis*, WIKIPEDIA, posted at <http://en.wikipedia.org/wiki/Houthis>.

<sup>127</sup> BILL, *supra*, at 1-5.

<sup>128</sup> See BILL, *supra*, at 47.

<sup>129</sup> BILL, *supra*, at 10.

<sup>130</sup> See *Papal Infallibility*, WIKIPEDIA, posted at [http://en.wikipedia.org/wiki/Papal\\_infallibility](http://en.wikipedia.org/wiki/Papal_infallibility). [Hereinafter, *Papal Infallibility*.]

related to the inability of the whole body of the faithful to err in matters of faith and morals. . . .<sup>131</sup>

In discussions of Papal infallibility, among the points often neglected is the proposition in the second sentence: the entirety of the Church, including the laity, will not err on a matter of faith and morals, which means:

"The whole body of the faithful . . . cannot err in matters of belief. This characteristic is shown in the supernatural appreciation of faith (*sensus fidei*) on the part of the whole people, when, 'from the bishops to the last of the faithful,' they manifest a universal consent in matters of faith and morals."<sup>132</sup>

Interestingly, this proposition exists in Islam. An oft-quoted *ḥadīth* from the Prophet Muhammad is: "My community will never agree upon an error."<sup>133</sup>

However, *ex cathedra*<sup>134</sup> (literally, "from the chair," in the sense of official) teachings must satisfy strict parameters, and Popes are parsimonious in dubbing them "infallible." According to the First Vatican Council (December 1869-October 1870), which declared the doctrine of Papal infallibility, a statement is "infallible" if:

- (1) Roman Pontiff
- (2) speaks *ex cathedra* in which
- (3) he defines
- (4) that a doctrine concerning faith or morals
- (5) must be held by the whole Church.<sup>135</sup>

<sup>131</sup> CATECHISM OF THE CATHOLIC CHURCH, *Glossary* at 883 (United States Catholic Conference, Inc., Washington, D.C.: Libreria Editrice Vaticana, 2nd ed. 1997). [Hereinafter, *CATECHISM*.]

<sup>132</sup> *Catechism*, *supra*, ¶ 92 at 28 (quoting *Lumen Gentium* 12, from the October 1962-December 1965 Second Vatican Council, November 1964).

<sup>133</sup> Quoted in *Ijma*, WIKIPEDIA, posted at <http://en.wikipedia.org/wiki/Ijma>. See also C.G. WEERAMASTY, *ISLAMIC JURISPRUDENCE — AN INTERNATIONAL PERSPECTIVE* 39 (1988, Kuala Lumpur, Malaysia: The Other Press, 2001 ed.) (quoting this *ḥadīth* as: "My nation will not unanimously agree in error.")

<sup>134</sup> "Ex" is a preposition meaning "from," and "cathedra" is the singular, nominative, feminine word for "chair," referring to the Pope's office as leader of the Church.

<sup>135</sup> *Papal Infallibility*, *supra*, quoting from The Dogmatic Constitution from Vatican I, *Pastor Aeternus* (Eternal Shepherd), ch. 4 (session 4, 18 July 1870), posted at [www.fishbeaters.com/pastoraeternus.html](http://www.fishbeaters.com/pastoraeternus.html). Likewise, the *Catechism* states:

"The Roman Pontiff, head of the college of bishops, enjoys this infallibility in virtue of his office, when, as supreme pastor and teacher of all the faithful — who confirms his brethren in the faith — he proclaims by a definitive act a doctrine pertaining to faith or morals . . . The infallibility promised to the Church is also present in the body of the bishops when, together with Peter's successor, they exercise the supreme Magisterium," above all in an Ecumenical Council. (quoting *Lumen Gentium* 25, from the October 1962-December 1965 Second Vatican Council, November 1964) When the Church through its supreme Magisterium proposes a doctrine "for belief as being divinely revealed," [quoting *Dogmatic Constitution on Divine Revelation — Dei Verbum* 10 § 2, from the Second Vatican Council, November 1965] and as the teaching of Christ, the definitions "must be adhered to with the obedience of faith." [quoting *Lumen Gentium* 25] This infallibility extends as far as the deposit of divine Revelation itself.

*CATECHISM*, *supra*, ¶ 891 at 235-236.



No Pope is held to be infallible outside his role as leader of the Church, or even impeccable in all respects. In fact, a Pope may still sin and err while holding the office, and indeed Popes avail themselves of the Sacrament of Reconciliation.

The Roman Catholic Pope may be likened to the Twelver *Shī'ite Imāms*. To *Shī'ites*, 'Alī is the rightful successor to the Prophet Muhammad by Divine order. That is because God (Allāh) is beneficent: He never leaves the faithful without a living guide. 'Alī and the 11 *Imāms* who follow him are Divinely appointed leaders of the Twelver *Shī'ite* faith. Allāh chose them to be His representative on earth. In contrast to Popes, the *Shī'ite Imāms* are infallible and impeccable in all respects.<sup>136</sup> However, since the Twelfth *Imām* went into hiding (occultation), the *Shī'a* rely on their *mujtahidun* to interpret divine law. A *mujtahid* is part of the religious hierarchy, chosen by his colleagues, and, therefore, is not infallible or impeccable. They (and only they) are allowed and indeed expected to use independent reasoning (*ijtihad*). As Catholics are bound to believe the full teaching of the Church, *Shī'ites* are required to follow a *mujtahid* for guidance.<sup>137</sup> A *Shī'ite* who is not a *mujtahid* is called a "*mukallid*," meaning "follower."

Another striking similarity between the two faiths is their rise despite, and perhaps because of, the intense persecution and suffering of individuals and the community. Individually, Jesus and Hussein, are seminal figures in Christianity and Islam, respectively. They led by example and accepted their physical fates as redemptive suffering. The Crucifixion and the Martyrdom of Hussein were "cosmic" events in the two faiths, the first offering himself to redeem humanity, and the second being the final breaking point with the *Sunni* majority.<sup>138</sup> Notably, as Jesus asked the Father from the Cross to forgive his persecutors, Hussein similarly forgave the *Sunnis* who had pursued him.<sup>139</sup> Jesus lived a life of poverty and peace only to be crucified by those who feared his rising authority and misunderstood its nature. Hussein, grandson of the Prophet and Third *Imām*, accepted his disposition and lived a virtuous life, only to be slaughtered by those fearful of his return to power.<sup>140</sup>

As Jesus and Hussein are the supreme role models of virtue, sacrifice, and strength for their followers, a special place also is reserved for their mothers. Mary, Mother of Jesus, herself sinless and pure occupies a unique place in Catholic dogma. In fact, among the rare times Papal infallibility has been invoked are two dogmas concerning Mary: her Assumption into Heaven and her Immaculate Conception.<sup>141</sup> Indeed, the Assumption and Immaculate Conception are the only indisputable instances of Papal infallibility universally acknowledged by the Church. Mary is revered by Catholics for her purity and grace. She is the ultimate loving mother who sacrificed for her son, and endured the worst of events, the cruel death of her son. Fātimah, like Mary, is the perfect picture of a mother. Her modesty and

<sup>136</sup> See BOLL, *supra*, at 16.

<sup>137</sup> See BOLL at 17.

<sup>138</sup> BOLL, *supra*, at 49.

<sup>139</sup> See BOLL, *supra*, at 49.

<sup>140</sup> See BOLL at 47-50.

<sup>141</sup> See Papal Infallibility, *supra*.

compassion should be a model for every woman in the *Shī'ite* community. Both women are shining examples of femininity and are considered immaculate and impeccable.<sup>142</sup> Notably, both women are regarded as influential intercessors between the faithful and God.

Historically, Roman Catholicism and Twelver *Shī'ism* have played significant roles in politics and law. Catholicism intricately intertwined in the monarchies of old Europe. *Shī'ism* took hold in Persia with the *Safavid* Dynasty (1501-1694 A.D.). However, with the separation of Church and State in the non-Muslim world, the Church has little direct influence on politics and law. In contrast, there is no separation of Mosque and State in Iran. It is an avowedly *Shī'ite* theocracy.

Finally, both the Catholic Church and Twelver *Shī'ism* have shown an ability to adapt to changes in the cultural, economic, social, and political milieu without compromising their core precepts. However, historically, each faith has handled centralizing movements better than ones emphasizing individual freedom, though certainly both faiths adhere to the concept of free will.<sup>143</sup> Because the community is so important within each faith, the Catholic Church and Twelver *Shī'ism* sometimes have struggled to balance diversity within unity, that is, to affirm both Divinely-inspired common principles and God-given individual rights. For example, Catholics and *Shī'ites* consider impoverished people a special case, and charity a necessary virtue. Yet, historically, some parts of the Church and *Shī'ite* leadership have been less than eager to upset a *status quo* characterized by a wide wealth gap.<sup>144</sup> Examples of such controversies from the 1970s and 1980s are the Liberation Theology movement stirred by some Latin American clergy, and populist *Shī'ite* movements led by *Āyatollāh* Khomeini.

<sup>142</sup> See BOLL, *supra*, at 50-55.

<sup>143</sup> See BOLL, *supra*, at 110.

<sup>144</sup> See BOLL, *supra*, at 116.

The first of these was the fact that the United States had a large and growing population. This was due to a number of factors, including immigration and a high birth rate.

Another factor was the fact that the United States had a large and growing economy. This was due to a number of factors, including the discovery of gold and silver, and the growth of industry.

A third factor was the fact that the United States had a large and growing military. This was due to a number of factors, including the discovery of gold and silver, and the growth of industry.

A fourth factor was the fact that the United States had a large and growing navy. This was due to a number of factors, including the discovery of gold and silver, and the growth of industry.

A fifth factor was the fact that the United States had a large and growing air force. This was due to a number of factors, including the discovery of gold and silver, and the growth of industry.

A sixth factor was the fact that the United States had a large and growing space program. This was due to a number of factors, including the discovery of gold and silver, and the growth of industry.

A seventh factor was the fact that the United States had a large and growing intelligence community. This was due to a number of factors, including the discovery of gold and silver, and the growth of industry.

A eighth factor was the fact that the United States had a large and growing diplomatic corps. This was due to a number of factors, including the discovery of gold and silver, and the growth of industry.

The first of these was the fact that the United States had a large and growing population. This was due to a number of factors, including immigration and a high birth rate.

Another factor was the fact that the United States had a large and growing economy. This was due to a number of factors, including the discovery of gold and silver, and the growth of industry.

A third factor was the fact that the United States had a large and growing military. This was due to a number of factors, including the discovery of gold and silver, and the growth of industry.

A fourth factor was the fact that the United States had a large and growing navy. This was due to a number of factors, including the discovery of gold and silver, and the growth of industry.

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## PART FOUR LAST GREAT ERA?



## Chapter 10

### OTTOMAN TURKISH EMPIRE (11th Century–1923 A.D.)

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Oh, East is East, and West is West, and never the twain shall meet, Till Earth and Sky stand presently at God's great Judgment Seat; But there is neither East nor West, Border, nor Breed, nor Birth, When two strong men stand face to face, though they come from the ends of the earth!

Rudyard Kipling (1865-1936)

*The Ballad of East and West* (1889)

Winner of the 1907 Nobel Prize for Literature, the first English language writer to receive this honor, and its youngest recipient

#### SYNOPSIS

- § 10.01 BIRTH (11TH CENTURY TO 1362 A.D.)
- § 10.02 CONQUEST AND CONSOLIDATION (1362 TO 1590 A.D.)
- § 10.03 BEGINNING OF END (1595 TO 1789 A.D.)
- § 10.04 WESTERN INFLUENCE, NATIONHOOD, AND DECLINE (1789 TO 1920 A.D.)
- § 10.05 ATATÜRK AND BIRTH OF MODERN TURKISH REPUBLIC (1923 A.D.)
- § 10.06 SALIENT DEVELOPMENTS IN *SHARĪʿA*
  - [A] Organization of Political Units on Religious Lines and Jurisdiction of Islamic Judges (*Qāḍīs*)
  - [B] 1499 Ottoman Law Book (*Kanun*)
  - [C] 1877 Ottoman Civil Code (*Mejelle*)
  - [D] 19th Century Legal Reforms Contrary to *Sharīʿa*
- § 10.07 LAW OF PERSONAL STATUS, OTTOMAN *MILLET* (DENOMINATION) SYSTEM, AND ISRAEL AND PALESTINE

#### § 10.01 BIRTH (11th Century to 1362 A.D.)

Prior to the establishment of the Ottoman Empire, Anatolia (roughly, modern day Turkey) was ruled by the Byzantine Empire. In the middle of the 11th century A.D., the *Seljuk* Dynasty arose, having its capital in Baghdad.<sup>1</sup> With the *Seljuks*

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<sup>1</sup> COLIN IMBER, *THE OTTOMAN EMPIRE, 1300-1650: THE STRUCTURE OF POWER 4* (Houndmills, Basingstoke, Hampshire, England: Palgrave MacMillan, 2002). [Hereinafter, IMBER.]

conquering most of present-day Iran, came an influx of Turks from central Asia, forever altering the ethnic balance of the Middle East.<sup>2</sup> In 1071, they defeated the Byzantine army in eastern Anatolia, which began the decline of the Byzantine Empire.<sup>3</sup>

There were many Turks within the *Seljuk* Dynasty, but not in the ruling class.<sup>4</sup> Turks were semi-nomadic pastoralists, in contrast to the Persian-speaking, city-dwelling *Seljuk* rulers. Hence, the newly-conquered areas of Anatolia were a natural place to relocate.<sup>5</sup> In 1204, the Byzantines lost Constantinople, Greece and the Aegean archipelago to the Fourth Crusade,<sup>6</sup> leaving only Western Anatolia under control.<sup>7</sup>

In 1243, an invading Mongol army in 1243 defeated the *Seljuks*.<sup>8</sup> The Mongols traditionally also were pastoralists, so the *Seljuks* in Anatolia had to compete for land, which forced them to Western Anatolia. Byzantine Emperor Michael VIII was focused on the west after recapturing Constantinople in 1261.<sup>9</sup> Anatolia came to be populated mainly with Turks and “by 1300, Turkish rule had replaced Greek, with a series of Turkish principalities on the former territory of the Emperor.”<sup>10</sup>

The Emirate of Osman was one such principality. The rise of Osman to power resulted from his ability to rally support from Turks and Muslims in the area.<sup>11</sup> When he died in 1323 or 1324, his son, Orhan, succeeded him.<sup>12</sup> Orhan is credited with elevating the Turkish principalities with a penchant for raiding, thereby creating the start of the Ottoman Empire.<sup>13</sup> Table 10-1 summarizes the Ottoman Sultans and their major events.<sup>14</sup>

<sup>2</sup> CAROLINE FINKEL, *OSMAN'S DREAM: THE STORY OF THE OTTOMAN EMPIRE 1300-1923* 3 (2005). [Hereinafter, FINKEL.]

<sup>3</sup> See IMBER, *supra*, at 4.

<sup>4</sup> See IMBER, *supra*, at 4.

<sup>5</sup> See IMBER, *supra*, at 5.

<sup>6</sup> See IMBER, *supra*, at 5.

<sup>7</sup> See IMBER, *supra*, at 5.

<sup>8</sup> JASON GOODWIN, *LORDS OF THE HORIZON: A HISTORY OF THE OTTOMAN EMPIRE* 7 (New York, New York: Henry Holt & Co., 1998). [Hereinafter, GOODWIN.]

<sup>9</sup> See IMBER, *supra*, at 6.

<sup>10</sup> See IMBER, *supra*, at 7.

<sup>11</sup> See IMBER, *supra*, at 8.

<sup>12</sup> See FINKEL, *supra*, at 12–13.

<sup>13</sup> See IMBER, *supra*, at 9.

<sup>14</sup> For the classic history of the Ottoman Empire, see Lord Kinross, *The Ottoman Empire Centuries: The Rise and Fall of the Turkish Empire* (1977) (London: The Folio Society, 2003) (retitled *The Ottoman Empire*).

Table 10-1:  
Ottoman Sultans

Name	Life (A.D.)	Dates of Reign (A.D.)	Major Developments
Osman I	1258-1324	1299-1324	Declared independence of his <i>Seljuk</i> Turkish clan in Anatolia, founding the Ottoman Empire.
Orhan I	1281-1361	1324-1361	Elevated status of empire by raiding and consolidating territory. Occupied town of Lopadion, blocking Byzantine access to Constantinople, leading to the capture of 2 other cities. Married Theodora, daughter of a Byzantine heir, and received control of Gallipoli Fortress in exchange for aid.
Murad I	1326-1389	1362-1389	Gallipoli retaken by Byzantines. Other large territorial gains in Thrace and Macedonia. Rise of the Janissaries (highly skilled military guard). Died on the Serbian battlefield.
Bayezid I	1360-1402	1389-1402	Gained territory through diplomacy and marriage. Married Olivera, sister of Serbia's successor. Attacked by Timur Empire to the east, losing Ankara in 1402. Died in Timur captivity.
Interregnum — Civil War		1402-1413	Timur divided his new territory into 4 parts, giving one to each of his sons. All 4 brothers fought a bloody civil war, ending with Musa winning and ruling brutally until his death in 1413.
Mehmed I	1382-1421	1413-1421	Period of extreme instability and territory loss.



Name	Life (A.D.)	Dates of Reign (A.D.)	Major Developments
Murad II	1404-1452	1421-1444, 1447-1452	Recaptured lost land in 20 years of his reign. Saw opportunity for more land when King of Hungary died at Battle of Varna (10 November 1444) leaving an infant as heir. Abdicated when his favorite son, Alaeddin, died in battle against Hungarian Crusaders. Retook crown and control over territory that rebelled during the Crusades in 1447.
Mehmed II "The Conqueror"	1432-1481	1444-1447, 1452-1481	Conquered Constantinople (1453), converting Hagia Sophia into Islamic mosque. Made significant territorial gains (Europe, Asia Minor, Persia). Died 2 days after leaving Constantinople to conquer the <i>Mamluk</i> Empire.
Bayezid II	1447-1512	1481-1512	Comprehensively codified Ottoman customary law. Accepted Jews expelled from Spain into Ottoman territory. Attacked by <i>Mamluk</i> Empire to the east, and alliance of powers in the west (ending with a treaty with Ottoman land concessions).
Selim I (Yavuz)	1465-1520	1512-1520	First Sultan to take the title "Caliph of Islam." Obtained fatwā against <i>Shī'i Safavid</i> Empire to legitimize fighting other Muslims. Gained territory in Eastern Anatolia and the Levant. Failed to conquer Egypt due to lack of naval experience, so alliance with Tunis and Algerian pirates.

Name	Life (A.D.)	Dates of Reign (A.D.)	Major Developments
Suleyman I "The Magnificent"	1494-1566	1520-1566	Sweeping legislative, legal, social and economic reforms. Prominent monarch of 16th century, patron and practitioner of the arts and sciences. Huge territorial gains (Anatolia, Persia, Aegean Peninsula and Hungary). Allied with French against Charles V, Holy Roman Emperor, when he attacked Algiers.
Murad III	1546-1595	1574-1595	1590 peace treaty over the Azerbaijan region (height of Ottoman territorial expansion). Wars on either side of the Empire drained the treasury, beginning economic decline and institutional decay.
Mehmed III	1566-1603	1595-1603	Territorial standstill, army exhausted and completely surrounded by powerful forces.
Ahmed I	1590-1617	1603-1617	
Mustafa I	1592-1639	1617-18, 1622-23	
Murad IV	1612-1640	1623-1640	Restored some internal order, using harsh tactic for social control.
Ibrahim I	1615-1648	1640-1648	Assassinated by Janissaries.
Mehmed IV	1642-1693	1648-1687	In 1683, Austrians successfully defended Vienna.
Suleyman II	1642-1691	1687-1691	Rural depopulation lead to food shortages.
Ahmed II	1643-1695	1691-1695	
Mustafa II	1664-1703	1695-1703	In 1699, Ottomans signed Treaty of Carlowitz as a defeated army, not conquering power.
Ahmed III	1673-1736	1703-1730	In 1718, treaty ceding territory.
Mahmud I	1696-1754	1730-1754	Dichotomy between Muslims and non-Muslims became more contentious as non-Muslims began gathering status as merchants and traders.
Osman III	1699-1757	1754-1757	
Mustafa III	1717-1774	1757-1774	In 1774, treaty ceding territory.

Name	Life (A.D.)	Dates of Reign (A.D.)	Major Developments
Abdul Hamid I	1725-1789	1774-1789	Well regarded by the people after leading a fire brigade in Istanbul. Could not afford to pay the army causing great territorial loss.
Selim III	1761-1808	1789-1808	Tried to institute reforms to the Ottoman government. Recognized Napoleon as Emperor of France, leading to his assassination by the Janissaries.
Mustafa IV	1779-1808	1808	Ordered Selim III killed by janissaries, then Janissaries demanded he step down in favor of Mahmud II.
Mahmud II	1785-1839	1808-1839	Anti-Western sultan, consolidating all power to himself. Reformed military, tax system, <i>waqf</i> system, and established an Ottoman newspaper.
Abdul Mejid I	1823-1861	1839-1861	Enacted the Tanzimat Reforms (legal reforms). New penal code issued 1840, influenced by French Civil Code, guaranteed equality under the law, first time Sultan used legislating power. In 1847, mixed civil and criminal courts established, using European based evidence rules. In 1850, commercial code established, administered by new tribunals of commerce. Built Dolmabahçe Palace in Istanbul. Outlawed the turban in favor of the fez.

Name	Life (A.D.)	Dates of Reign (A.D.)	Major Developments
Abdulaziz	1830-1876	1861-1876	Continued reforms of his brother, Abdul Mejid I. Cultivated good relations with the European leaders. Organized public education system, founding University of Istanbul. Connected railway to Europe (known as the Orient Express). <i>Mejelle</i> codified.
Murad V	1840-1904	1876	Reigned for 39 days before being deposed.
Abdul Hamid II	1842-1918	1876-1909	In 1876, promulgated Constitution, masquerading as democratic reform, but really furthering sultan's power. Dissent and distrust at the universities grew. In 1908, Bulgaria declared independence, Crete unified with Greece, and Bosnia joined with the Austrian Habsburgs. Young Turks movement forced him into exile.
Mehmed V	1844-1918	1909-1918	Sultan in name only. Committee of Union and Progress controlled the government through the legislature. In 1914, Ottomans enter First World War on losing side, allying with Austria-Hungary and Germany. In 1915, Armenian genocide.
Mehmed VI	1861-1926	1918-1922	On 11 November 1918, Armistice Agreement signed with Allies ending First World War. External defeat of entire Ottoman Empire.
Abdul Mejid II	1868-1944	1922-1944	Sultanate abolished in 1922.

The birth of the Ottoman Empire hinged largely on two specific events. First, in 1328, and as a result of a famine in Bursa and a subsequent earthquake, the army



of Orhan occupied the Byzantine town of Lopadion.<sup>15</sup> As the Byzantine forces responded, Orhan was able to block their access to Constantinople, allowing Orhan to capture at least two other Byzantine cities.

Second, in 1346, Orhan aligned himself with another would-be emperor with a competing claim to the Byzantine throne.<sup>16</sup> To cement the connection, Orhan married Theodora, a daughter of one claimant to that throne. The strategic nuptials served their intended purpose. In 1352, the father of Theodora needed additional help, and he called on Orhan. In exchange for the help of Orhan, he was given control of a fortress on the Gallipoli peninsula, the first territory the Ottomans occupied in Europe.<sup>17</sup> Eventually, in 1353, the Ottomans used this outpost to invade Bulgaria and Greece.<sup>18</sup>

## § 10.02 CONQUEST AND CONSOLIDATION (1362 TO 1590 A.D.)

After the death of Orhan in 1362 A.D., his son, Murad I, made large territorial gains in Europe, although in 1366 the Byzantines retook the fortress on Gallipoli.<sup>19</sup> They hoped reclaiming it would block access to Europe. But, in 1369, the Ottomans conquered Adrianople, accessing central and eastern Bulgaria and western Thrace.<sup>20</sup> Shortly thereafter, two Serbian lords in Macedonia suffered a crushing defeat to the Ottomans, by Janissaries, a highly-skilled military organization (akin to the Praetorian Guard of Ancient Rome) instrumental to all of the conquests for the Empire by Murad.<sup>21</sup>

With the Janissaries, according to a Greek Short Chronicle, “from then on the Muslims began to overrun the Empire of the Christians.”<sup>22</sup> Even the attempt of Pope Gregory XI to rally Europe into an anti-Turkish alliance in 1372 failed.<sup>23</sup> In 1385, Murad I conquered Sofia, and then proceeded to subdue Serbia,<sup>24</sup> but died on the battlefield.<sup>25</sup>

Through diplomacy and marriage, Bayezid I, son of Murad I, was successful in Serbia. In 1392, Serbia aligned itself with the Ottomans against Hungary.<sup>26</sup> To solidify this deal, Bayezid I married Olivera, the sister of Serbia's then-successor.

<sup>15</sup> See IMBER, *supra*, at 9.

<sup>16</sup> See IMBER, *supra*, at 10.

<sup>17</sup> See IMBER, *supra*, at 10.

<sup>18</sup> ROBERT D. KAPLAN, *BALKAN GHOSTS: A JOURNEY THROUGH HISTORY* 36 (New York, New York: St. Martin's Press, 1993). [Hereinafter, KAPLAN.]

<sup>19</sup> See IMBER, *supra*, at 11.

<sup>20</sup> See IMBER, *supra*, at 11.

<sup>21</sup> See GOODWIN, *supra*, at 21.

<sup>22</sup> See IMBER, *supra*, at 11.

<sup>23</sup> See IMBER, *supra*, at 12.

<sup>24</sup> See IMBER, *supra*, at 12.

<sup>25</sup> See FINKEL, *supra*, at 21.

<sup>26</sup> See IMBER, *supra*, at 14.

Emboldened by the alliance, Bayezid I tried to overthrow Byzantine-occupied Constantinople in 1394.<sup>27</sup>

However, the Timur Empire began expanding into Ottoman territory,<sup>28</sup> capturing Ankara in 1402, demanding the attention of Bayezid.<sup>29</sup> Prior to any response from Bayezid, the Timurids were able to sway the allegiance of a number of eastern Ottoman emirs, who switched sides on the battlefield. The army of Bayezid army was defeated swiftly; he was captured and died a year later in captivity.<sup>30</sup>

After the triumph of Timur (1336-1405), commonly known as Tamerlane, the Ottoman Empire was divided into four parts at his command. Timur gave his eldest son, Suleyman, reign of all European lands. In 1404, Suleyman waged war against two of his brothers and prevailed. In 1410, Musa, the fourth brother, defeated Suleyman. Despite solidifying control over the entire Ottoman Empire, Musa's reign was brief and violent, ending in his death in 1413. The period following the death of Musa was characterized by further instability, leading to additional loss of territory in the Ottoman Empire.

In 1421, Murad II took control of the Empire and recaptured land lost within the first 20 years of his leadership.<sup>31</sup> The death of the Hungarian King Sigismund in 1440, with only an infant successor, left that territory apparently vulnerable.<sup>32</sup> The conquest of this territory by Murad II, however, led to a later crisis for Ottoman rule.<sup>33</sup>

In 1439, Pope John VIII accepted a union with the Orthodox Christian Church in return for extending military aid to the Byzantines.<sup>34</sup> He also organized a Crusade against the Ottomans in 1444,<sup>35</sup> in which Hungarians were one of the main Crusading forces. Later that year, Murad II abdicated control after his favorite son, Alaeddin, was killed in a battle against the Crusaders, in favor of his other son, Mehmed.<sup>36</sup> This Crusade was the first time Europeans were able to capitalize on their more advanced technology, namely, cannons. However, in a battle at Varna on 10 November 1444, the King of Hungary was killed, causing the Hungarians to end the battle and ultimately cede the country to the Ottomans.<sup>37</sup> In 1447, Murad re-ascended to the Emperor's throne and regained control over provinces that had rebelled in the Crusades.<sup>38</sup>

<sup>27</sup> See FINKEL, *supra*, at 24.

<sup>28</sup> See IMBER, *supra*, at 17.

<sup>29</sup> See IMBER, *supra*, at 17.

<sup>30</sup> See IMBER, *supra*, at 17-18.

<sup>31</sup> See FINKEL, *supra*, at 71.

<sup>32</sup> See IMBER, *supra*, at 24.

<sup>33</sup> See IMBER, *supra*, at 25.

<sup>34</sup> See IMBER, *supra*, at 26.

<sup>35</sup> See FINKEL, *supra*, at 44-45.

<sup>36</sup> See FINKEL, *supra*, at 44.

<sup>37</sup> See IMBER, *supra*, at 26.

<sup>38</sup> See IMBER, *supra*, at 27.

Mehmed II officially regained the throne after the death of Murad II in 1451, and immediately laid siege to Constantinople.<sup>39</sup> When the city finally fell on 29 May 1453,<sup>40</sup> Mehmed “the Conqueror” solidified his place in Muslim history by converting the cathedral Hagia Sophia into an Islamic mosque.<sup>41</sup> In a series of strategic moves, Mehmed conquered Serbia up to the Danube River, Bosnia, Hercegovonia, and most of the Aegean Peninsula.<sup>42</sup> As a symbolic maneuver, the Ottomans also conquered Travzon, the last remaining stronghold of the Byzantine Empire.<sup>43</sup> In 1463, the Venetian Senate declared war against the Ottomans and created an alliance with Hungary, the Roman Catholic Church, Burgundy and, the Karamanids in the east.<sup>44</sup> This war ended in 1479 with the Ottomans relinquishing only the Aegean Peninsula.<sup>45</sup> The ever-militant Mehmed II then led an army in 1481, hoping to overthrow the Mamluk Empire, but died two days after departing Constantinople.<sup>46</sup> Overall, the reign of Mehmed II greatly expanded the territory of the Ottoman Empire into Europe, Asia Minor, and Persia.<sup>47</sup>

Bayezid II, the son of Mahmed, came to power after the death of his father. He did not immediately embark upon a conquest to expand the territory of the Ottoman Empire. Perhaps he was adversely affected by his absent father. Perhaps, too, Bayezid II realized the soldiers were exhausted from perpetually waging war. Additionally, domestic instability was increasing, because Mehmed II had both raised taxes and seized private property to finance his wars.<sup>48</sup> Due to this internal instability, Bayezid II was the first Emperor to attempt to codify comprehensively the customary law of the Ottomans. He was particularly concerned with law that “regulated the relationship between fief holders and the peasants on their land, and the military obligations of fief-holders and the peasants on their land, and the military obligations of fief-holders.”<sup>49</sup>

However, the peace of Bayezid II dissolved when the Mamluk Empire attacked the previously-annexed emirate of Karaman in the east.<sup>50</sup> Beginning in 1485, the war over the Taurus Mountains lasted 6 years with no material border changes.<sup>51</sup> In 1499, the Venetians declared war on the Ottomans, supported by the Papacy, Hungary, France, and Spain.<sup>52</sup> This war, provoked by Ottoman aggression, ended with a treaty in 1503 with minimal territorial gains, and “marked the beginning of

an Ottoman disengagement from Europe that was to last until 1521.”<sup>53</sup> Bayezid II was also timid in confronting the *Safavid* Empire (Iran, Iraq, and northern Syria) despite the Ottoman's aversion to *Shi'ism*.<sup>54</sup>

Selim II became Emperor in 1512, after the death of Bayezid II, facing a growing threat from the *Safavids*. To legitimize military action, Selim II obtained a *fatwa* labeling Shah Ismail (the *Shi'ite* leader of the *Safavid* Dynasty) a heretic to be eradicated.<sup>55</sup> Although, beginning in 1514, the Ottomans captured much of eastern Anatolia and northern Syria,<sup>56</sup> this expansion created a shared border with the Mamluk Empire. As a result, Shah Ismail formed an alliance with the Mamluks.<sup>57</sup> This alliance did not deter the Ottomans, who captured all of Syria (which included Damascus, Tripoli, Jerusalem, Mecca, Medina, Lebanon, and Palestine) because of their far superior military artillery.<sup>58</sup>

Emboldened by this success, Selim II attempted to overthrow Egypt, but failed due to the Ottoman's lack of naval expertise. To bolster this military deficiency, Selim II convinced two prominent Mediterranean pirates to aid him by establishing their territory, Tunis and Algiers, as provinces of the Empire.<sup>59</sup> Selim II died shortly thereafter in 1520.

Next, Suleyman I, considered one of the greatest Ottoman leaders for conquering vast amounts of territory, took the throne. During his 46-year rule, Suleyman I gained territory in eastern Anatolia, Iraq, land surrounding the Persian Gulf and Red Sea, almost all of the Aegean Peninsula, Moldavia, and Hungary.<sup>60</sup> When Spain attacked the Ottoman province of Algiers in 1535, Suleyman I allied with the French against the Spanish king, Charles V, who was also the then-ruler of the Holy Roman Empire.

In the late 1500s, the Ottomans took advantage of instability within the *Safavid* Empire.<sup>61</sup> After protracted fighting, a peace treaty was signed in 1590 giving the Ottomans control of present-day Azerbaijan, the Caucasus region, and western Iran,<sup>62</sup> marking the territorial height of the Ottoman Empire.<sup>63</sup> Murad III, the Emperor at the time, died on the western front in a losing conflict against the Austrians.

The Ottoman Empire, though far from homogeneous, functioned without serious sectarian disputes.<sup>64</sup> Islam was the dominant religion, but there were Greek and

<sup>39</sup> See GOODWIN, *supra*, at 29–43.

<sup>40</sup> See IMBER, *supra*, at 28–29.

<sup>41</sup> See IMBER, *supra*, at 29.

<sup>42</sup> See FINKEL, *supra*, at 59.

<sup>43</sup> See IMBER, *supra*, at 31.

<sup>44</sup> See IMBER, *supra*, at 32.

<sup>45</sup> See IMBER, *supra*, at 33.

<sup>46</sup> See IMBER, *supra*, at 37.

<sup>47</sup> See IMBER, *supra*, at 37.

<sup>48</sup> See IMBER, *supra*, at 37.

<sup>49</sup> See IMBER, *supra*, at 44.

<sup>50</sup> See IMBER, *supra*, at 37.

<sup>51</sup> See IMBER, *supra*, at 39.

<sup>52</sup> See IMBER, *supra*, at 41.

<sup>53</sup> See IMBER, *supra*, at 41.

<sup>54</sup> See FINKEL, *supra*, at 96.

<sup>55</sup> See IMBER, *supra*, at 46.

<sup>56</sup> See IMBER, *supra*, at 46.

<sup>57</sup> See IMBER, *supra*, at 46.

<sup>58</sup> See IMBER, *supra*, at 47.

<sup>59</sup> See IMBER, *supra*, at 48.

<sup>60</sup> See IMBER, *supra*, at 60.

<sup>61</sup> See IMBER, *supra*, at 63–64.

<sup>62</sup> See IMBER, *supra*, at 63–64.

<sup>63</sup> See IMBER, *supra*, at 66.

<sup>64</sup> See IMBER, *supra*, at 1.



Armenian Orthodox Churches, and a large number of Jews whose number increased dramatically in 1492 after their wholesale expulsion from Spain, and reception by Bayezid II.<sup>65</sup>

Rather, it was a dynastic Empire in which the only loyalty demanded of all its multifarious inhabitants was allegiance to the sultan. The loyalty demanded of those who did not hold office consisted in no more than not rebelling and paying taxes in cash, kind or services. Even these were often negotiable. It was in the end the person of the sultan and not religions, ethnic or other identity that held the Empire together.<sup>66</sup>

Reflecting the religion of the Ottoman founders and rulers, the Empire followed *Sunni* Islam and applied the *Şeriat* in accordance with *Hanafi* School jurisprudence. (In Turkish, "*Şar'at*" is expressed as *Şeriat*.)

In respect of religious diversity of the populace, the Empire allowed Christians and Jews considerable latitude to practice their religion, and to establish local courts that applied legal rules required by their religion.<sup>67</sup> Jurisdiction of these courts was limited to disputes in which both parties were of the religious group in question. However, any member of a religious group could petition an Islamic court.<sup>68</sup> This Middle Age forum shopping was possible because, if ever in conflict, the ruling of a Muslim court would have precedence over a Jewish or Christian court.<sup>69</sup>

### § 10.03 BEGINNING OF END (1595 TO 1789 A.D.)

After the 1590 treaty, the Ottoman Empire found itself in a territorial standstill, which persisted into the 17th century. Eastward expansion into Iran was blocked by a resurgent *Safavid* Empire and, by harsh terrain.<sup>70</sup> A superior Portuguese navy blocked any Ottoman advances from the Red or Arabian Seas, preventing access to the riches from south Asian spice trading.<sup>71</sup> Russians began to conquer areas around the Black Sea and north Caucasus region.<sup>72</sup> In Europe, the Habsburgs, with their far superior weaponry, successfully defended Vienna in 1683.<sup>73</sup> Finally, on 26 January 1699, the Ottomans signed the Treaty of Carlowitz<sup>74</sup> as the defeated power, not conquering victor.<sup>75</sup> Subsequent treaties in 1718 and 1774 ceded

<sup>65</sup> See Goodwin, *supra*, at 98–100.

<sup>66</sup> See Imber, *supra*, at 3.

<sup>67</sup> See Imber, *supra*, at 216.

<sup>68</sup> See Imber, *supra*, at 216–17. (Jewish women would often petition for divorce in a Muslim court because it had more preferential rules.)

<sup>69</sup> See Imber, *supra*, at 217.

<sup>70</sup> BERNARD LEWIS, *THE EMERGENCE OF MODERN TURKEY* 24 (Oxford, England: Oxford University Press, 2d ed. 1968). [Hereinafter LEWIS.]

<sup>71</sup> See Goodwin, *supra*, at 161–62.

<sup>72</sup> See Lewis, *supra*, at 25.

<sup>73</sup> See Lewis, *supra*, at 25–26.

<sup>74</sup> See Finkel, *supra*, at 322–23.

<sup>75</sup> See Lewis, *supra*, at 36.

additional territories to Ottoman foes.<sup>76</sup>

Internal pressure, too, led to the eventual decline of the Ottoman Empire:

The Ottoman systems of military organization, civil administration, taxation, and land tenure were all geared to the needs of a society expanding by conquest and colonization into the lands of the infidel. They ceased to correspond to the different stresses of a frontier that was stationary or in retreat.<sup>77</sup>

There are at least four specific internal factors. First, the army, citing exhaustion, refused to simply bow to the whim of the Emperor's colonial proclivities. While the military was still active during this time, it seems as if the soldiers had less interest in merely protecting already acquired land, as opposed to the glory of conquering something new.

Second, a rural depopulation had begun to take place in the mid-17th century. Largely because of a poor quality of life, the rise of wealthy landowners, and tax burdens, farmers began to move to the city — a stark contrast from the agrarian roots that had sustained it up to this point<sup>78</sup> — resulting in food shortages throughout the Empire.<sup>79</sup>

Third, internal instability had also been exacerbated by traditional divisions of labor between Muslims and non-Muslims. Muslims traditionally only worked in four professions: government, war, religion, and agriculture.<sup>80</sup> Non-Muslims, therefore, were left occupying increasingly lucrative vocations within industry and trade.<sup>81</sup> Even though the history of the Ottoman Empire was more accepting of a multi-religious, multi-ethnic Empire, the ruling Muslim class did not approve of this development. However, the non-Muslims were able to block most attempts to confiscate their businesses and thereby protect themselves because their success was sustaining the Empire at this time.<sup>82</sup>

Fourth, the Ottoman Emperors who ruled in this period left faced difficulties. They ascended to the throne amidst uncertainty in their status, probably due to a premature death of the previous ruler and the early age of his likely successor.<sup>83</sup> Two Emperors, Osman and Ibrahim, were assassinated. Notably, Osman was killed in 1618 by the Janissaries, who were instrumental in all previous military campaigns.<sup>84</sup> Murad IV managed to restore internal order during his rule from 1623

<sup>76</sup> See Lewis, *supra*, at 37.

<sup>77</sup> See Lewis, *supra*, at 27.

<sup>78</sup> See Lewis, *supra*, at 32–33.

<sup>79</sup> See Lewis, *supra*, at 33.

<sup>80</sup> See Lewis, *supra*, at 35.

<sup>81</sup> See Lewis, *supra*, at 35.

<sup>82</sup> See Lewis, *supra*, at 25–26.

<sup>83</sup> See Imber, *supra*, at 76, 78, 85 (concerning the death of Ahmed I in 1617 leaving numerous, young sons; accession of Murad IV in 1623 when he was only 12; and ascension of Mehmed in 1648 when he was only 7).

<sup>84</sup> See Imber, *supra*, at 78.

to 1640.<sup>85</sup> But, perhaps an ominous harbinger, his tactics for doing so were harsh, including the death penalty for enjoying coffee or tobacco.

#### § 10.04 WESTERN INFLUENCE, NATIONHOOD, AND DECLINE (1789 TO 1920 A.D.)

Throughout Ottoman Imperial history, there was considerable contact with the West. Western ideals failed to take root among the Ottomans, unlike European military weaponry.<sup>86</sup> The Ottoman Muslims saw their Christian adversaries as inferior, uncivilized and unintelligent.<sup>87</sup> The Doctrine of Successive Revelations buoyed this belief, stating:

the final mission of Muhammad . . . enabled the Muslim to reject Christianity as an earlier and imperfect form of something that he alone possessed in its entirety. . . .<sup>88</sup>

Despite this mantra, ripples from the French Revolution (1789–1799 A.D.) could be felt and Muslims in the Ottoman Empire during this period were beginning to have doubts about their place in the world. Culturally, there were two reasons for this fact.

First, because of territorial contraction and internal instability, Muslims began to question whether they still were in the favor of God.<sup>89</sup> Second, the French Revolution was explicitly secular in character, disconnecting Western ideals from Christendom. Ottoman curiosity was piqued, as “the Muslim world . . . hope[d] to find the elusive secret of Western Power without compromising its own religious beliefs and traditions.”<sup>90</sup>

The Ottoman ruling elite realized the destabilizing potential of the French Revolution, but then-current Selim III did not immediately share this concern. Most likely out of delight for the French defeat of Austria and Russia, Selim III recognized Napoleon as the French emperor.<sup>91</sup> This act ultimately led to his disposition in 1807 by the staunchly anti-Western Janissaries and Chief *Mufti*.<sup>92</sup> The ruling elite and Mahmud II, the next emperor, embarked on a campaign to publicly discredit the ideas of the “atheistic” French Revolution by disseminating letters denouncing it.<sup>93</sup>

<sup>85</sup> See IMBER, *supra*, at 81.

<sup>86</sup> See LEWIS, *supra*, at 41–42.

<sup>87</sup> See LEWIS, *supra*, at 40.

<sup>88</sup> See LEWIS, *supra*, at 40.

<sup>89</sup> See LEWIS, *supra*, at 45.

<sup>90</sup> See LEWIS, *supra*, at 54.

<sup>91</sup> See LEWIS, *supra*, at 70–71.

<sup>92</sup> ALAN PALMER, *THE DECLINE AND FALL OF THE OTTOMAN EMPIRE* 71–72 (London, England: John Murray Publishers, Ltd., 1992). [Hereinafter PALMER.]

<sup>93</sup> See LEWIS, *supra*, at 66–69.

Mahmud II transformed the role of the emperor by consolidating all of the power of the Ottoman Empire into himself.<sup>94</sup> Previously, provinces were semi-autonomous, allowing local authority to govern that vast majority of its own affairs. Mahmud II used this heightened power in at least four significant ways. First, in 1826 he sought to reform the Ottoman military and, specifically, to eliminate the Janissaries.<sup>95</sup> This reformation was to begin a more rigorous education for military officers.<sup>96</sup> Second, in 1831, Mahmud eliminated the *timar*,<sup>97</sup> a grant of land given to soldiers as payment for their military service, and upon which no taxes were due.<sup>98</sup> While the motivation for this was undoubtedly to increase the Ottoman tax base, the net effect of this was to “liquidate . . . the last vestige of feudalism.”<sup>99</sup> Third, Mahmud II also dramatically altered the *waqf*, or Islamic trust in 1826,<sup>100</sup> placing a government agency over the administration, or *evkaf*, of all *waqf*. As a result, all funds accruing to these trusts were filtered through the government, eventually amounting to one-third of the Ottoman Empire’s revenue.<sup>101</sup> And fourth, the first official Ottoman newspaper was established.<sup>102</sup> Mahmud II died in 1839.

Sultan Abdul Majid instigated even wider sweeping reforms than Mahmud II, known as the Tanzimat reforms. The Sultan felt that *Shariat* law failed to address international and business concerns as well as criminal issues and enforcement.<sup>103</sup> In May 1840, a new penal code was issued.<sup>104</sup> Although it did not seem to be revolutionary, it marked a beginning of radical changes in Ottoman law for three reasons.

First, it was highly influenced by the French code. Second, it required that all Ottoman citizens are equal before the law. Third, it was the first appearance of the Sultanate acting in a legislative manner.<sup>105</sup> In 1847, mixed civil and criminal courts were established.<sup>106</sup> Cases in this court were adjudicated by European and Ottoman judges with rules of evidence and procedure based upon European law. A commercial code was established in 1850 to be administered by newly created tribunals of commerce.<sup>107</sup>

<sup>94</sup> See LEWIS, *supra*, at 77–78.

<sup>95</sup> JASON GOODWIN, *LORE OF THE HORIZON: A HISTORY OF THE OTTOMAN EMPIRE* 292–93 (1998).

<sup>96</sup> See LEWIS, *supra*, at 80–87.

<sup>97</sup> See LEWIS, *supra*, at 90. See also HAIM GERBER, *STATE, SOCIETY AND LAW IN ISLAMIC OTTOMAN LAW IN COMPARATIVE PERSPECTIVE* 65–70 (1994). [Hereinafter GERBER.]

<sup>98</sup> See LEWIS, *supra*, at 90.

<sup>99</sup> See LEWIS, *supra*, at 92.

<sup>100</sup> See LEWIS, *supra*, at 92–94.

<sup>101</sup> See GERBER, *supra*, at 140.

<sup>102</sup> See LEWIS, *supra*, at 94.

<sup>103</sup> I.S.S. ONAL, *The Majalla, in LAW IN THE MIDDLE EAST: ORIGIN AND DEVELOPMENT OF ISLAMIC LAW* 293 (Majid Khadduri & Herbert J. Liebesny eds., 1955). [Hereinafter ONAL.]

<sup>104</sup> See LEWIS, *supra*, at 109.

<sup>105</sup> See LEWIS, *supra*, at 109–110.

<sup>106</sup> See LEWIS, *supra*, at 114.

<sup>107</sup> See LEWIS, *supra*, at 114.



The promulgation of this Code was the first formal recognition in Turkey of a system of law and of judicature independent of the *ulema*, dealing with matters outside the scope of the *Şeriat*. . . . [This was a] radical departure from previous Ottoman practice, and the harbinger of a complete legal and social revolution.<sup>108</sup>

Between 1858 and 1863 new land, penal, commercial, and maritime codes were established, all of which were based on the French model.<sup>109</sup>

These codes, with the *Mejelle* as the most important, adopted by the Ottomans highlighted a serious problem emerging within the Empire and its complicated, tumultuous relationship with the West. In particular, a bifurcated legal system developed; one applying the substantive provisions of the Western codes, the other applying the traditional *Şeriat*.<sup>110</sup> Exacerbating this dual system was the inability of courts and lawyers to apply these provisions. *Şeriat* courts were neither trained, nor had the authority to apply these Western codes.<sup>111</sup> Lawyers also had difficulties representing clients in this time due to their training. Western-trained lawyers could not apply the disparate, Arabic texts that *Şeriat* courts applied.<sup>112</sup> Arabic courts were unfamiliar with Western legal concepts upon which these newly promulgated legal codes were based.<sup>113</sup>

Promulgation of these laws did not sit well with the autocratic power of the Sultan that Mahmud II had gathered. The law required equal treatment of all Ottomans, but the Sultan failed to enforce impartially these laws. Thus, the grand legal reformation was meaningless to most Ottoman citizens, as the men entrusted with enforcement were inept and half-hearted.<sup>114</sup> Also, no group or force existed "among the different classes of the population which might, in its own interest, have impelled their effective application."<sup>115</sup>

In the 1860s and 1870s, Turkish literary figures, influenced by Western ideals, publishing many works domestically.<sup>116</sup> They were not a unified voice, but they were a key first step to breed popular support for the impending Revolution. Similarly, the press helped change popular opinion on abuses by the autocratic Sultanate.<sup>117</sup> Collectively, writers and journalists authored "an unmistakable liberal critique of government action, and a programme of constitutional reform."<sup>118</sup>

<sup>108</sup> See Lewis, *supra*, at 114–15.

<sup>109</sup> See Lewis, *supra*, at 119.

<sup>110</sup> See Onar, *supra*, at 292.

<sup>111</sup> See Onar, *supra*, at 293.

<sup>112</sup> See Onar, *supra*, at 294.

<sup>113</sup> See Onar, *supra*, at 294.

<sup>114</sup> See Lewis, *supra*, at 135.

<sup>115</sup> See Lewis, *supra*, at 135.

<sup>116</sup> See Lewis, *supra*, at 136–46.

<sup>117</sup> See Lewis, *supra*, at 146–50.

<sup>118</sup> See Lewis, *supra*, at 152.

The Young Turks was one group of writers that would become important in the Revolution. In 1868, it established a paper named *Hürriyet*, meaning "freedom."<sup>119</sup> Traditionally, this term referred only to being free of a master as in the converse of slavery. As testament to the influence of the French Revolution, the term began to connote a political, democratic meaning.<sup>120</sup> This journal was used to advocate their central message: to advocate "a return to the true spirit of early Islam, which recognized the sovereignty of the people and the principle of government by consultation."<sup>121</sup> It must be noted there were two factions within the Young Turk movement. One was nationalistic, wanting to restore the glory of the Ottoman Empire. The other was liberal, preferring a federal state with limited central authority and equality for minorities.<sup>122</sup>

In the 1870s, conditions within the Ottoman Empire deteriorated rapidly:<sup>123</sup>

The army and navy . . . had cost vast sums. The sultan's extravagance and the reckless borrowing of his ministers threw the state finances into chaos. Crop failures brought hardship and discontent; anti-European feeling became general and intense.<sup>124</sup>

To quell the mounting tension, Sultan Abdulhamid II promulgated a Constitution in 1876.<sup>125</sup> The Constitution, however, masqueraded as a step toward democratic reforms. It only further secured the sultan's rule. A legislative assembly was elected in 1877. But, it was merely a "façade of liberal and democratic government."<sup>126</sup> Additionally, the constitution turned out to be a significant setback for the Young Turks. Some of its members abandoned their ideals and took government positions. Most of those who did not begin working for the government either were imprisoned or banished.<sup>127</sup>

Distrust among Turkish university students grew. The first opposition group was formed in 1889 by four medical students. Outside the Ottoman Empire, opposition groups gained prominence. By 1906, opposition in the universities spread to officers in the Ottoman military,<sup>128</sup> but due to the poor financing of the army, a military *coup d'état* was not an option. Upon hearing of the growing opposition, the Sultan summoned two revolutionaries, Enver Bey and Ahmed Niyazi, to Istanbul to "explain the situation and receive a promotion."<sup>129</sup> Both recipients knew the request was a snare, and fled. After executing a fellow revolutionary, dissension spread. The

<sup>119</sup> See Lewis, *supra*, at 154.

<sup>120</sup> See Lewis, *supra*, at 129.

<sup>121</sup> See Lewis, *supra*, at 172–73.

<sup>122</sup> See Lewis, *supra*, at 215.

<sup>123</sup> See Lewis, *supra*, at 159.

<sup>124</sup> See Lewis, *supra*, at 159.

<sup>125</sup> See Finkel, *supra*, at 489–90.

<sup>126</sup> See Lewis, *supra*, at 168.

<sup>127</sup> See Lewis, *supra*, at 173.

<sup>128</sup> See Palmer, *supra*, at 200.

<sup>129</sup> See Lewis, *supra*, at 207.

masses began forcefully demanding restoration of the Constitution.<sup>130</sup> The sultan capitulated on 23 July 1908.<sup>131</sup>

In October of 1908, Bulgaria's King Ferdinand proclaimed independence from the Ottoman Empire. That same week Crete voted for union with Greece, and Bosnia-Herzegovina joined the Austrian Habsburgs.<sup>132</sup>

Put another way, Bulgarian-financed guerrillas in Macedonia had triggered a revolution among young Turkish officers stationed there, which then fanned throughout the Ottoman Empire; this development, in turn, encouraged Austria-Hungary to annex Bosnia, inflicting on its Serbian population a tyranny so great that a Bosnian Serb would later assassinate the Habsburg Archduke and ignite World War I.<sup>133</sup>

Within Turkey, Ottoman disintegration abroad enraged and emboldened the Young Turks against then-Sultan Abdul Hamid, who was forced into exile in April 1909.

At this point the nationalist Young Turks gained control of the government under the party name of the Committee of Union and Progress (CUP). Amid the instability of the time, CUP formed an unlikely alliance with Bulgaria, Serbia and Greece. In October 1912, this alliance declared war on the Ottoman Empire.<sup>134</sup> On 17 October as the Balkan armies approached Istanbul, Enver Bey led a group of ultra-nationalists and killed two of the top CUP officials.<sup>135</sup> At that point Turkey fell into the harshest of military dictatorships, culminating in the genocide of 1.5 million Armenians in 1915.<sup>136</sup> Professor Lewis summarizes the disappointment of the Turkish Revolution:

The high hopes of the Revolution were swiftly disappointed, and the orderly progress of constitutional government was ended in the wretched cycle of plot and counterplot, repression and sedition, tyranny, humiliation, and defeat.<sup>137</sup>

In 1914, the Ottoman Empire officially entered the First World War as an ally of Imperial Germany and the Austro-Hungarian Empire. That alliance proved catastrophic for the Ottoman Empire. A few years later, in 1918, the Armistice agreement was officially signed, marking the final external defeat for the former-glorious Empire.<sup>138</sup>

<sup>130</sup> See LEWIS, *supra*, at 208.

<sup>131</sup> See FINKEL, *supra*, at 512.

<sup>132</sup> See PALMER, *supra*, at 206.

<sup>133</sup> See KAPLAN, *supra*, at 62.

<sup>134</sup> See KAPLAN, *supra*, at 63.

<sup>135</sup> See LEWIS, *supra*, at 225.

<sup>136</sup> See KAPLAN, *supra*, at 63.

<sup>137</sup> See LEWIS, *supra*, at 227.

<sup>138</sup> ANDREW MANGO, *THE TURKS TODAY* 256 (2004). [Hereinafter, MANGO.]

## § 10.05 ATATÜRK AND BIRTH OF MODERN TURKISH REPUBLIC (1923 A.D.)

With a sense of assured defeat, the Turks allowed the victorious Allied forces (specifically those from the United Kingdom and France) to occupy Istanbul in November 1918.<sup>139</sup> The Ottoman Empire lay dormant until provoked by a Greek army incursion on 15 May 1919.<sup>140</sup> The intention of the Greeks was to annex Western Anatolia, and thereby control both shores of the Aegean. On 19 May 1919, Mustafa Kemal landed at Samsun and immediately organized an army against the Greeks.<sup>141</sup> The Treaty of Sevres was signed on 10 August 1920 by the Sultan that fled just prior to the Allied incursion two years prior.<sup>142</sup> This Treaty, however, never was implemented.

As the defunct Sultan Vahideddin was signing it, a Turkish state was emerging in Anatolia.<sup>143</sup> Kemal called for elections to establish a parliament under the Ottoman Constitution, and it commenced on 12 January 1920.<sup>144</sup> The last act of this parliament was to demand territorial integrity and Turkish national independence.<sup>145</sup> Kemal led the formation of the new Grand National Assembly, and with it the nation of Turkey.<sup>146</sup>

Kemal, appropriately called "Atatürk" (translated literally to mean "Father Turk") led this new Republic. However, Atatürk and Turkey vowed not to forget their long, tumultuous history as Ottomans. Atatürk himself said:

The Ottoman Empire has disappeared into history. A new Turkey has not been born. The countries may differ but civilization is one and the same. . . . The decline of the Ottoman Empire started on the day when, very proud of its triumphs over the West, it cut its ties with the European nations. This was a mistake which we will not repeat.<sup>147</sup>

The words of Atatürk proved prophetic, as modern Turkey struggles not only for greater understanding and acceptance in the non-Muslim west, but in particular for membership in the European Union (EU).

<sup>139</sup> See GOODWIN, *supra*, at 318.

<sup>140</sup> See LEWIS, *supra*, at 241.

<sup>141</sup> See LEWIS, *supra*, at 242–43. For a monumental account of the life of Mustafa Kemal, see Andrew Mango, *Atatürk — The Biography of the Founder of Modern Turkey* (Woodstock, New York: The Overlook Press, 1999).

<sup>142</sup> See GOODWIN, *supra*, at 318–319.

<sup>143</sup> See LEWIS, *supra*, at 247.

<sup>144</sup> See LEWIS, *supra*, at 250–51.

<sup>145</sup> See LEWIS, *supra*, at 251.

<sup>146</sup> See PALMER, *supra*, at 264–65.

<sup>147</sup> See KAPLAN, *supra*, at 283.



§ 10.06 SALIENT DEVELOPMENTS IN *SHARĪʿA*[A] Organization of Political Units on Religious Lines and Jurisdiction of Islamic Judges (*Qādis*)

Ottoman rulers organized the Empire into administrative units on religious lines, much like the organization of the Catholic world when the Vatican controlled religious and political matters. The basic unit for civil government was the *kada*. A *kada* was a district in which a particular *qādi* had jurisdiction. In that jurisdiction, the *qādi* was both the principle judge, and the supervisor of public morals.

The local police chief, the “*subashi*,” was answerable to the *qādi*. The supervisor of the marketplace (home of business and commerce) was the “*muh̄tasib*.” Like the *subashi*, the *muh̄tasib* was answerable to the *qādi*. Ottoman rulers ensured the *qādis* and religious scholars were trained, and organized them into a professional hierarchy.

[B] 1499 Ottoman Law Book (*Kanun*)• History of the *Kanun*

Several important legal developments took place during the rule of Bayezid II, who ruled from 1481 to 1512 A.D. While the *Ṣeriat* had been applied since at least the 15th century, *Kanun* was also an important, secular source of law.<sup>148</sup> As the administrative law of the Ottoman Empire, the “*Kanun*” consisted of legislative pronouncements, regulations, directives, and orders of the Sultans.

Primarily, the *Kanun* served as a gap-filler, typically concerning Criminal Law, land tenure and taxation.<sup>149</sup> The origin and legitimacy of *Kanun* likely predated the Ottoman Empire. Bayezid II contributed to its development by directing an official to compile a bound volume of all such laws, culminating in the Law Book of 1499.<sup>150</sup> Bayezid II, however, provided more than a recitation of customary law. In this Law Book the *Kanun* was developed to clarify the relationship between the Emperor’s tax-paying subjection and those soldiers and government officials who did not have to pay taxes.<sup>151</sup>

Following Bayezid II, two of the Ottoman Sultans, Selim I (1512–1520) and Suleyman I (1520–1560), as well as their successors, were keen to be pious rulers.<sup>152</sup> Accordingly, they based the administration of justice on the *Sharīʿa*. During the reign of Suleyman I, in the mid 1500s, the *Kanun* was brought into harmony with the *Sharīʿa*. To illustrate their piety, in producing and applying the *Kanun*, a Sultan typically referred to Islamic Law, and made use of its concepts.

<sup>148</sup> See IMBER, *supra*, at 244.

<sup>149</sup> See IMBER, *supra*, at 244.

<sup>150</sup> See IMBER, *supra*, at 249.

<sup>151</sup> See IMBER, *supra*, at 245.

<sup>152</sup> JOSEPH SCHACHT, AN INTRODUCTION TO ISLAMIC LAW 89–90 (Oxford, England: Oxford University Press (Clarendon Paperbacks) 1982). [Hereinafter SCHACHT.]

• The Grand *Mufti*; Abul-Suʿud and Consistency between *Kanun* and *Sharīʿa*

The Grand *Mufti*, who was the *mufti* of Istanbul, sat at the top of the professional hierarchy, and was called the “*Shaykh al-Islam*.” That is to say, the Grand *Mufti* was a high-ranking official both in the religious and governmental order. The essential obligations of the Grand *Mufti* were to (1) ensure compliance with the *Sharīʿa* by the government in its prospective actions, and (2) supervising the *qādis*.

One Grand *Mufti*, Abul-Suʿud, was especially influential.<sup>153</sup> Abul-Suʿud was the Grand *Mufti* from 1545–1574 under the regime of Suleyman I. With the support of Suleyman I, Abul-Suʿud brought consistency between the *Kanun* and *Sharīʿa*. For example, he amended the Property Law of the European provinces of the Ottoman Empire to ensure that law implemented the principles of the *Sharīʿa*.

Abul-Suʿud also harmonized operation of the *qādis* and *Sharīʿa*. He did not accept unconditionally the idea that the authority of a *qādi* came solely by virtue of appointment by a Sultan, and consequently that a *qādi* must follow the orders of a Sultan. Rather, he narrowed the subject matter jurisdiction of the *qādis*, and simultaneously instructed that *qādis* must apply the doctrines accepted by the *Hanafi* School.

• *Siyāsa* Still Existed — Example of *Taʿzīr* Punishments

Despite these efforts to ensure consistency between the *Kanun* and *Sharīʿa*, there were instances when the *Kanun* did more than supplement Sacred Law. One example where it exceeded that Law is in the field of Penal Law. The Sultans assumed that the *ḥadd* (limit) punishment (those associated with offences against God (Allāh), known as “*ḥaqq Allāh*” crimes) were obsolete.<sup>154</sup> So, they replaced them with *taʿzīr* punishments.

A *taʿzīr* (discretionary) punishment is one not specified in the Qurʾān, but rather decided upon by a *qādi*. Examples include beatings and fines, and the judge might choose to base the severity of the punishment on aggravating or mitigating circumstances, such as the socioeconomic status of the defendant found guilty. Clearly, calling for the use of *taʿzīr* punishments is an example of *siyāsa* — the policy of a Sultan.

For now, it is worth noting that in the Ottoman Empire, at least, many of these punishments were (by the standards of today) inhumane.<sup>155</sup> Emasculation could be a punishment for seducers, hanging for arsonists, burglars, and certain types of thieves, amputation of the hands could be a punishment for forgers (and, like the *ḥadd* punishment, for certain thieves). The Sultans also permitted torture in cases of theft or receipt of stolen goods, if the only available evidence was circumstantial.

<sup>153</sup> See SCHACHT, *supra*, at 90.

<sup>154</sup> See SCHACHT, *supra*, at 91.

<sup>155</sup> See SCHACHT, *supra*, at 91.

### [C] 1877 Ottoman Civil Code (*Mejelle*)

More significant than previous codes, the first section of the *Mejelle*, the Turkish Civil Code, was completed in 1870.<sup>156</sup> In 1876, the entire Civil Code was finished. Then, the entire *Mejelle* was submitted to the Sultan for approval, which he gave:

According to Muslim doctrines, in a controversial matter the opinion held by the Sultan is the one to be obeyed; therefore, if the opinions expressed in this book are found acceptable it should be submitted to the Sultan for approval.<sup>157</sup>

Highlighting the Islamic character of the *Mejelle*, the drafting committee considered this approval necessary.

Ahmed Cevdet Pasha is credited, aided significantly by the drafting committee, with authoring the *Mejelle*. Pasha was a highly revered Islamic legal scholar who was appointed Divan of Judicial Ordinances in 1868.<sup>158</sup> This appointment was a disappointment to Pasha. Although he had previously been a notable Tanzimat reformer, he had also been a high-ranking cleric.<sup>159</sup> Pasha had hoped to be appointed to the highly revered, religious position of *sheikhulislam*.<sup>160</sup> This personal setback, however, did not curtail his ambition or success at continued legal reform of the Ottoman Empire.

The immediate concern that Pasha and his committee had to consider was the extent to which Western ideals were to shape the *Mejelle*. "Reform as [Pasha] understood it was a process that enabled Islam to incorporate western scientific and technical concepts."<sup>161</sup> Earlier codes adopted by the Ottoman Empire had heavily incorporated both the form and substance of the corresponding French codes. In stark contrast from these previous codes, the *Mejelle* only incorporated the form of the French Civil Code, allowing the *Şariat* to determine its substance.<sup>162</sup>

Determining substance was no easy task. The *Mejelle* itself editorializes the vastness of such a project by describing Islamic law as "an ocean without shores."<sup>163</sup> Professor Finkel elaborates that "the corpus [of Islamic law] that had served the Ottomans for so long had come to seem amorphous and unfathomable, and out of keeping with the spirit of modernization blowing through government circles."<sup>164</sup> To curtail what had become an amorphous, unpredictable *Şariat*, the *Mejelle* codified *Hanafi* School jurisprudence.<sup>165</sup> The implication was to eliminate the ability of

Muslim Ottomans to act, or for individual judges to rule, on individual interpretation of the Qur'ān.<sup>166</sup>

However, [the *Mejelle*] was not a code in the strict European sense, because it was not a complete and exclusive statement of the law as it existed at the time of codification, but rather a nonexclusive digest of existing rules of Islamic law.<sup>167</sup>

The *Mejelle*, however, is reminiscent of Western codes insofar as it applied to all Ottoman subjects regardless of their individual religion.<sup>168</sup> This universal applicability was a departure from previous, religious-based Ottoman laws.

The *Mejelle* itself spans 1,851 total articles contained in an introductory section and sixteen books, each dealing with a separate subject. The subjects concern contracts, property, torts, wrongful appropriation, and procedure.<sup>169</sup> The introductory section contains general principles and canons of interpretation to all substantive provisions in the sixteen books. For instance, Articles 3 and 4 state that if there is a dispute in which there is a written agreement, the intent of the parties, not the text of the agreement, prevails if in conflict.<sup>170</sup> Additionally, the *Mejelle* ensures the primacy of morality in Article 30 when it states that "[r]epelling an evil is preferable to securing a benefit."<sup>171</sup> Thus, a court could rule in a matter contrary to what a substantive provision dictated if ruling in such a manner was an affront to morality.

The legitimacy of custom as a source of law was codified in the introductory section of the *Mejelle* in Articles 36 and 45.<sup>172</sup> Intending to enhance the adaptability of the *Mejelle*, Articles 39 and 40 allow custom to modify the meaning of law as time passes.<sup>173</sup> This stated fluidity, however, is substantially mitigated, if not altogether halted, in practice. Because it is the codification of *Hanafi* jurisprudence, the *Mejelle* is restricted to the unbending principles of Islam.<sup>174</sup>

Generally, the *Mejelle* intended to comprehensively regulate all matters that may affect the language, conclusion, and enforcement of a contract.<sup>175</sup> Article 449 states, for instance, in a contract for lease, "the subject matter . . . must be specified."<sup>176</sup> If a contract does fail to do so, it is altogether void. The rationale for this harsh conclusion is that "no judicial interpretation or inquiry into the intent of the parties is possible" in such circumstance.<sup>177</sup> Additionally, the *Mejelle* seriously restricts the

<sup>156</sup> See LEWIS, *supra*, at 122.

<sup>157</sup> See ONAR, *supra*, at 295.

<sup>158</sup> See LEWIS, *supra*, at 123.

<sup>159</sup> See FINKEL, *supra*, at 476–77.

<sup>160</sup> See FINKEL, *supra*, at 467–77.

<sup>161</sup> See FINKEL, *supra*, at 477.

<sup>162</sup> See FINKEL, *supra*, at 477.

<sup>163</sup> See FINKEL, *supra*, at 477.

<sup>164</sup> See FINKEL, *supra*, at 477.

<sup>165</sup> See ONAR, *supra*, at 295.

<sup>166</sup> See FINKEL, *supra*, at 477.

<sup>167</sup> See ONAR, *supra*, at 296.

<sup>168</sup> See FINKEL, *supra*, at 476.

<sup>169</sup> See ONAR, *supra*, at 299.

<sup>170</sup> See ONAR, *supra*, at 296.

<sup>171</sup> See ONAR, *supra*, at 297.

<sup>172</sup> See ONAR, *supra*, at 297.

<sup>173</sup> See ONAR, *supra*, at 297.

<sup>174</sup> See ONAR, *supra*, at 307.

<sup>175</sup> See ONAR, *supra*, at 300.

<sup>176</sup> See ONAR, *supra*, at 300. Oddly, though Article 43 of the *Mejelle* states that customs shall supplement private contracts and be enforced as if it was part of the contract. See ONAR, *supra*, at 297.

<sup>177</sup> See ONAR, *supra*, at 300.



freedom to contract, by listing the specific types of contracts that may be concluded.<sup>178</sup>

In 1888, Pasha and the drafting committee were finally dissolved.<sup>179</sup> In this interim period, a code of civil procedure had been completed. Although the *Mejelle* remained in force until 1926 in Turkey, all legal reforms came to an abrupt halt due to increasing autocracy and repression, compromising the search for justice.<sup>180</sup>

### [D] 19th Century Legal Reforms Contrary to *Shari'a*

Incongruities and even open conflict between legal developments and the *Shari'a* emerged by the 19th century Sultan Mahmud II (who ruled from 1808 to 1839) and his successor, 'Abdulmejid (who ruled from 1839 to 1861), sought to modernize the Ottoman legal system. For the first time Muslim and non-Muslim persons were called by the same term — “subjects.”<sup>181</sup> Inspired by European examples, legislation such as the Ottoman Code of Commerce was passed (enacted in 1850). Substantively, the Sultans took more and more out of the “orbit of Islamic law.”<sup>182</sup>

In sum, the reforms of the late Ottoman Sultans were not always viewed as consistent with the *Shari'a*, and indeed they were not. That is not to suggest the Sultans abandoned the *Shari'a*. They did not:

Ottoman Turkey is the only Islamic country to have tried to codify and to have enacted as a law of the state parts of the religious law of Islam. This is the *Mejelle* . . . , which covers the law of contracts and obligations and of civil procedure in the form of articles, and was promulgated as the Ottoman Civil Code in 1877. . . . [I]ts purpose was to provide the recently created (secular) tribunals with an authoritative statement of the doctrine of Islamic law and to obviate (without forbidding it) recourse to the works of Islamic jurisprudence which had proved difficult and impracticable.<sup>183</sup>

In 1926, 8 years after the First World War and demise of the Ottoman Empire, the Turkish government eliminated the *Mejelle*, and the *Shari'a*, as sources of Turkish law.

Still, the achievement of the *Mejelle* — codifying the *Shari'a* for application in the contemporary world — was remarkable, and has not been equaled since:

Strict Islamic law is by its nature not suitable for codification because it possesses authoritative character only in so far as it is taught in the traditional way by one of the recognized schools. The experiment of the *Mejelle* was undertaken under the influence of European ideas, and it is, strictly speaking, not an Islamic but a secular code. It was not intended for the tribunals of the *qadis*, and was in fact not used in them as long as they

<sup>178</sup> See ÖNAR, *supra*, at 299.

<sup>179</sup> See LEWIS, *supra*, at 184.

<sup>180</sup> See LEWIS, *supra*, at 184.

<sup>181</sup> See SCHACHT, *supra*, at 92.

<sup>182</sup> See SCHACHT, *supra*, at 92.

<sup>183</sup> See SCHACHT, *supra*, at 92.

existed in Turkey, and it contains certain modifications of the strict doctrine of Islamic law, particularly in the rules concerning evidence. [Articles 1684 ff. of the *Mejelle* retained all of the Qur'anic qualifications for a witness, except that the person be a Muslim.] Nevertheless, the *Mejelle* was one of the official codes of the Ottoman Empire; it remained in force (subject to subsequent legislation) in the territories, and later states, which were detached from the Ottoman Empire after 1918, where it was applied as the “civil law” by modern secular tribunals, until it was replaced by new civil codes in Lebanon (1932), Syria (1949), and Iraq (1953), and it is still the basis of the “civil law” of Cyprus (detached already in 1878), Israel, and Jordan.<sup>184</sup>

In other words, the *Mejelle* was a remarkable effort at a very difficult task, and its influence far outlived the Ottoman Empire.

### § 10.07 LAW OF PERSONAL STATUS, OTTOMAN MILLET (DENOMINATION) SYSTEM, AND ISRAEL AND PALESTINE

The lingering influence of the Ottoman Empire is evident in part through the Law of Personal Status in the Middle East.<sup>185</sup> The basis of Personal Status Law in that region is known as the “*Millet*” system, which comes from the Ottoman Empire. Loosely translated, the word “*Millet*” means “denomination.” It is a Turkish word, derived from the Arabic term “*millah*,” which literally means “nation.”

The key point about the term is it has nothing to do with what a person actually believes in, *i.e.*, whether the person actually believes in Islam, Christianity, or Judaism. Rather, “*Millet*” refers to the religion and community (sometimes called a confessional community) into which a person is born and dies. For example, a person baptized Catholic is part of the Catholic community, and dies as part of that community, regardless of the deep-seated belief of that person during his or her life. Likewise, a person born to a Jewish mother is part of the Jewish community, even if that person subsequently converts to another faith. The same is true in respect of Islam. Manifestly, then, “*Millet*” concerns categories of religious communities over which a person has little control.

Why were wooden categories established? The Ottoman Sultans gave autonomy to each religious community over matters of Personal Status. Such matters include:

- Marriage
- Divorce
- Child custody
- Inheritance

<sup>184</sup> See SCHACHT, *supra*, at 92–93. See also *id.* fn. 1 at 93 (on witness qualifications).

<sup>185</sup> This discussion draws on a lecture by Jonathan Kattah, Esq., *Personal Status Law*, delivered at the University of Kansas School of Law on 23 October 2006.

- Education (to a certain level)

The Sultans had a vast political and commercial empire to run. They did not want to deal with Personal Status matters. Conversely, the heads of the respective religious communities were keenly interested in preserving their autonomy, and that of their followers, from meddling by an Islamic Sultan sitting in Istanbul. Those leaders were the Bishop for Catholic Christians, Patriarch for Orthodox Christians, Rabbi for Jews, and Imām for Muslims. Thus, a pragmatic deal emerged: the leaders of the religious communities could maintain their preserve over matters of Personal Status, but they had to accept that they were accountable to the Ottoman Sultan.

Accordingly, Catholic and Orthodox Christians remained free to adjudicate disputes on Personal Status topics in Ecclesiastical (i.e., Church) courts. (To this day, the Ecclesiastical courts recognize 12 denominations as "Christian.") Jews remained free to adjudicate these matters in Rabbinical courts. Muslims were able to deal with them in *Shari'a* courts. In effect, the Ottoman Sultan sub-contracted the adjudication of Personal Status issues to religious courts. All four religious faiths could rely on the Ottoman ruler to enforce decisions of the respective courts. After all, the religious leaders accepted the sovereignty of the Ottoman Sultan, who did not want to sub-contract enforcement of law, even of religious law, as doing so would undermine his political and legal authority.

In its day, the *Millet* System was progressive. It was a legal manifestation of religious pluralism in a Muslim majority jurisdiction, and it safeguarded the rights of religious minorities. The System continues to the present day in parts of the Middle East, most notably, Israel and Palestine. But, the *Millet* system is challenged by ideas sourced in the European Enlightenment. Such ideas include:

- Separation of church and state (or synagogue and state, or mosque and state), meaning that religion belongs to God, but the homeland belongs to all persons living in it.
- Secularism, that is, the trend to remove religion from the public sphere, and confine it to individuals as a private matter.
- Social welfare systems, providing assistance to women and children and safeguarding their rights, which are a legitimate function of the state, not the exclusive province of a religious community.

Moreover, the *Millet* system is under pressure from challenges posed by the recent wave of globalization. Religious ideas travel across communities via information technologies, people leave one faith and join another, and men and women interact across communal lines, and enter into inter-faith marriages. These trends mean the traditional cohesiveness of religious communities has broken down. Put directly, people do not live in small, closed religious lines — bubbles, as it were — anymore.

The *Millet* System in Israel owes its origin in part to concessions granted by David Ben-Gurion (1886-1973), the founding Prime Minister (1949-1954, 1955-1963), to Orthodox Jews. Many Orthodox Jews at the time were anti-Zionist, refused to fly the Israeli flag, and rejected Israeli currency. ("Zionism" was a political movement to re-establish, and now to maintain, a Jewish homeland in the historic area of the

Jewish people, Israel.) To win their support for the fledgling Jewish state, Prime Minister Ben-Gurion agreed to a three-part deal:

(1) *Orthodox Monopoly* —

The Orthodox Jewish community obtained a monopoly on Personal Status affairs of Jews in Israel and Palestine. That is, the Orthodox leaders were given complete control over such matters. Members of the other two broad denominations in Judaism, Conservative and Reformed, were not part of this overall bargain. Consequently, Conservative and Reformed Jews were not given any such control. (Of course, the latter two groups contest this arrangement.) Thus, for example, they could define qualifications for who counts as a "Jew."

(2) *Military Exemption* —

Any male who studied the Torah, and any female who claimed to be religious, was given an exemption from service in the Israeli Defense Force (IDF).

(3) *Special Funding* —

Jewish religious schools, charities, and orphanages belonging to the Orthodox community were provided with special funding.

In return for these three concessions from Prime Minister Ben-Gurion, the Orthodox community dropped its anti-Zionism, and agreed that the Israeli Knesset could speak for it. This bargain remains in place, including the right of the Orthodox leaders to decide "Who is a Jew?" That is true even though many Israeli Jews describe themselves as secular, and many American Jews are Reformed.

Recently, Israeli courts have endeavored to erode, slowly, the authority of Orthodox courts. Likewise, they gradually have encroached on the authority of Christian and *Shari'a* courts. Generally, the prevailing legal philosophy in Israel is positivism. Civil courts look to the black-letter law as passed by the Knesset, though some judges try to incorporate references to the Talmud in their decisions. As a result, on Personal Status matters such as alimony and child support in the event of a divorce, conflicts arise. There is at times a race to the courts, with litigants seeking to get to an Israeli civil court, or a religious court, first depending on what suits their interests. Yet, the religious courts still have significant jurisdiction, and there is no such thing as a "civil" marriage or a "civil" divorce in Israel, Palestine, or Jordan. Likewise, the Ecclesiastical courts do not recognize the concept of a will, in the ordinary civil sense of the term, and require a decedent to comply with relevant religious-based inheritance rules.

Under the *Millet* System, as it operated during the Ottoman Empire and to the present day, the religious courts respect the jurisdiction and decisions of one another. They do so according to a "Principle of Amity." For example, a marriage is valid where it is celebrated, and respected by the other religious tribunals. Likewise, a divorce is valid where it occurs, and accepted by the other courts. An interesting illustration of the Amity Principle arose with respect to a former Chief Judge of the Israeli Supreme Court, Chaim Cohen. He wanted to re-marry a divorcee. His Jewish last name, "Cohen," marked him as a member of the Jewish



religious community, specifically a member of a group of the Chief Priests and Rabbis. As such, the Orthodox Jewish Rabbinical court had jurisdiction over his re-marriage request. That court denied his request, on the ground that an Orthodox Jew cannot remarry a divorced woman. Mr. Cohen got around the ruling by remarrying in New York, and then invoking the Principle of Amity, in an international sense, to ensure Israeli recognition of his American marriage.

In Israel, the importance of the Orthodox monopoly control over defining “Who is a Jew?” cannot be over-stated. First, if a person is non-Jewish, and seeks to convert to Judaism, that person must do so under Orthodox, not Conservative or Reformed, Jewish Law. Second, that control operates as a gatekeeper to obtain items associated with normal, everyday life. Whether a person obtains a mortgage, national insurance, or preference for a job, a visa depends on the status of the person as a “Jew.” Third, the Orthodox control has deleterious unintended consequences. Certain groups, such as “Jews for Jesus,” fight a battle to prove they really are “Jews,” and ironically, at times such groups stake out positions that are more stridently anti-Arab or anti-Palestine than right-wing Israeli groups, simply to prove they are “Jewish.”

Arguably, the *Millet* System, and the arrangement under it with the Orthodox Jewish community in Israel, is incongruous with demographic realities in modern-day Israel. Though no recent population censuses have been taken, it is generally accepted that about 20 percent of the Israeli population is Arab, the vast majority of which is Muslim, with a small number of Christians. Israel does not have a Constitution, but rather a small number of “Basic Laws.” These Laws have a superior status, i.e., a Constitution-like status, and have to be passed by 80 percent of the Knesset (not just the usual 50 percent plus majority). Many Israelis prefer not to have a formal Constitution, because negotiating and drafting one would require directly confronting two fundamental issues:

- (1) Arab and Jews: Should they clearly and openly be equal citizens, as would be expected in a democracy?
- (2) Secular and Religious Persons: Should governance, including on matters like Personal Status, be secular, with religious institutions separated formally from the state?

These two questions are existential ones for Israel. That is, they go to the heart of what modern-day Israel should be.

Should Israel be a religious state, namely, a special Jewish homeland, the only one of which exists in the world, and thus retain arrangements like the *Millet* System? Or, should it be a secular democracy, and do away with such arrangements and adopt American- or European-style mechanisms of governance? In respect of the *Millet* System, does its very continuance, by slotting Jews, Christians, and Muslims into religious communities whether they like it or not, impede effect dealing with these existential questions?

## Chapter 11

### MOGHUL INDIAN EMPIRE (1504–1857 A.D.)

There is neither Hindu nor Mussulman, so whose path shall I follow? I shall follow God's path. God is neither Hindu nor Mussulman, and the path which I follow is God's.

Guru Nanak (1469–1539, 1st of the 10 Sikh Gurus and founder of Sikhism, following an experience of enlightenment at age 30, quoted in W. OWEN COLE & PIARA SINGH GAMBHI, *THE SIKHS — THEIR RELIGIOUS PRACTICES AND BELIEFS* (London, England: Routledge, 1978)

#### SYNOPSIS

- § 11.01 ARRIVAL OF MUSLIMS ON INDIAN SUBCONTINENT AND ORIGINS OF MOGHUL RULE
- § 11.02 ACHIEVEMENTS OF GREAT MOGHUL EMPERORS
- § 11.03 BRITISH RAJ
- § 11.04 DEVELOPMENT OF ANGLO-MUHAMMADAN LAW
- § 11.05 EVOLUTION OF ANGLO-MUHAMMADAN LAW
- § 11.06 ENDURING IMPACT OF ANGLO-MUHAMMADAN LAW
- § 11.01 ARRIVAL OF MUSLIMS ON INDIAN SUBCONTINENT AND ORIGINS OF MOGHUL RULE

Although, the Indian subcontinent has long been ruled by Hindus, it has been vulnerable to incursion by outside forces. For instance, Alexander the Great (reign 356–323 B.C.) conquered northern India in 326 B.C., followed by Buddhist Emperor Ashoka (304–232 B.C.), of the Indian *Maurya* Dynasty, 50 years later.<sup>1</sup> After the death of Ashoka, the *Maurya* Dynasty fractured and a variety of regional Hindu rulers governed the Subcontinent until 712 A.D., when the first Muslim colonialists arrived.<sup>2</sup> Turkish and Afghan invaders conquered portions of Northern India, with little enduring impact. Despite conquering parts of India, Muslim sultans did not

<sup>1</sup> DIANA PRESTON & MICHAEL PRESTON, *TAJ MAHAL: PASSION AND GENIUS AT THE HEART OF THE MOGHUL EMPIRE* 16 (2007). [Hereinafter, PRESTON.]

<sup>2</sup> Asaf A.A. Fyzee, *Muhammadan Law in India*, 5 *COMPARATIVE STUDIES IN SOCIETY AND HISTORY* 401, 401 (July 1963). [Hereinafter, Fyzee, *Muhammadan*.]

successfully implement the *Shari'a* until 1206.<sup>3</sup> Prior to that point, sultans choose to apply the *Shari'a* regardless of the religion of persons upon whom it was enforced.<sup>4</sup>

In 1398, Timur (1336–1405) captured Delhi, pillaging the city and leaving it a pile of embers.<sup>5</sup> However, having no interest in governing Delhi, Timur returned to Samarkand, leaving the *Sayyid* Dynasty to rule.<sup>6</sup> *Sayyid* rule quickly collapsed under pressure from multiple local kingdoms, and the unitary control Timur gained was lost.

The Moghul Empire rose out of these local kingdoms. Ferghana, a small one located on the present-day India-Pakistan border,<sup>7</sup> was once controlled by both Genghis Khan and Timur. As a direct descendant of both rulers, Babur (1483–1530), founder of the Empire, took the throne at age 12.<sup>8</sup> Table 11-1 lists the Moghul Emperors and their significant achievements. The first major colonial conquest of Moghul rule occurred when Babur invaded Kabul in 1504.<sup>9</sup> Just over twenty years later, Babur invaded Hindustan, eventually capturing Delhi, its capital.<sup>10</sup> Although significantly outnumbered, the Moghuls won with superior weaponry acquired from the Ottomans. Shortly before his death in 1530, Babur clearly named his son, Humayan (1508–1556), as his successor.<sup>11</sup>

## § 11.02 ACHIEVEMENTS OF GREAT MOGHUL EMPERORS

Succession was not straightforward. Within 4 hours of the death of Babur, Sher Shah, the local competing ruler of Hindustan, ejected Humayan.<sup>12</sup> Humayan returned to Lahore, but was forced to leave as Sher Shah invaded it shortly thereafter. Humayan fled, finding a welcome reception in Persia in 1544 A.D.<sup>13</sup> In return for safe quarters, the Persian *Safavid* Emperor demanded Humayan convert from *Sunni* to *Shi'i*.<sup>14</sup> Humayan acquiesced, but likely only nominally. In return for his conversion, Humayan received a Persian army, with which he captured Kandahar and Kabul in 1554.<sup>15</sup> Each conquered city was ruled by a brother of Humayan. Akbar, the son of Humayan was being fostered nearby. Upon his triumphal return, Humayan was reunited Akbar. Humayan retook Hindustan in 1555, preying on internal instability, with a multi-faceted siege and the aid of his

<sup>3</sup> See Fyzee, *Muhammadan*, *supra*, at 401.

<sup>4</sup> See Fyzee, *Muhammadan*, *supra*, at 401.

<sup>5</sup> See PRESTON, *supra*, at 18.

<sup>6</sup> See PRESTON, *supra*, at 18.

<sup>7</sup> See PRESTON, *supra*, at 11.

<sup>8</sup> See PRESTON, *supra*, at 11.

<sup>9</sup> See PRESTON, *supra*, at 15.

<sup>10</sup> See PRESTON, *supra*, at 18. (Unimpressed by what he just conquered, Babur famously referred to Hindustan as “a place of few charms.” *Id.* at 19.)

<sup>11</sup> See PRESTON, *supra*, at 21.

<sup>12</sup> See PRESTON, *supra*, at 21–22.

<sup>13</sup> See PRESTON, *supra*, at 24.

<sup>14</sup> See PRESTON, *supra*, at 24.

<sup>15</sup> See PRESTON, *supra*, at 25.

Persian army. Soon after the victory, Humayan died, leaving the Empire to Akbar.

Shortly after acceding as Emperor, Akbar laid siege to Chitor, a mountain fortress held by a *Rajput* ruler.<sup>16</sup> Once in control, he ordered all people in the fortress be put to death to prevent distress messages going out to other *Rajput* leaders. “By 1570 all the major *Rajput* princes but one . . . had acknowledged Mogul suzerainty.”<sup>17</sup> But this did not satisfy Akbar’s desires to expand. In 1573, Akbar captured Gujarat, a major trading hub with Arabia.<sup>18</sup> Additionally, he extended Moghul rule into substantial portions of present-day Bangladesh, Afghanistan and Pakistan, including Kashmir.<sup>19</sup> With these territorial gains, Akbar increased the population under Moghul control to 100 million.<sup>20</sup>

Akbar realized his power would not hold for long if he only exerted control through military means. As a result, Akbar married a number of *Rajput* princesses,<sup>21</sup> banned the desecration of Hindu temples,<sup>22</sup> and forbid local Moghul officials from charging Hindus a pilgrimage tax on trips to the holy site of Mathura.<sup>23</sup> Additionally, Akbar banned *jizyah*, a poll tax on “infidels” prescribed in the Qur’ān.<sup>24</sup>

Although these measures were imposed as a method of consolidating and increasing authority, they were also motivated by his personal beliefs regarding religious tolerance. In the 1,000th year of the Muslim *Hijra* calendar, Akbar officially recognized individual freedom by issuing an edict commanding tolerance and prohibiting forced conversions.<sup>25</sup> Showcasing the mystical facets of his personal beliefs, Akbar even attempted to found his own religion (a hybrid of Islamic and Hindu thought, and astrology),<sup>26</sup> appointing himself as this religion’s only conduit with the divine.<sup>27</sup>

<sup>16</sup> See PRESTON, *supra*, at 30.

<sup>17</sup> See PRESTON, *supra*, at 30.

<sup>18</sup> See PRESTON, *supra*, at 31.

<sup>19</sup> See PRESTON, *supra*, at 16. (“By the end of his life Akbar could be well pleased that he had extended his borders to natural geographic boundaries such as the Himalayas, Hindu Kush and other high mountains in the north, the desert borders of Persia in the west and in the east the jungles bordering Arakan in present-day Burma (Myanmar) and to the south toward the tablelands of the Deccan.”)

<sup>20</sup> See PRESTON, *supra*, at 53.

<sup>21</sup> See PRESTON, *supra*, at 32.

<sup>22</sup> See PRESTON, *supra*, at 33.

<sup>23</sup> See PRESTON, *supra*, at 33.

<sup>24</sup> See PRESTON, *supra*, at 33. (“Akbar also cleared away a mass of petty, degrading and discriminatory practices, such as the bizarre right of Muslim magistrates to spit in the mouth of Hindus who were late in paying their taxes.”)

<sup>25</sup> AMARTYA SEN, *DEVELOPMENT AS FREEDOM* 238 (1999). A translation of this edict is as follows: “No man should be interfered with on account of religion, and anyone [is] to be allowed to go over to a religion he pleased.” *Id.*

<sup>26</sup> See PRESTON, *supra*, at 39.

<sup>27</sup> See PRESTON, *supra*, at 39–40.



Table 11-1:  
Moghul Emperors

Name	Lifespan (A.D.)	Years of Reign (A.D.)	Key Events of Reign
Babur	1483-1531	1526-1530	Founder of the Moghul Empire. Captured Hindustan, including its capital, Delhi.
Humayan	1508-1556	1530-1556	Lost all territory upon access- sion to throne. Regained all lost territory, in- cluding Delhi, through use of Persian Army given in exchange for his nominal conversion to <i>Shi'ism</i> .
Akbar	1542-1605	1556-1605	Vastly expanded the territorial reach of the Moghul Empire. Commanded religious tolerance and non-discrimination, espe- cially by Muslims against Hin- dus.
Jahangir (Salim)	1569-1627	1605-1627	Allowed British East India Company to set up factories in exchange for passage of Mus- lims to Mecca. As a result of his addition to opium and alcohol, delegated all ruling functions to members of his family.
Shah Jahan	1592-1666	1627-1658	Tried to regain the prestige of the Moghul Empire through constructing grand buildings, including the Taj Mahal. Became increasingly intolerant of non-Muslims later in life.
Aurangzeb	1618-1707	1658-1707	Intolerant of non-Muslims, es- pecially Hindus and Sikhs. Spent last portion of reign at- tempting to conquer regional kingdoms on the Deccan plateau.

Following his death in 1605, Akbar was succeeded by his son, Salim (1569-1627). Salim took the name "Jahangir," which literally means "Seizer of the World."<sup>28</sup> By 1608, European visitors frequented the Moghul Empire. The Portuguese established a naval base and centralized trading activities in Goa. The British did likewise in Surat. Given British naval superiority, Jahangir used English ships to secure passage for pilgrims to Mecca. In return, he allowed the British East India

<sup>28</sup> See PRESTON, *supra*, at 53.

Company to set up small factories.<sup>29</sup>

By 1616, Jahangir was so addicted to opium and alcohol he effectively ceded all governing control to his wife, Sur, and sons,<sup>30</sup> resulting in premature succession contests between each child to succeed Jahangir. Eventually, Shah Jahan (1592-1666), one son with great military responsibilities, rebelled against his father. Jahangir defeated his son in battle, forcing Shah Jahan and his wife, Mumtaz, to flee.<sup>31</sup> Through this roving period, Shah Jahan aligned himself with other rulers, some of whom acknowledged Moghul suzerainty, and allowed him to take the throne upon Jahangir's death in 1627.

The rule of Shah Jahan is notable for the use of architecture to reinforce his status as Emperor. He constructed buildings "to distinguish him[self] from his predecessors and inspire awe at his majesty."<sup>32</sup> Today, the Taj Majal, built as a memorial to his wife, Mumtaz, who died in 1631, is his most well-known project. Shah Jahan, similar to Louis XIV of France, conducted his reign in the eyes of the public, never allowing his subjects to forget that he was their emperor.<sup>33</sup>

Shah Jahan became increasingly intolerant of other religions after his wife, Mumtaz, died. This change may be attributed to the loss of her tempering influence, but it also was fueled by rebellions within the Empire. Shah Jahan banned construction of new Hindu temples.<sup>34</sup> He ordered an attack on a Portuguese Christian trading settlement near present-day Calcutta, including the explicit instruction to destroy all Christian churches.<sup>35</sup> This harsh, intolerant view of other religions was adopted by his son, Aurangzeb.

Delegating military authority to Aurangzeb and his three other sons, Shah Jahan set the stage for another violent succession. The capture of Samarkand by the Uzbeks and Kandahar by the Persians accelerated the posturing of his sons.<sup>36</sup> Through a succession of rapidly shifting alliances, Aurangzeb, who had co-opted the army of his brother Murad, confronted his father and eldest brother, Dara. Aurangzeb prevailed, blockading their exit from Agra and diverting the only water source of the city, and declared himself emperor on 21 July 1658.<sup>37</sup> Shah Jahan lived out the rest of his life, a prisoner in the Agra Fort thanks to Aurangzeb. He imprisoned his father in part out of concern Shah Jahan would bankrupt the Moghul Empire by building another Taj Mahal, in black marble, as a mausoleum for himself across the Yamuna River from that of Mumtaz. Till his death in 1666, from his prison chamber he could see in the distance the Taj Mahal.

<sup>29</sup> See PRESTON, *supra*, at 57.

<sup>30</sup> See PRESTON, *supra*, at 87.

<sup>31</sup> See PRESTON, *supra*, at 100.

<sup>32</sup> See PRESTON, *supra*, at 120.

<sup>33</sup> See PRESTON, *supra*, at 130-32.

<sup>34</sup> See PRESTON, *supra*, at 213.

<sup>35</sup> See PRESTON, *supra*, at 213-14.

<sup>36</sup> See PRESTON, *supra*, at 225-26.

<sup>37</sup> See PRESTON, *supra*, at 241.

A strict and rather fanatical *Sunni*, Aurangzeb magnified the discriminatory acts of Shah Jahan against other religions, particularly Hindus. Aurangzeb built mosques at major Hindu pilgrimage sites.<sup>38</sup> Additionally, He reversed the abolition of *jizyah* in 1679, financially penalizing non-believers.<sup>39</sup> Exacerbating tensions with Hindus (and Sikhs), Aurangzeb spent the remainder of his reign attempting to expand his empire into the Deccan, the interior plateau covering a large swath of central and southern India. Although modest territorial gains were made, the cost of these campaigns outstripped the added resources and tax revenue gained financially and socially:

Aurangzeb's treatment of his Hindu subjects in the Deccan, in Rajasthan and elsewhere had also changed the character of Moghul rule. It was no longer the inclusive, tolerant empire bound together by mutual trust and interdependence established by Akbar. Instead the Moghuls were once again, as in the time of Babur, an occupying power.<sup>40</sup>

After Aurangzeb died in 1707, the influence of the Moghul Empire quickly disintegrated. His three surviving sons battled for succession among themselves and against local kingdoms asserting their own power. The chaos culminated in the sack of Delhi in 1739 by the Persians, who snatched the Peacock Throne upon which Moghul Emperors sat.<sup>41</sup>

Although a Moghul Emperor technically ruled until 1862, all that followed Aurangzeb are of small consequence. The reign of these emperors is marked by significant concessions made to the British or local rulers. More often than not, the legacy of these emperors was mired in ineptitude, and strong questions about legitimacy.

### § 11.03 BRITISH RAJ

From the initial charter of the British East India Company in 1600,<sup>42</sup> the British sought, in the words of Sir Thomas Roe, to “seek profit in quiet trade.”<sup>43</sup> Sir Roe, however, failed to acknowledge the rich diversity and long history on the subcontinent, stating that India was a place of “religions infinite; laws none. In that confusion what can be expected?”<sup>44</sup> His Majesty's grant of the charter, however, was not all that was required; approval by the Moghul emperor was also necessary.

Initially just a trading post, the power to apply British law to resolve disputes was first granted in 1661 by Charles II.<sup>45</sup> This charter restricted the application of

British law to the confines of its factories. This increased power was necessary given the increased demand for Indian products that the East India Company exported. “When English merchants began to buy Indian silks and calicoes and bring them back home, the result was nothing less than a national makeover.”<sup>46</sup>

Until 1698, Moghul approval of the East India Company was forthcoming. At this point, Aurangzeb embargoed all European goods, any violation punishable by arrest.<sup>47</sup> Although this embargo should have had the effect of abruptly ceasing all trading activities of the East India Company, the rapidly waning power of the Moghul Empire gave the embargo few teeth. The British simply continued to operate as they had before.

Instability in the wake of the death of Aurangzeb in 1707, however, forced Britain to increase involvement beyond commercial matters, especially when the French backed a province asserting its independence from Moghul sovereignty. To safeguard its activities, the East India Company began hiring local security personnel, or *sepoys*, the traditional caste of Indian warriors.<sup>48</sup> Although the hiring of *sepoys* was intended to be temporary, it had an important, long-lasting role in Britain's imperial power in India.

Realizing the lack of a regional, governing power, Britain began to assert itself in local conflicts to increase its power. Typically, this was done through aligning itself with one side, in exchange for a promise to expand their trade. Supporting the Moghuls in 1764 in the Battle of Buxar, the East India Company was given the civil administration of Bengal, Bihar and Orissa.<sup>49</sup> In this grant, the British gained tax authority over 20 million people, netting two to three million pounds per year of revenue.<sup>50</sup> This additional revenue eclipsed the amount of money generated from its trade. This development likely focused the British upon the profitable venture of governing in combination with trading.

Despite the increased British meddling in the internal affairs that exceeded its prior mercantilist aims, it was not until the East India Company's charter changed in 1813 that the Episcopal chaplains serving within the “factories” were allowed to evangelize to Indians.<sup>51</sup> In fact, even attempted conversion to Christianity was expressly forbidden in all prior charters. Coupling this newfound religious zeal with a rapidly expanding territory by military conquest, something had to give. In 1857 Hindu and Muslim *sepoys* rebelled. The flashpoint for the rebellion began with a rumor that rifle cartridges, which had to be bitten off to properly load, had been sealed with pork lard or beef tallow — both of which are forbidden to these *sepoys*. Emperor Bahadur Shah, was named the leader of the rebellion, although he had no formative role in the mutiny.<sup>52</sup>

<sup>38</sup> See Preston, *supra*, at 250.

<sup>39</sup> See Preston, *supra*, at 250.

<sup>40</sup> See Preston, *supra*, at 254.

<sup>41</sup> See Preston, *supra*, at 254.

<sup>42</sup> See Fysee, *Muhammadan, supra*, at 410.

<sup>43</sup> See Preston, *supra* at 255–56.

<sup>44</sup> Niall Ferguson, *EMPIRE: THE RISE AND DEMISE OF THE BRITISH WORLD ORDER AND THE LESSONS FOR GLOBAL POWER* 29 (2002). [Hereinafter, *Ferguson*.]

<sup>45</sup> See Fysee, *Muhammadan, supra*, at 410.

<sup>46</sup> See Ferguson, *supra*, at 17.

<sup>47</sup> See Ferguson, *supra*, at 30.

<sup>48</sup> See Ferguson, *supra*, at 31.

<sup>49</sup> See Ferguson, *supra*, at 43.

<sup>50</sup> See Ferguson, *supra*, at 43–44.

<sup>51</sup> See Ferguson, *supra*, at 137–38.

<sup>52</sup> See Preston, *supra*, at 256.



The British quelled the uprising and banished Bahadur Shah to Burma. Through forcible suppression, the British laid claim to governing authority over India, with independent kings or rajas that held 40 percent of the territory acknowledging British suzerainty individually.<sup>53</sup> In 1858 Queen Victoria put an abrupt halt to the exportation of religion and culture into India.<sup>54</sup> Correspondingly, the governing authority of the British changed. The Viceroy now assumed local direction of activities in the subcontinent, rather than the Governor-General, although the previous Governor-General usually became the Viceroy.<sup>55</sup> In 1872, Queen Victoria was formally declared the ruler of India.<sup>56</sup>

Despite the litany of criticism against colonial rule, the British made critical and beneficial contributions. Most notably, these were the Indian form of government (e.g., democracy), highly structured bureaucracy (e.g., the Indian civil service), and education (e.g., the elite schools and universities founded on British models). Furthermore, British investments in the Indian infrastructure had advantages:

By the 1880s the British had invested £270 million in India, not much less than one-fifth of their entire investment overseas. By 1914 the figure had reached £400 million. The British increased the area of irrigated land by a factor of eight, so that by the end of the Raj a quarter of all land was irrigated, compared with just 5 per cent of it under the Mughals. They created an Indian coal industry from scratch which by 1914 produced nearly 16 million tons a year. There were also marked improvements in public health, which increased Indian average life expectancy by eleven years. It was the British who introduced quinine as an anti-malarial prophylactic, carried out public programmes of vaccination against small-pox — often in the face of local resistance — and laboured to improve the urban water supplies that were so often the bearers of cholera and other diseases.<sup>57</sup>

These advantages, however, were not transferred to the majority of India's population.

For instance, Britain's *per capita* gross domestic product (GDP) rose 347 percent between 1757 and 1947, compared to India's rise of 14 percent over the same time span.<sup>58</sup> Despite an abundance of capable Indian entrepreneurs and managers, lucrative contracts were only awarded to British business people. Discrimination in the selection of applicants to the Indian civil service occurred when qualified Indians were denied employment and the jobs were given to lesser-qualified British citizens. This, among other discriminatory acts, led to the formation of the Indian Nationalists. In 1908, the group organized a boycott of all British goods, calling for

<sup>53</sup> See PRESTON, *supra*, at 257.

<sup>54</sup> See FERGUSON, *supra*, at 155. The text of this proclamation forbade "the right and the desire to impose Our convictions on any of Our subjects." *Id.*

<sup>55</sup> See FERGUSON, *supra*, at 179.

<sup>56</sup> See PRESTON, *supra*, at 257.

<sup>57</sup> See FERGUSON, *supra*, at 216.

<sup>58</sup> See FERGUSON, *supra*, at 216.

self-sufficiency (or *swadeshi*).<sup>59</sup> On 30 April 1908, British investigators found large caches of weapons in homes of Bengal's Brahmin elite after a bomb killed two British women in Calcutta.<sup>60</sup> In response, Britain sought to disenfranchise the Nationalists by moving the capital of Bengal from Calcutta to Delhi, the former Moghul capital city.

In spite of these hardships, the Indian *sepoys* continued to make significant contributions during the British campaign in the First World War. In return, the Secretary of State for India, Edwin Montagu, vaguely promised "the progressive realization of responsible government."<sup>61</sup> However, this commitment rang hollow as the British extended martial law restrictions on political freedoms for an additional three years after the end of the war under the *Rowlatt Acts*.

This situation precipitated the rise Mahatma Gandhi to prominence. Calling on his fellow Indians to harness their soul force for truth and firmness, or *satyagraha*, tens of thousands followed suit. Shortly after his appointment as Brigadier-General, Rex Dyer attempted to deal with peaceful demonstrations, which were increasing both in frequency and size, by force. At Jallianwala Bagh, in Amritsar, Punjab, on 13 April 1919 he commanded British troops to open fire on around 20,000 people, killing 379 and wounding more than 1,500.<sup>62</sup> Additionally, high-caste organizers of this demonstration were publicly flogged. Recognizing the mounting tide of public opinion and the tenuous grip on control, Winston S. Churchill denounced the reaction as "monstrous."<sup>63</sup>

The opposition of Gandhi to British rule heightened in 1930 when he organized the Salt *Satyagraha*, or Salt March, to protest a tax on salt. Britain had little choice but to relinquish slowly governing control and prepare India for self-rule. The *Government of India Act of 1935* allowed all provinces of India elected representative to the National Assembly, as well as equality for Muslims. Yet, power gained through voting was lost when, in the Second World War, the British declared war on Nazi Germany on behalf of India. In 1942, Gandhi initiated the "Quit India" campaign, with more massive, disruptive civil disobedience than before. Gandhi was imprisoned, but the British announced their intention to leave India in 1948. Viceroy Mountbatten accelerated the exit, relinquishing control with the Partition of India into India and Pakistan on 15 August 1947.<sup>64</sup>

## § 11.04 DEVELOPMENT OF ANGLO-MUHAMMADAN LAW

Moghul rule on the Indian Subcontinent was influenced by its Muslim predecessors, but perhaps more so by their failures than successes. Previous invading Sultans strictly applied the *Shari'a* to all subjects, regardless of their religion.<sup>65</sup> The

<sup>59</sup> See FERGUSON, *supra*, at 210.

<sup>60</sup> See FERGUSON, *supra*, at 212.

<sup>61</sup> See FERGUSON, *supra*, at 325.

<sup>62</sup> See FERGUSON, *supra*, at 326.

<sup>63</sup> See FERGUSON, *supra*, at 327–28.

<sup>64</sup> See FERGUSON, *supra*, at 348–49.

<sup>65</sup> See Fyzee, *Muhammadan*, *supra*, at 402.

Moghuls, likely out of recognition of their delicate hold on power, changed that practice:

The Muslim Sultans who ruled India brought with them a system of jurisprudence; but they had not come to a rude and barbarous land. They therefore saw that they had to deal with a mature body of native laws, known as the *dharma*. And it is they, the Muslims, who formulated the well-known rule of Indian law that Muhammadan law would govern the Muslims and Hindu law, the Hindus; and this was accepted by the East India Company, confirmed later by the British Government and is now firmly established in the Union of India.<sup>66</sup>

Instead, they applied the law of the religion, if that religion was common among the disputing parties. In addition, courts also considered imbedded customs as a relevant modification of *Shari'a* or *dharma*.

Moghul tolerance for religious freedom must not be overlooked, especially in contrast to concurrent events in Europe. But, it must not be glamorized. As long as the tolerance they showed kept them in power, the Moghuls respected this freedom. Even the *Hedaya* (an authoritative text on *Hanafi* jurisprudence) stated this practical reality.

"It is true, this statement rather accords with the spirit of the Mohamedan laws, than with the practice of them; for it too frequently happened that too little regard was paid either to judicial ordinance or natural equity. — Where avarice and bigotry are united with despotic power, such a combination will occasion abuses, and corrupt the streams of justice."<sup>67</sup>

If the non-Muslim population turned against the ruling Moghuls, the tolerance and freedom the government extended would no longer be beneficial.

The first major issue the Moghul Empire faced was how to deal with the large number formerly-Hindu Muslims. Would these converts apply Hindu Law (*dharma*) because it was so culturally entrenched, even if it conflicted with Islamic Law? As a result, Hindus — or more accurately, Hindu males — selected to continue certain cultural norms of Hindu origin despite of the demands of their newfound religion. Primarily, this occurred in inheritance law, where Hindu legal tradition precluded married female heirs from inheriting any land. However, the *Shari'a* provides such heirs a share of the estate. The Moghuls and their respective legal administrators allowed the converts to apply their customary, Hindu rules, explaining: "[t]hese and similar notions based on self-interest are too deep-rooted to be destroyed by the magic wand of God — Prophet — Koran."<sup>68</sup>

A legal system recognizing the validity of the different religious rules was not without controversy, especially among fundamentalist Muslims. The Qur'an, so it was argued, does not allow the selective incorporation of *Shari'a* — an Islamic legal system must abide by all of its demands:

<sup>66</sup> See Fyzee, *Muhammadan*, *supra*, at 403.

<sup>67</sup> See Fyzee, *Muhammadan*, *supra*, at 403 (quoting Hamilton, *Hedaya*, Preliminary Discourse, xiv.)

<sup>68</sup> See Fyzee, *Muhammadan*, *supra*, at 404-05.

This, from a systematic point of view, was an important departure, of much greater importance than the silent ignoring of the relevant sections of Islamic law which had taken place in most Islamic countries from the early Middle Ages onwards. It showed that the idea of a secular law had for the first time been accepted by the leaders of an important community of Muslims.<sup>69</sup>

This fusion lasted over a century and saw some of the greatest Moghul achievements.

Application of the *dharma* as a valid source of law for Hindus ended under the rule of Aurangzeb. This intolerant development was a "part of the orthodox reaction against the ephemeral religious experiment of the emperor Akbar."<sup>70</sup> In line with his more fundamentalist beliefs, Aurangzeb sought to implement a stricter version of the *Shari'a* to all of his subjects. To accomplish this feat, Aurangzeb commissioned a comprehensive compilation of *Hanafi* jurisprudence.<sup>71</sup>

Another layer of complexity was added as the British began to exert legal authority over India. In 1772, the East India Company claimed sovereign rights and, therefore, attendant legal jurisdiction outside of its factories for the first time. This assertion of legal authority, though, did not radically change the content of law in the subcontinent, even though this change led to the almost immediate replacement of Muslim judges, or *qadis*, by British magistrates.<sup>72</sup>

Prior to the British expansion of jurisdiction, Charles II importantly modified the rights available to Hindus and Muslims within the judicial systems of the factories. In 1753, the East India Company's charter allowed Muslim and Hindus to obtain an exemption from common law rules in favor of the rules of their respective religion:<sup>73</sup>

To implement this policy effectively, an important rule was laid down in 1772, whereby *maulanas* [Islamic jurists] and *pandits* [Hindu jurists] were to attend the Courts as jurisconsults and assist the judge in discovering the exact rule applicable.<sup>74</sup>

Sir Erskine Perry, a magistrate judge, explained the adjudicatory task as follows:

A jurist *qua* jurist has only to deal with human laws: he recognizes the existence of divine laws, and their validity *in foro conscientiae*<sup>75</sup> with those

<sup>69</sup> JOSEPH SCHACHT, AN INTRODUCTION TO ISLAMIC LAW 89-90 (Oxford, England: Oxford University Press (Clarendon Paperbacks) 1982). (Hereinafter, SCHACHT.)

<sup>70</sup> See SCHACHT, *supra*, at 94.

<sup>71</sup> See SCHACHT, *supra*, at 94.

<sup>72</sup> See SCHACHT, *supra*, at 95. (Islamic judges (*qadis*) were not totally eliminated, though. They were reduced to a position with more ministerial functions, like recording marriages. See *id.*)

<sup>73</sup> See Fyzee, *Muhammadan*, *supra*, at 412.

<sup>74</sup> See Fyzee, *Muhammadan*, *supra*, at 412. See also SCHACHT, *supra*, at 95 (observing that British magistrates were assisted by *maulanas* "whose duty it was to state the correct doctrine of Islamic law for the benefit of the magistrate.")

<sup>75</sup> Literally meaning "common knowledge of the court." "*In*" is a dative preposition paired with the feminine singular dative "*foro*" (court, forum or space), and "*conscientiae*" (common knowledge, conscience).



to whom they are addressed, or who believe in the revelation containing them; but he does not recognize them as enforceable in Courts of Justice any further than the secular power has ordained.<sup>76</sup>

British judges, therefore, had to take Hindu and Muslim law into account as an equitable factor in their decisions.

Recognizing the validity of religious laws, especially those concerned with "personal" aspects like Family Law, the British never seriously questioned them. Perhaps they were motivated by a desire for a smooth transition from Moghul to British rule, so as not to disrupt profitable commercial activities. Yet, there also is evidence of a liberal tolerance. Sir William Jones, a judge on the Calcutta bench, stated:

Nothing could be more obviously just than to determine private contexts according to those laws which the parties themselves had ever considered as the results of their conduct and engagements in civil life; nor could any thing be wiser than, by a legislative act, to assure the Hindu and Muselman subjects of Great Britain that the private laws which they severally hold sacred, and a violation of which they would have thought the most grievous oppression, should not be superseded by a new system, of which they could have no knowledge, and which they must have considered as imposed on them by a spirit of rigour and intolerance.<sup>77</sup>

In effect, imposing British common law on Hindu or Muslim factory workers could have disastrous social consequences.

The immediate problem was magistrates were not bound to accept advice of the *mamlawi* or *pandit*.<sup>78</sup> The extent to which magistrates used this advice in their decision-making is unclear, but it was not invariably followed. In 1780, a formal regulation was promulgated requiring absolute adherence to disputes regarding certain matters:

That in all suits regarding inheritance, marriage and caste, and other religious usages or institutions, the laws of the Koran with respect to be Mohamedans, and those of the Shaster with respect to the Gentoos, and where only one of the parties shall be a Mohamedan or Gento, the laws and usages of the defendant shall be invariably adhered to.<sup>79</sup>

<sup>76</sup> C.J. PERRY, in *Kojas' and Memors' Case*, PERRY'S ORIENTAL CASES (London, 1853) 110, 112 (quoted in ASAF A.A. FYZEE, CASES IN THE MUHAMMADAN LAW OF INDIA AND PAKISTAN XVIII (Oxford, England: Clarendon Press, 1965). [Hereinafter, FYZEE, CASES.]

<sup>77</sup> W.H. MORLEY, ADMINISTRATION OF JUSTICE IN BRITISH INDIA 193 (London, 1858) (quoted in ASAF A.A. FYZEE, OUTLINES OF MUHAMMADAN LAW 55 (Oxford, England: Oxford University Press, 4th ed. 1974). [Hereinafter, FYZEE, OUTLINES.]

<sup>78</sup> See SCHACHT, *supra*, at 95.

<sup>79</sup> See FYZEE, *Muhammadan*, *supra*, at 412. (It is unclear from the article who issued this regulation. Although the British government always had a hand in legal administration, issuance came directly or indirectly via the East India Company.)

Furthermore, determining that if the parties' religions conflicted, then the defendants prevailed was also the Moghul practice. See FYZEE, CASES, *supra*, at xix.

Now enshrined in law, British judges were now compelled to incorporate religious law into their secular court, depending on the beliefs of the parties involved.

## § 11.05 EVOLUTION OF ANGLO-MUHAMMADAN LAW

Despite this regulation, the law as applied in India was altered over time, through the accretion of case law, among other things. Table 11-2 provides a synopsis of legal cases in the development of Algo-Muhammadan Law. The tempering influence of English Common Law and equity had a great impact, although ways in which it may conflict or fail to address a situation had been explicitly allowed, if not required, as early as 1726.<sup>80</sup> This principle, however, had little effect on the adjudication of these cases at the trial level. The Privy Council, the highest appellate court in India, most radically altered the content of, and therefore application, of Islamic rules.<sup>81</sup> Later in 1861, the British established three intermediate appellate courts in each of the three provinces where Islamic content of legal rules was further reformed.<sup>82</sup>

Out of this law there has grown a new Anglo-Muhammadan jurisprudence, the aim of which, in contrast with Islamic jurisprudence during the formative period of Islamic law, is not to evaluate a given body of legal raw material from the Islamic angle, but to apply, inspired by modern English jurisprudence, autonomous juridical principles to Anglo-Muhammadan law. This law, and the jurisprudence based on it, is a unique and a most successful and viable result of the symbiosis of Islamic and of English legal thought in British India.<sup>83</sup>

More honestly, this evaluative process often had a foregone conclusion.

That is, when a court decided an issue where there was either conflict between British Common Law and Muslim or Hindu Law, or if there was no law on point, the judge would fashion a rule "according to equity, justice and good conscience."<sup>84</sup> This expression was "generally interpreted to mean the rules of English law if found applicable to Indian society and circumstances."<sup>85</sup> In a report of the Law Commission in 1871, the reality judges would apply English law candidly admitted: "Practically speaking these attractive words mean little more than an imperfect understanding of imperfect collections of not very recent editions of English text-books."<sup>86</sup>

In 1883, the indigenous functioning of the Indian justice system gained new heights when local judges, or *Mofussils*, in all areas (except the cities of Bombay,

<sup>80</sup> See FYZEE, *Muhammadan*, *supra*, at 412.

<sup>81</sup> See SCHACHT, *supra*, at 95.

<sup>82</sup> See FYZEE, CASES, *supra*, at xvii.

<sup>83</sup> See SCHACHT, *supra*, at 96.

<sup>84</sup> See FYZEE, *Muhammadan*, *supra*, at 412.

<sup>85</sup> *Waghela v. Sheikh Mashudin* (quoted in FYZEE, *Muhammadan*, *supra*, at 412-13).

<sup>86</sup> SETALVAD, THE COMMON LAW IN INDIA 12 (London: 1960) (quoted in FYZEE, *Muhammadan*, *supra*, at 413).

Calcutta and Madras) gained equality with their British counterparts.<sup>87</sup> This equality resulted in giving *Mofussils* the ability to preside over criminal proceedings in which the defendant was of European origin. The British reaction to this — dubbed the “White Mutiny” — was outspoken and occasionally violent, but largely confined to Calcutta, where the city contained the headquarters of the major silk, indigo and tea exporters. These goods were produced in the countryside where the white business owners now could not rely on the beneficial application of law by their fellow judges.<sup>88</sup>

Another issue plaguing Indian courts was how to decide who is a Muslim. This issue was first determined by a court in 1863 in *Abraham v. Abraham*.<sup>89</sup> This court held that someone who converts to Islam is afforded no different treatment than a person born Muslim. Later, in *Narantakath v. Parakkal*, in 1922, two judges — one British and the other an Indian Hindu — determined that the essential doctrine of the Muslim faith contained two components: “(i) that there is but one God, and (ii) that Muhammad is his Prophet.”<sup>90</sup> “This is the indispensable minimum; a belief short of this is not Islam; a belief in excess of this is, for the law courts at least, a redundancy.”<sup>91</sup>

This determination was poignantly applied in *Jiwan Khan v. Habib*.<sup>92</sup> In this case, *Sunni* Muslims sued to keep certain *Shi'ites* from praying in a Lahore *Sunni* mosque. On one previous occasion, the *Shi'ites* named as defendants spoke harshly about the first three caliphs. Despite this difference in belief, the court here ruled that *Shi'ites* are Muslims because they pass the *Narantakath* two-prong test. And, according to other well-settled rules, no sect of Islam has an exclusive claim on any mosque. Therefore, these *Shi'ites* could not be prevented from praying in this mosque.

<sup>87</sup> See FERGUSON, *supra*, at 197.

<sup>88</sup> See FERGUSON, *supra*, at 200.

<sup>89</sup> 9 MOORE'S INDIAN APPEALS 195 (quoted in FYZEE, CASES, *supra*, at 39-57).

<sup>90</sup> 45 MADRAS 986 (cited in FYZEE, OUTLINES, *supra*, at 61).

<sup>91</sup> See FYZEE, OUTLINES, *supra*, at 61.

<sup>92</sup> 14 Lahore 518 (1933) (cited in FYZEE, OUTLINES, *supra*, at 62).

Table 11-2:  
Ten Important Cases in the Development of Anglo-Muhammadan Law

Case Name (Year)	Facts	Issue	Holding
<i>Abul Fata v. Russomoy Dhur Chowdhury</i> (1894) <sup>93</sup>	In a <i>waqf</i> established by two brothers, “the poor” were listed as the beneficiary. A “hundred and more” defendants who were its beneficiaries claimed that this was a legitimate grant.	Whether a <i>waqf</i> specifying its beneficiary as the poor was justifiable under Islamic Law?	No. Specification of the poor was illusory and, as a result, must be treated as “simple gifts of inalienable life-interests to remote unborn generations of descendants,” which are forbidden under <i>Shari'a</i> .
<i>Nawab Sultan Marian Begum v. Nawab Saheb Mirza</i> (1889) <sup>94</sup>	A King of Oudh made an endowment to his wife and descendants that was not allowed under <i>Shi'ite</i> law.	Whether Islamic Law trumps an international agreement between sovereigns?	No. “[A] treaty between two sovereigns may have the effect of abrogating the Qur'anic law of succession and establishing a mode of succession <i>dehors</i> the Muhammadan law.” <sup>95</sup>
<i>Hamira Bibi v. Zubaida Bibi</i> (1916) <sup>96</sup>	A Muslim widow sued for payment of a past due dowry debt with interest.	Whether interest on this dowry debt can be collected, despite the Islamic prohibition on <i>riba</i> ?	Yes. As remuneration for forbearance, the widow is owed the principal debt plus an equitable rate of interest. <i>Riba</i> is not discussed.
<i>Ghasiti v. Umrao Jan</i> (1893) <sup>97</sup>	Ghasiti was the adopted daughter of the deceased father who ran a brothel. This family was Kanchans, a small ethnic group living in Punjab where prostitution was not uncommon.	Whether Ghasiti — the adopted, prostitute daughter — was entitled to inheritance rights as prescribed in the Qur'an?	No. Ghasiti is not entitled to inheritance rights under the Qur'an, because her adoption was for the purpose of prostitution, and prostitution is forbidden under both Islam and Christian traditions.

<sup>93</sup> See FYZEE, CASES, *supra*, at 379-88 (quoting 22 Indian Appeals 76).

<sup>94</sup> 16 INDIAN APPEALS 175 (quoted in FYZEE, CASES, *supra*, at 504-49).

<sup>95</sup> See FYZEE, CASES, *supra*, at xxvii.

<sup>96</sup> 43 INDIAN APPEALS 294 (quoted in FYZEE, CASES, *supra*, at 145-51).

<sup>97</sup> 20 INDIAN APPEALS 193 (quoted in FYZEE, CASES, *supra*, at 90-94).



Case Name (Year)	Facts	Issue	Holding
<i>Vidya Varuth v. Balusami Ayyar</i> (1921) <sup>98</sup>	In Mysore, Varuth was granted a permanent lease by the administrator of a <i>math</i> (a Hindu charitable endowment). The administrator of the <i>math</i> died shortly after this grant. Later on, the person in possession of this land sub-leased it to two further parties. The subsequent administrator of the <i>math</i> sought an injunction to void the previous transfers.	Whether the permanent lease was a valid grant of a <i>math</i> administrator that cannot be rescinded?	Yes. A <i>math</i> or <i>waqf</i> is distinct from a trust. While if this act was by a trustee, the court would acknowledge the validity of the trustee's transfers of property, this is not the case here. The pious origin of a <i>math</i> or <i>waqf</i> limits the validity of its administrator's acts to those that are consistent with the founding, religious purpose.

<sup>98</sup> 48 INDIAN APPEALS 302 (quoted in FYZEE, CASES, *supra*, at 379-88). In articulating the need to delineate between *waqfs* and trusts, the court states the following:

[T]here are two systems of law in force in India, both self-contained and both wholly independent of each other, and wholly independent of foreign and outside legal conceptions. In each there are well-recognized rules relating to their religious and charitable institutions. From the year 1774 the Legislature, British and Indian, has affirmed time after time the absolute enjoyment of their laws and customs so far as they are not in conflict with the statutory laws, but Hindus and Mahomedans. It would, in chief Lordships' opinion, be a serious invasion into their rights if the rules of the Hindu and Mahomedan laws were to be construed with the light of legal conceptions borrowed from abroad, unless perhaps where they are absolutely, so to speak, *in pari materia*.

*Id.* at 382-83.

Literally the Latin translates to mean "on the same substance." *Pari* (equal to, the same) is feminine singular dative, while *materia* (matter, substance) is ablative.

Case Name (Year)	Facts	Issue	Holding
<i>Farid-un-Nisa v. Mukhtar Ahmad</i> (1925) <sup>99</sup>	"An illiterate <i>pardanashin</i> woman executed a deed whereby she settled the whole of her property by way of <i>waqf</i> , reserving a small monthly stipend to herself and her husband who was an invalid, and also the right for her life to use a house." <sup>100</sup> Generally, <i>pardanashin</i> women were secluded from normal life and, as a result, were in need of protection by the courts. In this case, Farid-un-Nisa sought to rescind the creation of the <i>waqf</i> claiming that she was coerced by her husband to create it.	Whether Farid-un-Nisa may cancel the <i>waqf</i> , thereby receiving full possession of the property? (The <i>mutawallis</i> are the defendants arguing she lacks the power to terminate.)	Yes. In this case, the <i>mutawallis</i> have the burden to prove that Farid-un-Nisa intended to grant away her rights through the <i>waqf</i> . The <i>mutawallis</i> could not prove this. As a result, Farid-un-Nisa can rescind the previous establishment of this <i>waqf</i> .

<sup>99</sup> 52 INDIAN APPEALS 342 (quoted in FYZEE, CASES, *supra*, at 325-36).

<sup>100</sup> See FYZEE, CASES, *supra*, at xxvi.

Case Name (Year)	Facts	Issue	Holding
<i>Moonshee Buzul-ul-Raheem v. Luteefut-oon-Nissa</i> (1861) <sup>101</sup>	Moonshee (husband) and Luteefut (wife) married. Both Muslims, Moonshee later married another wife. Favoring this latter wife, he treated Moonshee incredibly harshly. Moonshee's mother (the plaintiff) filed a complaint seeking protection of her daughter.	Whether the mother must return the marriage settlement to the husband?	No. This divorce is a <i>taluk</i> ( <i>talāk</i> ) or unilateral choice to divorce by the husband. Because it was not consensual, the mother did not have to return the settlement.
<i>Skinner v. Orde</i> (1871) <sup>102</sup>	Generally, it is presumed that a child is of its father's religion. Here, a child born in India to a Christian, British father died later and instructed the child's mother to bring up the child as a Christian. The mother later converted to Islam. When the child turned 14, she chose to become Muslim. The child's relatives then petitioned to remove the child into the custody of a Christian guardian.	Whether the deceased father's instruction to raise his daughter Christian is enforceable, and whether the daughter may convert to Islam?	Yes, and Not Yet. Although the daughter has expressed a desire to convert to Islam, the mother was incapable of fulfilling her deceased's husband's wishes. Therefore, a guardian will be appointed who can better effectuate the father's desire, at least until the daughter can make a more fully informed, adult decision.

<sup>101</sup> 8 MOORE'S INDIAN APPEALS 379 (quoted in FYZEE, CASES, *supra*, at 159-169).

<sup>102</sup> 14 MOORE'S INDIAN APPEALS 309 (quoted in FYZEE, CASES, *supra*, at 254-60). This court explains the applicability of the religious laws as follows:

Case Name (Year)	Facts	Issue	Holding
<i>Rajah Deedar Hossein v. Rane</i> <i>Zuhoor-oon Nissa</i> (1841) <sup>103</sup>	Akbar had an interest in the <i>Zemindary</i> , along with his brother, Rajah. After the death of Akbar, his wife, Rane, and three children took possession. Akbar sued claiming superior succession rights over Akbar's wife and children.	Whether <i>Shi'ite</i> or <i>Sunnite</i> succession rules apply?	Because all parties are <i>Shi'ites</i> , <i>Shi'ite</i> law applies, even though the majority of Indian Muslims are <i>Sunnis</i> . Under <i>Shi'ite</i> law, the brother of a deceased has no rights in succession and the widow and children rightfully took possession, and may retain possession of, the subject interest.
<i>Mitar Sen v. Maqbul Hasan</i> (1930) <sup>104</sup>	Jaragedeo Singh converted from Hindu to Muslim in 1843. He died the following year. In the present case, the property of the estate is claimed by descendants where the plaintiff is a Hindu and the defendants Muslims.	Under the <i>Caste Disabilities Act of 1850</i> , whether "a Hindu . . . has a right to inherit according to Hindu law the estate of a <i>Shi'ite</i> who was descended from a <i>Shi'ite</i> , but had become a convert to Islam in 1843[?]" <sup>105</sup>	No. Under this <i>Act</i> , succession is determined by the religion of the decedent at the time of his or her death. Islamic Inheritance Law applies. To hold otherwise would render Jaragedeo Singh's conversion inutile and deprive his female heirs of inheritance rights.

Not only did court decisions have a modifying effect on the applied rules of the *Shari'a*, but statutes too had an equally, if not greater, modifying effect. For

In India, however, all, or almost all, the real religious communities of the world exist, side by side, under the impartial rule of the British Government. While Brahmin, Buddhist, Christian, Mahomedan, Parsee, and Sikh are one nation, enjoying equal political rights and having perfect equality before the Tribunals, they co-exist as separate and very distinct communities, having distinct laws affecting every relation of life. The law of husband and wife, parent and child, the descent, devolution, and disposition of property are all different, depending, in each case, on the body to which the individual is deemed to belong; and the difference of religion pervades and governs all domestic usages and social relations.

*Id.* at 256 (emphasis original).

<sup>103</sup> 2 MOORE'S INDIAN APPEALS 441 (quoted in FYZEE, CASES, *supra*, at 490-92).

<sup>104</sup> 57 INDIAN APPEALS 313 (quoted in FYZEE, CASES, *supra*, at 499-503).

<sup>105</sup> See FYZEE, CASES, *supra*, at 499 (quoting *Mitar Sen v. Maqbul Hasan*, 57 INDIAN APPEALS 313 (1930)).



instance, in 1862 *Shari'a*-based criminal law was replaced by British common law.<sup>106</sup> Similarly in 1872, Islamic rules of evidence were replaced by their British analog.<sup>107</sup> Although these are instances where the British clearly sought to alter Islamic law, there are other instances where legislation sought to uphold the unique blend of Anglo-Muhammadan law. Following *Abul Fata v. Russomoy Dhur Chowdhury*, which prohibited *waqfs* that specified the poor as its beneficiary, the *Mussalman Wakf Validating Act of 1913* expressly overruled this decision.<sup>108</sup> By statute, this exact type of beneficiary was permitted, as it had been prior to this court decision.

Perhaps the most interesting statutory development was one that was antithetical to Anglo-Muhammadan by its letter, but perhaps not in its spirit. By the 1930s, legislators in India had recognized that severe injustice had developed precluding women from receiving significant inheritance rights.<sup>109</sup> Muslim men took advantage of the settled rule that custom may deviate from *Shari'a*, and applied less generous customary inheritance rights for women, some of which originated in Hinduism. The *Shariat Act of 1937* removed these “cultural incrustations.”<sup>110</sup> The resulting statute precluded Muslims from appealing to custom to modify the *Shari'a*. Although criticized as “an act of deliberate archaism and purism,”<sup>111</sup> this statute can more charitably be interpreted as “[t]he British continuation of non-interference in the personal laws of respective religious communities . . . throughout . . . India.”<sup>112</sup>

## § 11.06 ENDURING IMPACT OF ANGLO-MUHAMMADAN LAW

The legacy of religious tolerance found in the Moghul Empire is evident in the Indian Constitution enacted after independence, and remains to the present. Article 25 entitles Indians to freedom of conscience and the right to practice religion.<sup>113</sup> Article 26 allows every religious denomination “to manage its own affairs in matters of religion” and “to administer such property in accordance with law,” among other things.<sup>114</sup>

The recognition of the validity of the *Shari'a* by secular authorities, or the recognition by an Islamic authority of secular laws or laws required of another religion, is possible. Currently, Canada and Britain have both experimented with the implementation of the *Shari'a* in certain disputes. In 1991, an Ontario provincial arbitration law allowed certain faiths — namely, Muslims, Catholics, and Jews — to

enter into arbitration to resolve these disputes.<sup>115</sup> Although successful in resolving mainly custody and divorce proceedings, and easing the backlog of cases in the Ontario courts, which was this law's main motivation, this law was later repealed.<sup>116</sup>

More recently, Dr. Rowan Williams, the Archbishop of Canterbury, has argued that the British government should allow Muslims to settle disputes regarding marital disputes and financial matters in *Shari'a*-based arbitration.<sup>117</sup> Although unpopular according to public opinion polls, this possibility is still being discussed in the United Kingdom, especially as it continues to consider improving internal relations with Muslims and non-Muslims after the 7 July 2005 terrorist attacks in London.

<sup>106</sup> See SCHACHT, *supra*, at 94.

<sup>107</sup> See SCHACHT, *supra*, at 94.

<sup>108</sup> See SCHACHT, *supra*, at 97.

<sup>109</sup> See SCHACHT, *supra*, at 96.

<sup>110</sup> See Fyzee, *Muhammadan, supra*, at 414.

<sup>111</sup> See SCHACHT, *supra*, at 96.

<sup>112</sup> See Fyzee, *Muhammadan, supra*, at 414.

<sup>113</sup> See Fyzee, *Muhammadan, supra*, at 414–15.

<sup>114</sup> See Fyzee, *Muhammadan, supra*, at 415.

<sup>115</sup> *Sharia Law Move Quashed in Canada*, BBC News, 12 September 2005, posted at <http://news.bbc.co.uk/2/hi/americas/4236762.stm>. [Hereinafter, *Sharia Law Move*.]

<sup>116</sup> See *Sharia Law Move, supra*.

<sup>117</sup> *Sharia Law in UK is 'Unavoidable'*, BBC News, 7 February 2008, posted at [http://news.bbc.co.uk/2/hi/uk\\_news/7232661.stm](http://news.bbc.co.uk/2/hi/uk_news/7232661.stm).

## PART FIVE

THEORY — CLASSICAL SOURCES OF  
JURISPRUDENCE (*UŞÛL AL-FIQH*)



## Chapter 12

### FUNDAMENTAL SOURCES: HOLY QUR'ĀN AND *SUNNAH*

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One may well ask: "How can you advocate breaking some laws and obeying others?" The answer lies in the fact that there are two types of laws: just and unjust. I would be the first to advocate obeying just laws. One has not only a legal but a moral responsibility to obey just laws. Conversely, one has a moral responsibility to disobey unjust laws. I would agree with St. Augustine that "an unjust law is no law at all."

Now, what is the difference between the two? How does one determine whether a law is just or unjust? A just law is a man-made code that squares with the moral law or the law of God. An unjust law is a code that is out of harmony with the moral law. To put it in the terms of St. Thomas Aquinas: An unjust law is a human law that is not rooted in eternal law and natural law. Any law that uplifts human personality is just. Any law that degrades human personality is unjust.

Reverend Dr. Martin Luther King,  
*Letter from a Birmingham Jail*, 13 April 1963

#### SYNOPSIS

##### § 12.01 OVERVIEW OF FOUR SOURCES

- [A] Sources and Their Philosophical and Practical Dimensions
- [B] Defining "*Uṣūl al-Fiqh*"
- [C] Two Primary and Two Secondary Sources, and Term "Fundamentalist"

##### § 12.02 AMBIGUITY, VAGUENESS, INTERPRETATION, AND CONSTRUCTION

##### § 12.03 QUR'ĀN AND APPROACHES TO READING IT

- [A] Meaning of "Qur'ān"
- [B] Biblical Parallel
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##### § 12.04 ISSUES IN QUR'ĀNIC INTERPRETATION

- [A] Translations of Qur'ān and Formal versus Dynamic Equivalence
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- [A] Definition and Relation to "*Ḥadīth*"

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#### § 12.06 COMPILATIONS OF *HADĪTH*

[A] Question of Authenticity

[B] *Isnād* (Chain of Transmission)

[C] Summary and Evaluation of *Hadith* Compilations

### § 12.01 OVERVIEW OF FOUR SOURCES

#### [A] Sources and Their Philosophical and Practical Dimensions

It is a predictable question for a lawyer to ask about the sources of law in a legal regime. Indeed, it would be shocking if a lawyer did not inquire into the roots from which rules in the regime emanate. Likewise, it would be surprising not to inquire about sources of teachings in a religion. From where does the religion derive its central precepts?

In both the legal and religious contexts, the question of sources has two dimensions: philosophical and practical. The first dimension reveals the authority on which the law or religion relies. Certain authorities will be deemed authentic, while others will be dismissed as unreliable. Further, the criteria for delineating between "good" and "bad" authority is also part of the question of sources. The authority may be a person, a text, a tradition or collections or combinations thereof. It also may be a rigorous methodology for discerning appropriate from inappropriate understandings, elaborations, and extensions of the messages conveyed by the person, text, or tradition.

The second dimension explains where the rules of a legal regime, or precepts of a religion, may be found. Lawyers studying a legal or religious system need to know where in their libraries to "find" the law or "find" the religion. Today, that task is faster and cheaper than ever before: information technology, specifically, the internet, makes the search for sources efficient. But, it creates a problem: information overload. With so much legal and religious material posted on the web, how is a lawyer to group the materials into categories, let alone filter out unreliable websites? The answer is that the lawyer must have a sense of the sources of the law or religion as they have been defined through the ages by the scholars and practitioners of law and religion.

Before turning to the sources of Islamic Law, consider the sources, and their philosophical and practical dimensions, of United States law and Catholic Christianity. When a lawyer asks "what are the sources of American law?" the general answer is:

- For Federal law, the sources are, in rank order:

(1) The Federal Constitution

(2) Federal Statutes, Case Law, and Treaties

(3) Federal Administrative Agency regulations and rulings

- For State law, which because of the Supremacy Clause of the Federal Constitution is subordinate to Federal law, the sources are, in rank order:

(1) The State Constitution

(2) State Statutes, Case Law, and Treaties

(3) State Administrative Agency regulations and rulings

These sources reflect the outcome of debates by the Founding Fathers who wrote the Federal Constitution, and advocated for it in *The Federalist Papers*. In turn, the Founding Fathers not only were well-schooled in Classical Greek and Roman Philosophy, but also in Judeo-Christian precepts. Finding United States Federal or State law is a matter of accessing the books, publications, and websites that contain the above-listed primary sources, along with a prodigious volume of secondary source material, such as treatises, textbooks, and law review articles, which discuss and critique the primary sources.

As for Catholic Christianity, its precepts and practices emanate from three sources:

- Sacred Scripture, that is, the Bible, with an understanding that the New Testament contains the Word of Jesus Christ, as well as accounts of the works Christ performed in his ministry.
- Sacred Tradition, that is, the practices of Christians through the 2,000 year history of the Church, with a special regard for the Apostles of Jesus and the early Christian communities (*i.e.*, the ones in the first few centuries A.D.).
- The *Magisterium*, that is, the teachings of the Church as written down, preached, and practiced by its supreme leader, the Holy Father (or "Pontiff" or "Pope"), Cardinals, Bishops, Priests, and Nuns.

As to where to "find" Catholic Christianity, there are two essential documents: the Bible, and the *Catechism of the Catholic Church* ("*Catechism*," or "*CCC*"). The Bible is the most widely read and translated book in human history. There are many Catholic editions of the Bible, including ones that contain helpful historical background material, charts, maps, and tables.<sup>1</sup> The *Catechism* encapsulates and summarizes all three sources, and is divided into four parts, which correspond to faith (*Part One: The Profession of Faith*), sacraments (*Part Two: The Celebration of the Christian Mystery*), morality (*Part Three: Life in Christ*), and prayer (*Part Four: Christian Prayer*).<sup>2</sup>

<sup>1</sup> See, e.g., *THE CATHOLIC STUDY BIBLE* (New York, New York: Oxford University Press, 1990, New American Bible trans.). [Hereinafter, *BIBLE*.]

<sup>2</sup> See, e.g., *CATECHISM OF THE CATHOLIC CHURCH* (United States Catholic Conference, Inc., Washington, D.C.: Libreria Editrice Vaticana, 2nd ed. 1997).



## [B] Defining "Uṣūl al-Fiqh"

The Arabic term "*fiqh*," commonly used in Islamic Law, literally means "understanding." It is derived from the verb "*faqaḥa*," which means "to understand." Used in the context of the *Shari'a*, *fiqh* refers to the totality of human comprehension of the perfect, immutable, and Divine law as revealed in the Qur'ān and *Sunnah*, and as explained, elaborated, and interpreted by Islamic legal scholars (*fukahā*). This reference begins to convey the sense of reverence Muslims have for the *Shari'a*. The *fiqh* is the science of the *Shari'a*, or more generally, the science of Islamic jurisprudence.

The full term is "*uṣūl al-fiqh*," which refers to the roots of jurisprudence, or roots of the law. The word "roots" is appropriate, because it connotes the focus on the sources of legal rules. To explore the roots is to ask the question a basic question relevant in any legal system: whence does the law come? Because of its Divine origin, and because of the 1,400 years of scholarship about it, the *fiqh* occupies a special place in the minds of Muslims. It is not like any secular legal system in which rules are the outcome of give-and-take in a politically-charged legislative process. Rather, the *fiqh* is one of the greatest gifts of God (Allāh) and products of research in human history. Succinctly put, there are four roots of Islamic jurisprudence, that is, four sources of Islamic Law:

The primary sources of law in *Sunni* orthodoxy are: 1) the *Qur'ān* (the divine word of Allah), 2) the *sunnah* (the practices, examples, dicta, and decisions of the Prophet Mohammed), 3) *ijmā* (consensus, most particularly the consensus of the community of scholars), and 4) *qiyās* (analogical deductions and reasoning). *Hadith* are the textual records of the Prophet's *sunnah*, as determined by skilled juristic scholars.<sup>3</sup>

More precisely, the *Qur'ān* and *Sunnah* are "primary" sources of the *Shari'a*, pre-eminent in their importance, while *ijmā* and *qiyās* are secondary sources. Note the breadth and depth of these roots, and their origin and elaboration: they are in part Divine, in part from the example of an extraordinary human being, and in part the product of human reason. Therefore, it should come as no surprise that Islamic jurisprudence — that is, courses in the *uṣūl al-fiqh* — are required parts of the curriculum in every Islamic Law school. Once these roots are understood, they are then applied to all aspects of the human experience, from simple individual prayers to complex financial transactions.

## [C] Two Primary and Two Secondary Sources, and Term "Fundamentalist"

It was not always the case that Islamic religious and legal scholars (*ulema* and *fukahā*, respectively), much less the average Muslim, clearly understood that there were four sources of Islamic Law. The identification and enumeration of four

roots of jurisprudence (*uṣūl al-fiqh*) came about through careful research and thought by *Imāms* Mālik ibn Annas (710-795 A.D.) and Muhammad Shāfi'i (768-820).<sup>4</sup>

*Imām* Mālik presented the first definitive work on *fiqh* (jurisprudence). In it, he recognized the *Qur'ān* and *Sunnah*, but also allowed for opinion (*ra'y*) and public interest (*maṣlahah*), and saw the importance of consensus (*ijmā*) in Medina among the Companions of the Prophet (*Ṣaḥābah*) and the Ancient School at Medina. *Imām* Shāfi'i proposed the theory of the *uṣūl al-fiqh*. He formalized the interpretation of the *Shari'a* by listing four sources that could be considered legitimate. Thus was born the Classical Theory of Islamic Law. Interestingly, *ijmā* was a key point of disagreement between these two great scholars. *Imām* Shāfi'i felt *Imām* Mālik over-emphasized the consensus of Medina, and feared doing so would lead to stasis in the *Shari'a*. *Imām* Shāfi'i argued that an interpretation can and should be changed if it gets closer to the Truth, hence he advocated a broader and more evolutionary approach to *ijmā*.

According to the Classical Theory, there are four sources of the *Shari'a*. The first two are by far the most important, and are considered the primary sources. They are:

- (1) The *Qur'ān*.
- (2) The *Sunnah* of the Prophet Muhammad, as collected in compilations of his non-prophetic sayings and actions, i.e., the *ḥadīths*.

Note the order: the *Qur'ān* is supreme, and no other source, even *Sunnah* of Muhammad, can overrule it. Muslims regard the *Qur'ān* as the Word of God (Allāh) revealed to the Prophet through the Archangel Gabriel over a period of 22 years (610-632).

Also notice the connection between the two primary sources and the term "fundamentalist." The two primary sources are fundamental, in the sense of being the more important than the two secondary sources. The contemporary mainstream media is wont to toss around and apply casually the label "fundamentalist" to a broad array of Muslims, particularly ones who do or appear to oppose American interests. In truth, such persons are more accurately labeled "extremists." In contrast, the proper use of the epithet "fundamentalist" is for one who seeks to return Islamic Law to its fundamental sources. That is, a "fundamentalist" prefers, even demands, that the *Shari'a* be based exclusively, or as much as possible, on the *Qur'ān* and *Sunnah*.

The third and fourth sources are considered secondary, or dependent:

- (3) Analogical reasoning, or "*qiyās*," and
- (4) Consensus, or "*ijmā*."

Through the ages, Muslim scholars (*ulema* and *fukahā*) in the Four *Sunni* Schools, and in the *Shi'ite* tradition, have debated the appropriate weight to be

<sup>3</sup> Michael J.T. McMillen, *International Legal Developments in Review: 2007 — Islamic Law Forum*, 42 THE INTERNATIONAL LAWYER 1017, 1018 (Summer 2008) (emphasis original). See generally JOHN MAKDISI, ISLAMIC PROPERTY LAW ch. 1A-B (Durham, North Carolina: Carolina Academic Press, 2005) (concerning the four sources of the *Shari'a*, and more generally the sources of law.)

<sup>4</sup> See JOHN L. ESPOSITO ED., THE OXFORD HISTORY OF ISLAM 126-128 (Hong Kong: Oxford University Press, 1999).

given to *qiyās* and *ijma'*. They do not all agree. "Fundamentalists" take a strict, traditionalist line, and downplay their role. One of their champions was the great *Ḥanbali* School Scholar, Ibn Taymiyya (1263-1328).<sup>5</sup> They are akin to advocates for a strict constructionist approach to understanding the constitution of a country. The Traditionists emphasize the original intent and plain meaning of the Qur'ān and *ḥadīths*. They fear *qiyās* and *ijma'* can introduce distortions to the *Sharī'a* that reflect personal biases. Regrettably, their misguided followers sometimes turn to extreme, violent measures to promulgate their ideas. Hence, mainstream media conflates the terms "fundamentalist" and "extremist."

Other *ulema* and *fukahā'* dispute the Traditionist project, just as many American Supreme Court justices disagree with an original intent approach to the Constitution. The "moderates" counsel that even the Qur'ān and *Sunnah* do not answer all questions. They find recourse to *qiyās* and *ijma'* is ineluctable. Over time, this moderate position has become the majority one in the Islamic World, meaning the conventional understanding of the Classical Theory of the *Sharī'a* includes all four sources.

There is one point on which all Muslim scholars, and indeed all Muslims, agree: they share a respect, indeed reverence, for the *Sharī'a*, and in particular the "*uṣūl al-fiqh*" or roots (or science) of the jurisprudence. In most American law schools, Jurisprudence is a course that a minority of law students take, and is typically regarded as marginally important. That is unfortunate, and happily the course occupies a prominent place in many British law schools. In Islamic law schools, jurisprudence — the science of knowing where the *Sharī'a* comes from — is a central part of the curriculum.

## § 12.02 AMBIGUITY, VAGUENESS, INTERPRETATION, AND CONSTRUCTION

Every religious or legal text contains terms that are ambiguous or vague, and every such text requires interpretation and construction. "Ambiguity" and "vagueness" are not synonyms, nor are "interpret" and "construct." An "ambiguous" word is one that has two or more meanings. Consider the word "light." It can refer to a light color, a light weight, light by which sight is possible, or the light of God. A "vague" word is one that has penumbral meanings. That is, it is difficult to define what is included within the word, and what is excluded. Again take the word "light," but in reference to a weight. A one kilogram weight is "light." A 100 kilogram weight is not "light." Is a 35 kilogram weight "light" or not "light"?

As for "interpretation," this term refers to the process by which the meaning of a word in a text is decided. To "interpret" a text is to develop an understanding of what the words in it mean. There are different methods of "interpretation," one of the most famous and controversial of which is known as originalism. This method seeks to discern the original public meaning of a text — what did the drafters of the text intend as to how to understand its provisions? In the American Constitutional

Law context, this approach is championed by Supreme Court Justice Antonin Scalia. However, the approach long pre-dates the birth of the United States Supreme Court. In Islamic Law, Ibn Taymiyya insisted on defining the *Sharī'a* according to the text of the Qur'ān and authentic *ḥadīths*.

A radically different method of interpretation from originalism is to regard a text as flexible, and breathe meaning into it based on contemporary circumstances. This approach allows wide latitude for additional sources, beyond the traditional four roots, such as independent reasoning (*ijtihād*) and public policy (*maṣlaḥah*). It is associated with the American Supreme Court Justice William O. Douglas, and long before him, with a variety of *Sharī'a* scholars.

In contrast, "construction" is about deciding what to do with words in a text. In particular, how should those words, once their meaning or meanings is understood, be applied to specific fact patterns? Additionally, "construction" involves filling in gaps when the meaning of a term is unclear. For example, if the originally intended meaning of a term is uncertain, then the issue at hand is under-determined. "Construction" is necessary for the purpose of interstitial law-making. However, "construction" always requires an independent normative defense. That is because construction involves gap-filling. Without a defense, construction devolves into "making it up" based on personal, subjective preferences. A range of defenses are available, from strict positions that read texts as narrowly as possible to liberal positions that import theories or perspectives such as law and economics or law and philosophy.

Obviously, the focus of both "interpretation" and "construction" is on ambiguous and vague terms. Clear words do not need much interpretation or construction. The identification of ambiguous and vague terms, and their interpretation and construction, is a familiar task of Anglo-American lawyers and legal scholars. It also is required of clergy and scholars of the Bible. Catholic priests, Protestant ministers, and theologians analyze, discuss, and debate words used in the Old and New Testament the way lawyers and legal scholars do for contracts, wills, court decisions, statutes, constitutions, and treaties.

The Qur'ān is no exception — it, too, not only is susceptible to, but also demands, identification, interpretation, and construction of ambiguous and vague terms. Indeed, it is an arrogance of the modern American legal mind to think these processes were generated and mastered in the Common Law tradition of the United States and England. As indicated, Islamic legal scholars wrestled with these problems long before there was a Common Law, or even an England.

As the Qur'ān is both a supreme religious and legal text, this demand is heightened in comparison to a contract, case, constitution, or treaty. Islamic *ulema* and *fukahā'* are aware of this demand. Ever since the canonical text of the Qur'ān was set, they appreciated the need to discern meanings of ambiguous and vague terms, and to apply them to real-world issues. They understood it as the Qur'ān was being revealed, as is adduced by the fact they asked many questions of the Prophet about the revelations.

This give-and-take led to the *ḥadīth*. The Qur'ān as the "Guide," was (and is) not unambiguous on all points, hence there was (and remains) a need for a "guide to the

<sup>5</sup> Born in Harran, in Turkey, near the Syrian border, to a family of theologians, he died in Damascus. His full name was Taqī ad-Dīn Ahmad ibn Taymiyya (sometimes spelled "Taymiyyah").



Guide," which is the *Sunnah* of the Prophet as recorded in compilations of the *hadith*. (To be sure, even the *hadith* contains ambiguities, vagaries, and needs interpreting and constructing, as the *ulema* and *fukahā'* also appreciate.) Those words need interpreting, i.e., their meaning or meanings must be discerned. And, critically, those words need to be constructed, which is to say they need to be applied to real-world contexts.

## § 12.03 QUR'ĀN AND APPROACHES TO READING IT

### [A] Meaning of "Qur'ān"

In Arabic grammar, the word "*qur'ān*" is a noun derived from the verb "*qara'a*" which means "to read" or "to recite." In this sense, the word "*qur'ān*" conveys the idea of diligent reading. That connotation is accurate, as Muslims are called to read the Qur'ān in an assiduous, conscientious, and earnest manner.

Scholars debate whether the word "*qur'ān*" was formed within Arabic language from the root verb "*qara'a*," or whether it was borrowed separately from another language. One scholar, F. Schwally, along with other western researchers, suggests that the word "*qur'ān*" originally derived from the Syriac word "*keryana*," which means a religious scripture or book that must be read regularly.<sup>6</sup> Other scholars argue that "[t]he Arab[s] derived [this word] from the Arami [i.e., the Arabic word came from Aramaic, a Semitic language used in Syria and the Near East starting in the 6th century B.C.] and the Arabs 'had begun to use this word for the meaning of recitation before Islam.'"<sup>7</sup>

From the earliest days of Islam, the word "*qur'ān*" gained more than a linguistic weight. The first verse of the Qur'ān itself is one of the root words of the Arabic word "*qur'ān*." The first word that was revealed from Allāh (God) to Muhammad verbally through the Archangel Jabreel (Gabriel) is the word "*iqra'*," a verb in the imperative (command) tense means "Recite!" or "Read!"

Within the Qur'ān, the word "Qur'ān" itself is used several times. For instance, *surah* 12, *ayyah* 2 describes the Holy text as an "Arabic Qur'ān." There are Arabic words that are used as synonyms for "Qur'ān" elsewhere in the book. Examples include *Al Kitab* (the Book), *Al Furqan* (concerning distinctions between right and wrong), *Al Dhikr* (the Remembrance). All told, within the Holy text itself, there are seventy instances in which the text refers to itself, either expressly by using the word "Qur'ān," or impliedly, by using a synonym.

Within Islamic culture, the word "Qur'ān" is a generic reference to the central religious text of the Muslim faith. In this sense, Muslims consider the Qur'ān as the final revelation of Allāh (God) for guidance and direction of mankind. The Qur'ān follows in time other earlier revelations, such as *Suhuf Ibrahim* (Scrolls of Abraham), the *Zabur* (Book of Psalms), the *Torah* (Old Testament), and the *Injeel*

<sup>6</sup> Farhat Aziz, *Word of "Qur'an" (Its Origin and Synonymous)*, At. Atwa at 5 (2007) posted at [www.pu.edu.pk/site/journal/previousissue.htm](http://www.pu.edu.pk/site/journal/previousissue.htm). [Hereinafter, Aziz.] The author is an Assistant Professor at the Department of Islamic Studies, F.C. College, Lahore, Pakistan.

<sup>7</sup> Aziz, *supra*, at 7-8.

(the Bible, or specifically the New Testament). Interestingly, in contemporary Muslim literature, the word also is used as an adjective to describe scholarly works or theories that emerge from studying the Holy text, whether in the context of the *Shar'ia*, science, or ethics.

### [B] Biblical Parallel

So, then, how do the *ulema* and *fukahā'* go about interpreting and constructing the Qur'ān? That is, how do they decide what ambiguous and vague words in this sacred text mean, and how do they make use of those meanings to help shape the lives of Muslims?

These questions are not unfamiliar in the Catholic Christian context. Is the Bible to be taken literally? The general answer in Catholic Christianity is "no." The Bible contains the Word of God. Indeed, some passages in this sacred scripture are to be understood literally. The Two Great Commandments of Christ — two love God with all one's heart, mind, and soul, and to love one's neighbor as oneself — would be an example.

But, many are not, and require interpretation in light of other passages, their context, and the other sources of Catholic Christianity, namely, Sacred Tradition and the *Magisterium*. For example, there are many historical events recorded in the Old Testament. Did they happen? Yes. Did they happen in exactly the way the Old Testament says they did? No. In other words, there is broad factual accuracy to the events, in the sense of their occurrence, but each and every fact is not literally accurate, in the sense of precisely how and when certain aspects of the events occurred.

### [C] Easy, Simplistic Dichotomies

As in Catholic Christianity with respect to the Bible, in Islam with respect to the Qur'ān, the easy approach answer is to divide interpretation methodologies into "literal" and "liberal," and construction methodologies into "strict" and "flexible." Following this answer, a word is interpreted either literally according to its lexicographic meaning, or liberally, extending that meaning beyond the narrow confines of a dictionary. The word then is applied strictly, whereby it is applied in a manner that it was around the time of the Prophet Muhammad, or perhaps during the era of the *Rashidun*. Or, the word is applied flexibly, in that its use is updated to suit modern times.

Like many easy answers, this one is not entirely wrong — it just is simplistic. If the question had been posed in the context of American Constitutional Law, then many lawyers and legal scholars would realize that the "literal — liberal" and "strict — flexible" dichotomies do not capture the full range of methodologies used with respect to the United States Constitution. In truth, these dichotomies are not binary opposites, but rather are poles at ends of a continuum. Along that continuum are gradations, thus there are a plethora of methodologies. That is true in respect of the Qur'ān, too. Over the centuries since it was first revealed, the *ulema* and *fukahā'* have developed a variety of techniques to interpret and construct ambiguous and vague terms.

### [D] Ramadan's Categorization of Six Approaches

In his 2004 book, *Western Muslims and the Future of Islam*, Professor Tariq Ramadan surveys the range of techniques.<sup>8</sup> He classifies the diversity of methodologies, arguing there are six basic approaches to interpreting the Qur'ān:

#### (1) Scholastic Traditionalism —

Scholastic Traditionalists reject *ijtihād*. They rely solely on the text, and nothing but the text. They insist on the distinction between *dār al-harb* (or *dar-kufr*) and *dār al-Islām* (or *dār al-salam*). They are comprised of adherents to any of the Four Major *Sunni* Schools — *Hanafi*, *Māliki*, *Shāfi'i*, and *Hanbali*, and — as well as the *Jāfari* and *Zaydi Shī'ite* Schools.

#### (2) Salafi Literalism —

The word "Salafi" refers to:

one who ascribes her/himself to the *Salaf* of Islam, based on its meaning in the Arabic language. Amongst contemporary historians, it denotes a follower of a *Sunni* Islamic movement that takes the pious predecessors, the *Salaf* of the patristic period of early Islam, as exemplary models. The word *Salaf* is an Arabic noun which translates to "predecessor," or "forefather" and who are collectively referred to as the "*Salaf as-Saaleh*," or Pious Predecessors, namely the first three Muslim generations. In Islamic terminology, it is generally used to refer to the first three generations of Muslims: the *Sahaba* ("Companions"), the *Tabi'un* ("Followers"), and the *Tabi' al Tabi'in* ("Those after the Followers"). These three generations and their understanding of the texts and tenets of Islam are looked upon as the Islamic orthodoxy, and a model for how Islam should be practiced. *Salafism* is not considered a sect foreign to orthodox Islam, rather a term usually used by *Sunni* theologians since the fifth Muslim generation or earlier to differentiate the creed of the first three generations from subsequent variations in creed and methodology. Landmarks in the history of *Salafi* revival are the three scholars commonly titled with the honorary "*Shaikh al-Islam*," namely, Ahmad ibn Hanbal (d. 855), Taqi ad-Deen ibn Taimiyyah (d. 1328), and Muhammad ibn Abd al-Wahhab (d. 1792), all considered to be revivers of the *Sunnah* and of the *Salafi* creed and methodology in their respective generations.<sup>9</sup>

Like Scholastic Traditionalists, *Salafi* Literalists rely squarely on the text of the Qur'ān and forbid any interpretative reading, i.e., any *ijtihād*. Thus, *Salafism* is regarded as a puritanical approach to Islam. But, *Salafi* Literalists allow for some flexibility in reading the Qur'ān.

#### (3) Political Literalist Salafism —

In this approach, the text of the Qur'ān is read literally. Thus, Political

Literalist *Salafists* also reject *ijtihād*. But, Political Literalist *Salafists* read the Qur'ān literally in combination with specific, political aspirations. The aim of those aspirations — their political agenda — is to overthrow existing powers and implement an Islamic Caliphate.

#### (4) Sufism —

*Sufis* are a mystical Islamic group — indeed, the word "*Sufi*" sometimes is used synonymously with Islamic mystics. *Sufis* believe the texts have a Gnostic meaning. They say this special meaning may be appreciated through meditation, as distinct from the application of independent reasoning (*ijtihād*). Thus, *Sufis*, too reject *ijtihād* as a way of understanding the text of the Qur'ān.

#### (5) Salafi Reformism —

*Salafi* Reformists agree with *Salafi* Literalists in that both groups seek to circumvent the juridical schools of the Traditionists. But, they are different from the *Salafi* Literalists in that they (the *Salafi* Reformists) accept *ijtihād*, believing its practice is an objective, necessary, and constant factor in applying the *fiqh* (Islamic jurisprudence), at every time, and in every place.

#### (6) Liberal Reformism —

This group is the opposite end of the spectrum from Scholastic Traditionalists and *Salafi* Literalists. Whereas they are the most conservative, Liberal Reformists are the most liberal. Liberal Reformists do not insist on the daily practice of religion. Rather, they focus on the spiritual dimension of religion, and on the individual, private practice of religion. That is, religion is — or ought to be — an individual, private matter. Liberal Reformists also see religion as a matter of maintaining culture of origin. Obviously, Liberal Reformists support the use of *ijtihād*.

The thesis Tariq Ramadan argues is that the inevitable consequence of the rejection of *ijtihād* is the ghetto-ization of Muslims who live in the west. That is because rejecting *ijtihād* means disengaging, detaching, and withdrawing from mainstream society.

At the same time, Ramadan cautions against the opposite extreme — namely, reading the text of the Qur'ān as if it were susceptible to free, undisciplined interpretation. To do that is to disengage from the very sources of Islam. Ramadan is a mainstream moderate. Islam and its sources must be a point of reference, even an anchor, but there is a history, and social and cultural context, in which to read the Qur'ān.

Manifestly, these approaches are not in accord with one another anymore than original intent-minded Supreme Court Justices like Antonin Scalia are with liberal activists like former Justice William Brennan. Much of the battle within the Islamic world today is over ideas, and a key issue is how best to interpret and apply the Qur'ān.

<sup>8</sup> See TARIQ RAMADAN, *WESTERN MUSLIMS AND THE FUTURE OF ISLAM* (Oxford, England: Oxford University Press 2004).

<sup>9</sup> *Salafi*, WIKIPEDIA, posted at <http://en.wikipedia.org/wiki/Salafi>.



In the true spirit of Islam, the struggle (*jihād*) to understand the Will of God (Allāh) and follow it, perhaps it does not matter whether one methodology is proven better than all others. Indeed, perhaps such proof is impossible. The struggle is one that necessarily lasts until the end of time. Over time, some methodologies for interpreting the United States Constitution, or the Bible, are discarded as weak, others shown to be persuasive, and yet new ones develop. So it may be with the Qur'ān. What matters is to take up the struggle, to exert oneself in a sincere — and, critically, non-violent — way to discern more deeply what Allāh has revealed, and to practice it in one's own life.

In this struggle, one point is clear to all Muslims, regardless of the method of interpretation or construction chosen. Law — specifically, the *Shari'a* — matters. It is common (though by no means universal) among professors at certain ostensibly elite American law schools to believe that law is just politics, and that legal argumentation and rules are nothing more than the products of expediency. That approach, which has crystallized in movements such as Critical Legal Studies, is an intellectual cul-de-sac, the end circle being one of hopeless and cynicism. It is orthogonal to much of the intellectual history of humankind, during which Natural Law Theory prevails, and during which questions of the relationship among law, morality, and religion are taken seriously. This approach certainly is at variance with Islamic Law.

To the Islamic legal mind, law matters. Invocation of the *Shari'a* to bolster an argument is important only if Islamic Law has a substantive content independent of the intentions or motives of an interested party. (Indeed, this precept is true in any legal system.) In the *Shari'a*, there is such content: it is revealed in the Qur'ān by God (Allāh).

## § 12.04 ISSUES IN QUR'ĀNIC INTERPRETATION

### [A] Translations of Qur'ān and Formal versus Dynamic Equivalence

The Qur'ān was sent by God (Allāh) through the Archangel Gabriel (Jabreel) to the Messenger, the Prophet Muhammad in Arabic. For that reason, the only truly authentic version of the Qur'ān is one in Arabic. Muslims the world over endeavor to learn Arabic, in part so they can read, recite, and hear passages from the Qur'ān in Arabic. Yet, of the 1.57 billion Muslims in the world, only about 300 million are Arabs and native speakers of Arabic. The vast majority of Muslims certainly have not mastered Classical Qur'ānic Arabic, and many of them do not have the time, resources, or even interest to do so. Thus, like most non-Muslims, who are not schooled in Arabic, most Muslims rely on a translation of the Qur'ān into the vernacular.

While the Bible is the most widely translated and read book in human history, there certainly is no shortage of translations and avid readers of the Qur'ān. Translation is a special field unto itself, requiring considerable effort, skill, experience, and judgment. But, as any international or comparative lawyer knows, there is a single, ineluctable trade-off for every translation. On the one hand, a

translator can stick as closely as possible to the original language (Classical Arabic) and thereby provide a literal rendition of the original text. This method is known as "formal equivalence." On the other hand, a translator can seek to discern the intended meaning of the original text, and translate it into modern parlance. This method is known as "dynamic equivalence."

Both methods have strengths and weaknesses. "Formal equivalence" was the same method used to translate the famous King James Version of the Bible from Latin into English in 1611 A.D. Yet, today that English appears artistic and flowery to some readers, but awkward and abstruse to other readers. Thus, other translations of the Bible adopt contemporary English grammar and vocabulary to facilitate comprehension for the widest possible audience. The choice between formal and dynamic equivalence is not exclusive. These methods define ends of a continuum, and depending on the translator, the end-result may be somewhere in between.

Consider the observations of Dr. Laleh Bakhtiar. She is an American convert to *Shi'ism*, and the first American Muslim woman to translate the Qur'ān:

This translation [entitled *The Sublime Quran*, by Dr. Bakhtiar], then, is one of *formal equivalence* in order to be as close to the original as possible. This is the most objective type of translation, as compared to a translation using *dynamic equivalence*, where the translator attempts to translate the ideas or thoughts of a text, rather than the words, which results in a much more subjective translation.

[In respect of not providing commentary on each *surah* and *ayah*,] [i]ntroducing the non-Arabic speaker to the words of the revelation without any commentary is as formal equivalence dictates. Related to the *eternality* of the Quran, each reader of the translation would then be able to ask: As this is the eternal Word of God, what does it mean to me today? What does it say to me? How can I self-identify with it? How do I feel when I read it? Do I accept the arguments that the Quran presents for the Oneness of God?

In writing about the Quran, al-Ghazzali [*i.e.*, Abū Hamid Muḥammad al-Ghazālī, a Persian scholar who lived from 1058-1111 A.D. and is regarded as one of the most important figures in Sunni thought, who is credited with changing the course of Islamic philosophy away from metaphysics based on Ancient Greek philosophy and toward Islam based on cause-and-effect ultimately determined by Allāh, and who attempted a grand synthesis that incorporated Sufi mysticism] says each person should read or recite it, not as a historical document, because then it loses its eternal quality, but as it relates to the person reading or reciting it. He asks: "How can one suppose otherwise when the Quran was revealed to the Messenger not only for him particularly but as a spiritual cure, guidance, mercy and light for all the worlds?" As the Quran says: "We send down in the Quran what is a healing and a mercy for the ones who believe." (16:126).

*The Quran is not an historic text, frozen in the time period of its revelation.* To this end, there are no parenthetical phrases further inter-

preting and elaborating a verse, thus allowing the translation, as the Quran itself is, to be free of any transient political, economic, denominational or doctrinal bias.<sup>10</sup>

Dr. Bakhtiar uses the method of formal equivalence, but argues it enhances the contemporary relevance, and reinforces the eternal nature of the message, of the Qur'an.

This argument is contrary to the conventional wisdom. It is commonly thought the conversion of an old text into modern parlance breathes new life into that text and gives it enduring value. There are analogs to both arguments in respect of the Catholic Mass. On the one hand, the permission to celebrate Mass in the vernacular, granted by the Second Vatican Council, follows the logic of making the Mass as widely understood as possible. On the other hand, the use of Latin for some elements of the Mass, and the continuation of the tradition of the Tridentine Mass, supported by Pope Benedict XVI among others, is an effort to adhere to 2,000 years of tradition that, in effect, is timeless.

The point here is not to resolve the debate as to whether a translation of the Qur'an using formal or dynamic equivalence, or some intermediate approach, is the "best." Rather, the point is to highlight the spectrum of possibilities. In the library of an international or comparative lawyer, it is useful to have multiple renditions of the Qur'an, using different methodologies. For the most part, the lawyer becomes comfortable with one reliable translation, and makes greatest use of it, which provides a degree of consistency and continuity. For instance, throughout the present work, the frequently quoted and cited translation of the Qur'an is by Professor Abdel Haleem.<sup>11</sup> The methodology of this acclaimed 2003 translation tends toward dynamic interpretation, without misrepresenting the Arabic meaning. Professor Abdel Haleem explains:

This translation is intended to go further than previous works in accuracy, clarity, flow, and currency of language. *It is written in a modern, easy style, avoiding where possible the use of cryptic language or archaisms that tend to obscure meaning. The intention is to make the Qur'an accessible to everyone who speaks English*, Muslims or otherwise, including the millions of people all over the world for whom the English language has become a *lingua franca*. The message of the Qur'an was, after all, directly addressed to all people without distinction as to class, gender, or age: it does not rely on archaisms or pompous language for effect. Although the language of the present translation is simple and straightforward, it is hoped that it does not descent to an inappropriate level.<sup>12</sup>

Yet, the utility of having on hand multiple translations comes when it is time to discern the meaning of a particularly knotty or controversial passage. For example, the translation by Dr. Bakhtiar is quoted, along with others, in a subsequent

<sup>10</sup> LALEH BAKHTIAR, THE SUBLINE QUR'AN — ENGLISH TRANSLATION Preface, x-xi (www.sublinequran.org; Laleh Bakhtiar, trans., revised 6th ed., 2009) (emphasis added).

<sup>11</sup> See THE QUR'AN — A New Translation by M.A.S. Abdel Haleem (Oxford, England: Oxford University Press, 2004). [Hereinafter, Qur'an.]

<sup>12</sup> M.A.S. Abdel Haleem, Introduction, in Qur'an, supra, at xxix.

Chapter on Family Law in respect of the highly contentious Qur'ānic passage concerning wife beating (*surah* 4, *ayah* 34). To put the point simply, the student, scholar, or practitioner of Islamic Law, like that of Christianity, surely will appreciate the need for both a "favorite" text of the Qur'an or Bible, and for additional renditions.

## [B] Theory of Repeal (*Naskh*)

The Arabic word "*naskh*" means "repeal." An alternative, complementary, translation is "abrogation." There is a theory of repeal of one verse of the Qur'an by another, or of one *Sunnah* of the Prophet (specifically, a *hadith*) by another.<sup>13</sup> The passage that effects (*i.e.*, causes or brings about) the repeal is the "*nāsikh*." The repealed passage is the "*mansūkh*."

This theory is not part of the Classical Theory of the *Shari'a*, meaning that under an orthodox approach, invoking the theory of *naskh* is not accepted as a mode of interpretation or reasoning. The logic for the orthodoxy is simple enough. If the Qur'an is the literal Word of God, then how can He contradict Himself?

But, the rebuttal also is plain: the Qur'an itself envisions *naskh*. The key passage is *surah* 2, *ayah* 106:

Any revelation We cause to be superseded or forgotten, We replace with something better or similar. Do you [Prophet] not know that God has power over everything?<sup>14</sup>

Based on this passage, the majority of Muslim scholars accept the theory of *naskh*, and thus hold one *ayah* can repeal another, and likewise, one *hadith* can repeal another. According to Professor Burton, the Qur'ānic basis for *naskh* extends beyond this passage, because the doctrine also figures prominently in *surah* 13, *ayah* 39, *surah* 16, *ayah* 101, and *surah* 87, *ayah* 6-7.<sup>15</sup>

As evidence in favor of the theory of *naskh*, just how strong is *surah* 2, *ayah* 106? Arguably, the reference to "any revelation" is not to the Qur'an itself, but to previous Prophetic messages from God — namely, the Old and New Testaments. Interpreted thusly, the passage does nothing more than affirm the veracity of the Qur'an against earlier revelations. This approach favors the minority position, namely, repeal is not possible.

As an example of the abrogation of a Qur'ānic rule by a subsequent *ayah*, two instances come from Islamic Criminal Law. First, consider the punishment for *kadhif* (false accusation of adultery). Suppose the accusation is levied against a woman, but the accuser fails to provide four witnesses. The Qur'ānic punishment of

<sup>13</sup> See JOSEPH SCHACHT, AN INTRODUCTION TO ISLAMIC LAW 115 (Oxford, England: Oxford University Press (Clarendon Paperbacks) 1982).

<sup>14</sup> Qur'an, supra, 2:106 at 13.

<sup>15</sup> See John Burton, *The Exegesis of Q. 2: 106 And the Islamic Theories of Naskh: Mā (Long A) Nāṣikh Min āya (first A is capitalized and long) Aw Nāṣahā (last a long) Na'ī bi Khairin Minhā (last a long) aw Mithlīhā (last a long)*, 48 BULLETIN OF THE SCHOOL OF ORIENTAL AND AFRICAN STUDIES, UNIVERSITY OF LONDON 30, 3 at 468 (1985) (Cambridge, United Kingdom: Cambridge University Press). [Hereinafter Burton.]



80 lashes (*surah* 24, *ayah* 4) for the accuser is abrogated by the following exception that a husband need only swear four times to God that "he is telling the truth" (*surah* 24, *ayah* 6).<sup>16</sup> Second, consider the gradual banning of *shurb al-khamr* (drinking alcohol) pursuant to *surah* 2, *ayah* 219, then *surah* 4, *ayah* 43, and finally *surah* 5, *ayah* 90. The repealed *ayah*, in this case *surah* 2, *ayah* 219, is one that was revealed to Muhammad chronologically earlier than the replacing *ayah*, in this case *surah* 5, *ayah* 90.<sup>17</sup> Note that when discussing *naskh*, it is assumed the current religious rule is known. Therefore, when *ayah* that contradict current law are found, it is assumed those *ayah* have been repealed (at least when the observer is one who acknowledges the validity of *naskh*).<sup>18</sup>

What is the theory supporting *naskh*? One justification is that as the circumstances of Muhammad and the early Muslim community changed, so too did their religious rules. Professor Burton cites the repealing of *surah* 2, *ayah* 180 by *surah* 4, *ayah* 10–11:

Many verses counsel patience in the face of the mockery of the unbelievers, while other verses incite to warfare against the unbelievers. The former are linked to the Meccan phase of the mission when the Muslims were too few and weak to do other than endure insult; the latter are linked to Medina where the Prophet had acquired the numbers and the strength to hit back at his enemies.<sup>19</sup>

The altered circumstances in Medina led to altered religious rules about battle.

But, how is it possible to justify the Qur'ān as the literal Word of God, on the one hand, with the theory of *naskh*, on the other hand? That is, how can repeal happen without vitiating the integrity of the holy text or impugning God? There are three responses. First, material revealed to Muhammad might have been omitted from the collection of the *Mushaf* (the loose leaf collection of written revelations eventually used to compile the Qur'ān).<sup>20</sup> If the *mansūkh* had been affected in this first way, the revelation would not have been included in the Qur'ān.<sup>21</sup>

This first type of *naskh* also might be accomplished through "divinely controlled forgetting."<sup>22</sup> This theory suggests some material was erased from the memory of Muhammad, and therefore omitted from the compilation of revelations into the

Qur'ān. This definition of *naskh* finds its basis within *surah* 2, *ayah* 160 and *surah* 22, *ayah* 52.<sup>23</sup>

The second way to effectuate the *mansūkh* is by "supersession" (*naskh al-hukm dāna al-tilāwa*).<sup>24</sup> Here, the religious rulings found within a certain *ayah* (or *ayah*) or the *Sunnah* are repealed and replaced by another. When supersession occurs, the wording of the original religious rule remains in the text of the Qur'ān or in the *Sunnah*. However, the rule itself is no longer valid, having been replaced by a textual rule that is also part of the Qur'ān or by a practice found as part of the *Sunnah*.<sup>25</sup>

Lastly, *nāsikh* might bring about the *mansūkh* where the text of a religious rule had been erased, but the rule itself remains valid (*naskh al-tilāwa dāna al-hukm*). This definition of *naskh* was not popular among early exegetes, but was followed by a minority of early Muslim scholars. For instance, of the Four *Sunnite* Schools of law, the Shāfi'i School sometimes acknowledge this definition of *naskh*. This School believes the Islamic penalty for adultery (stoning) originally existed in the Qur'ān, but that the text of the rule was removed, while the rule itself remains valid.<sup>26</sup>

*Naskh* applies to the *Sunnah* of the Prophet, whereby one practice repeals an unlike one. Abū 'Abdullah Al Qurtabi (a 13th century Muslim scholar) observes the punishment Muhammad advocated for adulterers.<sup>27</sup> The Qur'ānic punishment, in *surah* 24, *ayah* 2, for adultery (*zinā*) is 100 lashes. The *Sunnah* holds that adulterers are to be stoned to death. For a time, both punishments were inflicted on adulterers, the striking before the stoning. But, Muhammad did not long require adulterers be whipped before stoned. The practice of striking an adulterer before execution was allowed to "lapse."<sup>28</sup> In sum, the *Sunnah* of flogging and stoning was replaced by the *Sunnah* of stoning.<sup>29</sup>

Can the *nāsikh* or *mansūkh* be an *ayah* or a *Sunnah*? This question provokes some controversy. The majority of scholars accept that a Qur'ānic passage can negate a *hadith*. (To be sure, the Prophet would not be expected to say something intentionally that is contradictory to, and requiring repeal by, the Qur'ān, so the issue arises in the context of an earlier-in-time *hadith* versus a later-in-time *ayah*.) Consider the change in *qibla* (the ritual direction Muslims face to pray) that took place 2 years after the *Hijra*. It appears the specific direction Muslims originally faced (towards Jerusalem) was not conveyed in *surah* 2, *ayah* 142–144, but rather was a matter of the personal practice of Muhammad, i.e. it was a *Sunnah*, not in an *ayah*. But, this Qur'ānic passage conveys the direction they should face during prayer, namely, the *Ka'ba*. Therefore, the change in *qibla* can be thought of as an

<sup>16</sup> See Andrew Rippin, *Al-Zuhri, "Naskh al-Qur'ān" and the Problem of Early "Tafsir" Texts*, 47 BULLETIN OF THE SCHOOL OF ORIENTAL AND AFRICAN STUDIES, UNIVERSITY OF LONDON no. 1 at 40 (1984) (Cambridge, United Kingdom; Cambridge University Press). Andrew Rippin is Professor of History, and Dean of the Faculty of Humanities, University of Calgary. See <http://web.uvic.ca/~arippin/>.

<sup>17</sup> See *Naskh*, Wikipedia, posted at [http://en.wikipedia.org/wiki/Naskh\\_\(tafsir\)](http://en.wikipedia.org/wiki/Naskh_(tafsir)).

<sup>18</sup> See Andrew Rippin, *The Function of "Asbāb al-nuzūl" in Qur'ānic Exegesis*, 51 BULLETIN OF THE SCHOOL OF ORIENTAL AND AFRICAN STUDIES, UNIVERSITY OF LONDON no. 1, at 18 (1988) (Cambridge, United Kingdom; Cambridge University Press).

<sup>19</sup> C.E. BOSWORTH, E. VAN DONZEL, W.P. HEINECKS & CH. PELLAT EDS., THE ENCYCLOPEDIA OF ISLAM VOL. VII, FASCICLES 129–130, 1009–1012 (Leiden, The Netherlands: E.J. Brill, new ed., 1992) (entry for *Naskh*, by John Burton). [Hereinafter, BOSWORTH.]

<sup>20</sup> See Burton, *supra*, at 452.

<sup>21</sup> See Burton, *supra*, at 452.

<sup>22</sup> See BOSWORTH, *supra*, at 129–30, 1009–12.

<sup>23</sup> See Qur'AN, *supra*, at 18, 212. In footnote a, to *surah* 22, *ayah* 52, Professor Abdel Haleem notes: "the basic meaning of *naskha* is 'removed' rather than 'abrogated' (*al-Mu'jam al-Wasit*)."

<sup>24</sup> See Burton, *supra*, at 452.

<sup>25</sup> See Burton, *supra*, at 452.

<sup>26</sup> See Burton, *supra*, at 452.

<sup>27</sup> See Al Qurtabi, Wikipedia, posted at <http://en.wikipedia.org/wiki/Al-Qurtabi>

<sup>28</sup> See Burton, *supra*, at 465.

<sup>29</sup> See Burton, *supra*, at 465; see also, BOSWORTH, *supra*, at 129–30, 1009–12.

instance when an *ayah* changed a *Sunnah*.<sup>30</sup>

But, among scholars who accept the theory of *naskh*, some do not agree a Qur'ānic verse can repeal a practice of Muhammad. *Imām Shāfi'ī*, founder of the *Shāfi'ī* School, originally believed that only an *ayah* could repeal an *ayah*, and only a *Sunnah* could repeal a *Sunnah*. Yet, his belief gave way to one — held by some, not all, scholars — in which any *Sunnah* is not only equal to any *ayah*, but even can be superior to it. For these scholars, then, an *ayah* can repeal an *ayah*, and a *Sunnah* can repeal an *ayah*, but an *ayah* can never repeal *Sunnah*.<sup>31</sup> Thus, Scholars disagree as to whether a *hadith* can repeal a Qur'ānic passage.

## § 12.05 SUNNAH OF PROPHET

### [A] Definition and Relation to “*Hadith*”

The literal meaning of “*sunnah*” is way or path that others will follow. In the normative sense, this method can be a good *sunnah*, or it can be a bad *sunnah*. Indeed, in Arabic, “*sunnah*,” without any religious context, means a way or method that can have two states, either good or bad. The word is derived from the word “*sanān*,” which is Arabic for: a road or a path.<sup>32</sup>

The religious definition of “*Sunnah*” refers to the life of the Prophet. It encompasses whatever the Prophet said or did. All of his utterances (other than his recitations of Qur'ānic verses), including decisions and *dicta*, plus his actions are reported as *Sunnah*. Further, his way of life — the example he provided — also is called “*sunnah*.” Not surprisingly, the Prophet is a model for all Muslims and his method and manner are defined as *Sunnah*:

*Sunna* means the path that is trodden (*al-tariq al-mastūk*), which entails holding fast to whatever the Prophet and his rightly-guided successors held of doctrines, deeds, and sayings.<sup>33</sup>

This definition illustrates the key point that “*Sunnah*” is a broad term that covers many aspects of Islam. It could be the way the Prophet showed people by example, as well as by word. *Sunnah* also could be different things came from his successors, companions, or any well known scholars. In contrast, *hadith* is a narrower term than *Sunnah*. “*Hadith*” is limited to the Prophet's teaching, in effect, his non-Prophetic statements (i.e., his utterances other than recitals of Qur'ānic verses). But, critically, the existence of a *hadith* implies a written, textual record of that teaching. Such textual records are researched, debated, and verified by *ulema* and *fukahā*.

Thus, a *hadith* is a teaching of the Prophet. Literally, it means “speech, report, or account.”<sup>34</sup> Specifically, it is what is narrated from the Prophet, but it could be a

narration not only of something he said, but also of what he did (his actions, such as his approval or disapproval of certain conduct) in some situations. Thus, *hadith* is defined as follows:

*Hadith* implies the narration of a saying, or of an act, or of an approval (*taswib*) of the Prophet, irrespective of whether the matter is authenticated or still disputed.<sup>35</sup>

Manifestly, the terms “*Sunnah*” and “*hadith*” overlap in some places, and are separate in other places. However, the two terms (*Sunnah* and *hadith*) are different words that have different meanings:

*Hadith* and *sunnah* are generally taken as synonymous terms. This is not a correct impression. The words *hadith* and *sunnah* have entirely different connotations, and each one holds a different status in the *Shari'a*. If we assign the same meaning to both the terms, it would create a lot of complications. For a proper understanding of the science of *hadith*, therefore, it is necessary to know precisely the difference between *hadith* and *sunnah*.<sup>36</sup>

In brief, the two terms are closely related to one another, but not synonymous.

In what way do the two terms overlap? One example is what is narrated from the Prophet Muhammad, whether a saying or action, in a matter of teaching. The saying or action recounted is called a *hadith*, but also may be called a *Sunnah*. Another illustration of overlap relates to the people who follow the Prophet's teaching. They are called the people of the *Sunnah*, but also people of the *hadith*. They have come to be known as “*Sunnites*” or “*Sunnis*.” Finally, books devoted to the collection of *hadiths* also are called books of the *Sunnah* or collections of the *Sunnah*.

In what way do the two terms differ from each other? One example concerns the manner, method, and path of the Prophet. That manner, method, and path is called *Sunnah*, but it is not called a *hadith*. The difference here is technical. It is not what the Prophet says or teaches, but how the Prophet lived, that is at issue. Following the way of life established by the Prophet can be called only *Sunnah*. A *hadith* is merely the recorded account of the Prophet, literally, words written on a page. Therefore, *hadiths* may be a source of the *Sunnah* of the Prophet.<sup>37</sup>

### [B] Codification of *Shari'a*

The death of the Prophet in 632 A.D. left a void in the social and legal fabric of the emerging Arab-Islamic Empire. Faced with internal crisis and dissension over succession, the leaders needed a formula to govern newly conquered territory and

<sup>30</sup> See BOSWORTH, *supra*, at 129–30, 1009–12.

<sup>31</sup> See BOSWORTH, *supra*, at 129–30, 1009–1012; see also, BURTON, *supra*, at 466.

<sup>32</sup> MUSTAFA AS-SHAI'Ī, translated By Mr. AHMAD M. HASSIM, *Sunnah and Its Position in Islamic Law*, DEFINITION OF SUNNAH, available at <http://www.islamonline.net>.

<sup>33</sup> SH. G. F. HADDAD, THE MEANING OF SUNNA, available at [http://www.livingislam.org/h/ms\\_e.html](http://www.livingislam.org/h/ms_e.html).

<sup>34</sup> CYRIL GLASSE, THE NEW ENCYCLOPEDIA OF ISLAM 160 (Walnut Creek, CA: AltaMira Press, 2002,

Revised Edition of the Concise Encyclopedia of Islam). [Hereinafter GLASSE.]

<sup>35</sup> AMIN ARSAN ISLAHI, DIFFERENCE BETWEEN HADITH AND SUNNAH, available at <http://www.renaissance.com.pk/jafelife86.html> (emphasis added). [Hereinafter ISLAHI.]

<sup>36</sup> See ISLAHI, *supra*.

<sup>37</sup> See GLASSE, *supra*, at 162.



peoples in it. This realization triggered the arduous process of trying to codify the *Shari'a*.

During the time between 662 and 692 (40–60 years after the death of the Prophet), a consensus emerged among Muslims believing it necessary to define a specific code of behavior, practices and beliefs. Such a code would allow any Muslim to know exactly what he or she was supposed to do to lead a life in accordance with God's Will, no matter where he was located (geographically or socially) in the Muslim community (*ummah*).

Due in part to an expanding empire, the undirected Muslim world was threatening to tear itself apart. Leaders argued over the definition, codification, and establishment of a *Shari'a*. It must be a universally accepted, but specific, code of what a Muslim must and must not do, believe and not believe, in order to submit to the Will of God. It must be written down and disseminated to the legal and religious leaders to ensure compliance.

To be sure, this movement is not synonymous with codification in the Anglo-American sense, or the civil law sense, of a single book that has all the rules. There have been efforts at that type codification in Islamic legal history, but it has never been achieved to the same degree. Rather, it is a written "code" in a more loose sense of the development of a body of law. The *Shari'a* is a human interpretation of Divine Will of God (Allāh), coming as close to the ideal pattern of behavior as possible.

It was apparent a uniform body of law was desirable, but achieving consensus among everyone (including civil, political and religious leaders) was difficult. The traditional sources of *Shari'a* are the Qur'ān and *Sunnah* of the Prophet. The Qur'ān is the most important source, being the unimpeachable word of God (Allāh). But, the second source, the words and deeds of the Prophet (*Sunnah*), is essential to understand it. By acknowledging the *Sunnah* as the most authoritative guide to the application of the Qur'ān in daily life, the Islamic community could rely, and cite to, the words and actions of the Prophet. The key was to collect, compile, elucidate, and codify the *Sunnah* of the Prophet, everything he said and did that could be authenticated through careful research.

Additionally, the *Sunnah* of the first Islamic community became regarded as authoritative in its own right. It was not as authoritative as the *Sunnah* of the Prophet himself, but it was authoritative nonetheless. Muslims looked to what the first Islamic community did, and they argued all Islamic communities ought to strive to achieve that communal behavior. Thus, the *Sunnah* of the Prophet may be regarded as a "guide to the Guide (Qur'ān)" for Muslims, and the *Sunnah* of the first Islamic Community may be a further guide to interpret the actions of the Prophet.

The weight given to the *Sunnah* of the first Islamic Community was, and still is, a point of contention among religious leaders. Those religious scholars (*ulema*) who began the process of collecting and sifting through accounts of the Prophet and his first followers played a significant role in shaping the *Shari'a*. Compilations of the *hadith* that were collected had to be checked to ensure the account was in sync with the Will of Allāh (God) and would not misdirect the faithful.

### [C] Authority of Ulema

For Westerns, codification of law may bring to mind political institutions such as a legislature or parliament. These institutions, thereby, draw the power to make law from a mandate from the people by whom they are elected. The *ulema*, however, after the death of the Prophet, did not form a single body, nor were they elected by people at large, nor were most specifically chosen by the political leadership.

All this begs the question: where did the *ulema* get the power to codify the *Shari'a*? It is an authority granted to them by the Muslim community, in recognition of the scholarship and study of the two fundamental sources (Qur'ān and *Sunnah*). Thus, the *ulema* hold a powerful position, albeit typically with informal authority.

Between the 8th and 11th centuries, the *ulema* engaged in two highly significant processes: identification and codification of the *Sunnah*, and codification of the *Shari'a*. First, the *ulema* gathered, comprehended, and authenticated the *Sunnah* of the Prophet, and the *Sunnah* of the first Islamic community. This process required study of the non-prophetic words of the Prophet, i.e., of the *hadith*, and of biographies and history. The *ulema* spent an enormous amount of time writing biographies of the Prophet, his companions of the Prophet, and of the first Islamic Community. Once the *ulema* had codified the *Sunnah*, the *ulema* looked at both the Qur'ān and the *Sunnah* to develop and write down codes of *Shari'a*. The Qur'ān and *Sunnah* were the bases from which the *ulema* uncovered precisely what Muslims were supposed to do, and not to do.

### [D] Achievement and Tension

The creation of the *Shari'a* is an incredible achievement of Islam because most Muslims do not have the time or energy to devote a prodigious amount of time to the study of the Qur'ān and the *Sunnah*, any more than most Christians do of the Bible and the life of Jesus. In codifying the *Sunnah* and creating the *Shari'a*, Muslims have a guide — in addition to the Qur'ān itself — as to how to live in the will of God.

But a certain tension still holds the strings of this great achievement: it is not God, but the *ulema*, that have defined the *Shari'a*. It is incumbent upon every Muslim that he or she read, interpret, and apply the Qur'ān in a manner consistent with the Will of God (Allāh). But how is a regular (non-*ulema*) Muslim to know which interpretation to obey? In other words, how does a Muslim on the one hand, approach the Qur'ān and thereby approach God directly on his (her) own terms, and on the other hand, adhere to the *Shari'a*, which is based on reference to the Qur'ān and *Sunnah* and codified by the *ulema* for the entire Muslim community?

All told, it took 300–400 years after the death of the Prophet to finish the codification of the *Shari'a*. To most Muslims in the world — 85 percent of them, the *Sunnites* — believe that by the end of the 11th century, the basic parameters (or framework) of the *Shari'a* had been clearly identified and elucidated.

By and during the 12th, 13th, and 14th centuries, Muslim scholars spoke of the "closing of the door of interpretation." They did not mean discussions of the Qur'ān and *Sunnah* would cease. Rather, they meant the basic framework that made up the *Shari'a*, and the basic issues with which the *Shari'a* dealt, had been authoritatively defined. Thus, since this time the *Sunni* Muslim scholars have focused on explaining (1) the *Shari'a*, (2) the application of the *Shari'a* to the present, and (3) how the application of the *Shari'a* in the present relates to the application of the *Shari'a* in the past.

It is important to realize this process of codification has not stopped. It still is going on today. The codes of Islamic Law — the *Shari'a* — still are being produced, codes of what a Muslim is supposed to do, and what a Muslim is not supposed to do. These codes are very detailed and very broad in scope. The codes cover matters like how to engage in ritual purification, how to pray properly, and how to carry out the Five Pillars and other major obligations. In addition, the codes deal with the minor obligations, and they instruct as to how to strike a balance among obligations. They are based on 1,400 years of scholarship by the *ulema*, a tradition that continues to the present.

## § 12.06 COMPILATIONS OF HADĪTH

### [A] Question of Authenticity

The importance of authenticity in respect of an account of the sayings and deeds of a religious leader is not a question unique to Islam. Once the leader has passed away, efforts to collect his (or her) teachings are made, particularly if those teachings were wholly or partly through the spoken word. Rigor and scrutiny are required to ensure the teachings have been properly recorded and transmitted. After all, memories grow dim, and eyewitnesses die. Written compilation must accurately reflect what the leader said and did, and distortions must not be introduced with re-publications and translations through the ages. Otherwise, followers in subsequent generations may be led astray.

The critical issue, therefore, is: how is it known that what is written down is an accurate account of what a religious leader said and did, and thus a reliable basis on which to shape behavior? The question is familiar to Catholic Christianity. Saint Luke deals it at the start of his *Gospel*:

<sup>38</sup>Since many have undertaken to compile a narrative of the events that have been fulfilled among us, <sup>39</sup>just as those who were eyewitnesses from the beginning and ministers of the word have handed them down to us, <sup>40</sup>I too have decided, after investigating everything accurately anew, to write it down in an orderly sequence for you, most excellent Theophilus [literally, "friend of God"], <sup>41</sup>so that you may realize the certainty of the teachings you have received.<sup>38</sup>

In other words, the whole purpose for which Saint Luke writes is to provide:

Theophilus and others like him with certainty — assurance — about earlier instruction they have received (1, 4). To accomplish this purpose, Luke shows that the preaching and teachings of the representatives of the early church are grounded in the preaching and teaching of Jesus, who during his historical ministry (Acts, 1, 21-22) prepared his specially chosen followers and commissioned them to be witnesses to his resurrection and all else that he did (Acts 10, 37-42). This continuity between the historical ministry of Jesus and the ministry of the apostles is Luke's way of guaranteeing the fidelity of the church's teaching to the teaching of Jesus.<sup>39</sup>

Saint Luke uses the methodology of documenting continuity, in thorough and organized manner, to provide the necessary assurance of authenticity as to what Jesus said and did. He is a second- or third-generation Christian, and he acknowledges his debt to the testimony of eyewitnesses who came before him.<sup>40</sup> To be sure, it may be suggested that he, the writer, is accrediting his work. That is why corroborating evidence is important, namely, to verify and buttress his work. Such evidence, for Catholic Christians, is found (*inter alia*) in other passages of the Bible.

Islam, too, considers the question of authenticity in respect of what the Prophet Muhammad said, apart from his revelations set out in the Qur'ān. The phrase "apart from his revelations" refers to his non-prophetic utterances — what he did not repeat as a *rasūl* (messenger) directly from what the Archangel Gabriel conveyed to him from God (Allāh), but rather what he said and did as a leader of a religious movement. These sayings and doings are known as the "*Sunnah*" of the Prophet. The Arabic term "*Sunnah*" means "tradition." The traditions of the Prophet are compiled in multi-volume collections called the "*hadīth*" (singular), or "*hadīths*" or "*ahādīth*" (plural). The word "*hadīth*" refers both to the prophetic tradition of Muhammad, and to the collection of what he said and did, aside from what was revealed to him and is set out in the Qur'ān.

Note that there is an important sub-category of *hadīths* known as "*hadīth qudsi*." This term literally means "sacred *hadīth*." Muslims regard a *hadīth qudsi* as the Word of God (Allāh) repeated by the Prophet Muhammad, but in his (Muhammad's) own words. As repeated by the Prophet, the statement was recorded, transmitted through the process of *isnād*, and ultimately authenticated. Muslims believe Allāh revealed to the Prophet the *hadīth qudsi*, on some occasions through a dream. But, in contrast to a passage from the Qur'ān, a *hadīth qudsi* is not the direct word of Allāh. A loose and imperfect analogy might be that a *hadīth qudsi* is an accurate and close paraphrasing, but not an exact quote, of what God said to the Prophet. As such, it may well carry greater weight than a regular *hadīth*, but less weight than a Qur'ānic passage.

### [B] Isnād (Chain of Transmission)

For several centuries following the death of Muhammad in 632 A.D., Muslim religious scholars (*ulema*) worked tirelessly to collect the *hadīths*, and to check their accuracy. In his epic *The Decline and Fall of the Roman Empire* (1776),

<sup>38</sup> Introductory Note to *The Gospel According to Luke*, in BIBLE, *supra*, at 96 (emphasis added).

<sup>40</sup> See *The Gospel According to Luke*, in BIBLE, *supra*, fn. to 1, 1-4 at 97.

<sup>38</sup> *The Gospel According to Luke*, in BIBLE, *supra*, at 97 (emphasis added).



British historian and Member of Parliament Edward Gibbon (1737-1794) writes:

In all religions the life of the founder supplies the silence of his written revelation: the sayings of Mohammed were so many lessons of truth, his actions so many examples of virtue, and the public and private memorials were preserved by his wives and companions. At the end of two hundred years the *Sonna*, or oral law, was fixed and consecrated by the labours of Al Bochari [Imām Bukhārī], who discriminated seven thousand two hundred and seventy-five genuine traditions from a mass of three hundred thousand reports of a more doubtful or spurious character.<sup>41</sup>

However, the effort to collect the non-prophetic utterances of the Prophet began earlier than Gibbon intimates. Beginning under the Caliph Omar, Muhammad ibn Muslim ibn Shihab az-Zurhi (died 742), began to not only gather *ḥadīths*, but also created a standard for their authentication.<sup>42</sup>

"*Isnād*" is the "chain of transmission" for *ḥadīths*. In order to be considered authentic, a *ḥadīth* must be related back to the Prophet in a reliable manner. Az-Zurhi formulated a scale to grade the *ḥadīths* he collected. A *ḥadīth* may be distinguished according to whether it was "heard," "reported," "disclosed," "found," or recorded in other circumstances.<sup>43</sup> When recording a *ḥadīth*, it is recognized that the collector or transmitter (*raṣī*) of the information may edit the transmission itself (*riwayah*) for style. This explains why the same *ḥadīth* may be found in different collections with slight variations in the wording.<sup>44</sup>

Az-Zurhi died before he finished his collection *ḥadīth* for Caliph Omar, but he had students who continued his work and promulgated his methods. *Isnād* quickly became important for grading collections of *ḥadīths* and their sources. There are four such gradations, in descending order of authenticity:

- (1) *Mutawatir*, or *ṣaḥīḥ* — reliable because of high corroboration.
- (2) *Hasan* — good.
- (3) *Da'if* — weak.
- (4) *Mawdu'a* — fabricated.

These gradations are based on the number of people (*ruwat*) who transmit the *ḥadīth*, their reputation for accuracy and honesty, and the degree of consistency in the wording of the *ḥadīth* in different transmissions.

The highest rating for a *ḥadīth*, "*mutawatir*," means that particular *ḥadīth* is reported by many different sources. "*Mutawatir*" signifies the highest level of authenticity a *ḥadīth* can have. In effect, this denomination signifies the *ḥadīth* has been highly corroborated. Thus, a *ḥadīth* that is "*mutawatir*" also is known as

"*ṣaḥīḥ*," which means reliable. In contrast, "*hasan*" is good, and "*da'if*" is weak. "*Hasan*" connotes the second highest level of authenticity that a *ḥadīth* can have, meaning that the *ḥadīth* has been corroborated, but not as extensively as is the case with a *ḥadīth* that is "*ṣaḥīḥ*," and there are some discrepancies in the wording of the versions of the *ḥadīth*. The third highest levels of authenticity, *da'if*, signifies a *ḥadīth* that is weak. Such a *ḥadīth* is not widely corroborated, and contains some uncertainty or flaw, such as an interruption in the chain of transmission (*isnād*) or a transmitter in it (*raṣī*) is unknown. Finally, a *ḥadīth* considered "*mawdu'a*" is fabricated.<sup>45</sup> Indeed, it is not erroneous to call the statement a *ḥadīth*, because it is not accepted as and authentic, reliable utterance of Muhammad. Rather, it is fabricated, perhaps for reasons of politics, religion, or self-interest.

Even today, collections of *ḥadīths* are judged by their authenticity. The compilations of Al Bukhārī and Ṣaḥīḥ Muslim are now and were then considered to be two of the most accurate renditions of the words and deeds of the Prophet.<sup>46</sup> Their method of *isnād* is based on the recollections of the pious. Because it is unthinkable God-fearing men would lie about sacred matters, each person in the chain of transmission could vouch for the others. If, however, the *ḥadīth* was passed through a person of dubious integrity, the authenticity of the *ḥadīth* was called into question. Therefore, biographies of the Prophet's Companions were scrupulously researched as well.<sup>47</sup>

### [C] Summary and Evaluation of Ḥadīth Compilations

Beginning after the death of the Prophet (632), many different versions of *ḥadīth* were collected. The Islamic scholars of the time did not all agree on which *ḥadīth* were authentic. The "tightest," i.e., strictest, version was recorded by 'Isa'at. His tough standards for authenticity meant only 3,956 *ḥadīths* could be authenticated. On the other hand, Imām Hanbal lists 22,199 *ḥadīths*. Generally speaking, Bukhārī and Ṣaḥīḥ Muslim, are regarded as the most famous and reliable.

Imāms Bukhari and Muslim were also very strict on which *ḥadīth* they want to add to their collections. According to a report about Bukhārī:

I selected [the content of] this book — meaning the *Ṣaḥīḥ* book — from about 600,000 *ḥadīths*. Abu Sa'd al-Malini informed us that 'Abdullah Ibn 'Udayy informed us: I heard al-Hasan Ibn al-Husayn al-Bukhārī say: "I have not included in my book *al-Jami'* but what is authentic, and I left out among the authentic what I could not get hold of."<sup>48</sup>

Imām Muslim, also known for his selective collection, tried to focus only on clearly authenticated *ḥadīths*. He once said:

<sup>45</sup> See GLASSE, *supra*, at 160.

<sup>46</sup> See GLASSE, *supra*, at 160.

<sup>47</sup> See GLASSE, *supra*, at 160.

<sup>48</sup> Khalid al-Khazraji, Muhammad Ghoniem & M.S.M. Saifullah, On The Nature Of Hadith Collections Of Imam Al-Bukhari & Muslim, posted at [www.islamic-awareness.org/Hadith/bukhari.html](http://www.islamic-awareness.org/Hadith/bukhari.html) (emphasis added). [Hereinafter, KHAZRAJI.]

<sup>41</sup> EDWARD GIBBON, THE DECLINE AND FALL OF THE ROMAN EMPIRE 658 (1776) (New York, New York: Penguin Books, abridged version, 1980). [Hereinafter, GIBBON.] The 6 volumes of this work originally were published between 1776 and 1788.

<sup>42</sup> See GLASSE, *supra*, at 160.

<sup>43</sup> See GLASSE, *supra*, at 160.

<sup>44</sup> See GLASSE, *supra*, at 160.

I have not included in my present book anything but with proof [regarding authenticity], and I have not left out anything but with proof. . . . I did not include everything that I judge authentic (*ṣaḥīḥ*), I only included what received a unanimous agreement, i.e., what fulfilled all the criteria of authenticity agreed upon.<sup>49</sup>

Therefore, Muslim scholars consider Bukhārī and Muslim's collections as the most authenticated collections among all other *ḥadīth* collections. The selective work of both *Imāms* distinguishes them from other compilations.

Table 12-1 shows the most famous compilations, the Islamic scholars who compiled them, and the year(s) in which they lived. The Table also shows the number of acts and sayings of the Prophet in each *ḥadīth* compilation. Not all *ḥadīth* compilations contain the same number of acts and sayings. The listings are in chronological order.

Table 12-1:  
Compilations of *Ḥadīths*

Years	Compiler	Biography	Name of Compilation	Number of <i>Ḥadīth</i>
<i>Life of Compiler (A.D. and A.H.)</i>	<i>Name of Islamic Scholar Doing the Compilation</i>	<i>Brief Biographical Information about Compiler</i>	<i>Ḥadīth Title</i>	<i>Number of Sayings or Acts in the Compilation</i>
780-855 (164-241 A.H.)	Ahmed Ibn Ḥanbal	Ahmad bin Muhammad bin Hanbal Abu 'Abd Allah Al Shaybani. Born in Bagdad, famous Islamic scholar, founder of <i>Ḥanbalī</i> School.	Mosnad <i>Imām</i> Ahmed	22,199

Years	Compiler	Biography	Name of Compilation	Number of <i>Ḥadīth</i>
<i>Life of Compiler (A.D. and A.H.)</i>	<i>Name of Islamic Scholar Doing the Compilation</i>	<i>Brief Biographical Information about Compiler</i>	<i>Ḥadīth Title</i>	<i>Number of Sayings or Acts in the Compilation</i>
810-870 (194-256A.H.)	Muhammad Ibn Ismail Al Bukhārī	Muhammad Ibn Ismail Ibn Ibrahim Ibn Al Mughīrah Ibn Bardizbah Al Bukhari ( <i>Imām</i> Bukhārī). Born in Bukhara (Uzbekistan), raised by his mother who encouraged him to attend school and learn from scholars.	Saḥīḥ Bukhārī ( <i>Imām</i> Bukhārī)	7,275 <i>ḥadīths</i> total  2,712 non-duplicated <i>ḥadīths</i>
817-888 (202-275 A.H.)	Sulaiman Bin Al-Aash'ath Al-Azdi	Abu Dawood Sulayman ibn As-h'ath al-Azadi al-Sijistani. Born in Sijistan (Afghanistan), traveled extensively (Iraq, Egypt, Syria, Arabian Peninsula, Khurasan) to collect <i>ḥadīths</i> .	Sunan Abū Dawood	4,800
821-875 (206-261 A.H.)	Muslim Ibn Al-Hajjaj Al-Nisaburi	Abul Husayn Muslim ibn al-Hajjaj Qushayri al-Nishapuri. Born in Nishapure (Iran), son of local scholar, student of <i>Imām</i> Bukhārī, traveled through Arabian Peninsula, Egypt, Iraq, and Syria to collect <i>ḥadīths</i> .	Saḥīḥ Muslim ( <i>Imām</i> Muslim)	9,200

<sup>49</sup> See Khazraji, *supra* (emphasis added).



Years	Compiler	Biography	Name of Compilation <i>Ḥadīth Title</i>	Number of <i>Ḥadīth</i> <i>Number of Sayings or Acts in the Compilation</i>
<i>Life of Compiler (A.D. and A.H.)</i>	<i>Name of Islamic Scholar Doing the Compilation</i>	<i>Brief Biographical Information about Compiler</i>		
824-887 (209-273 A.H.)	Muhammad Ibn Yazid	Abū 'Abdillāh Muḥammad ibn Yazid Ibn Mājah al-Rab'i al-Qazwini (Ibn Majah). Born in Qazvin (Iran), traveled Islamic world to collect <i>ḥadīths</i> , returned to Qazvin and died there.	Sunan Ibn Majah	4,000
824-892 (209-279 A.H.)	Muhammad Ibn 'Isa'at	Abū 'Isā Muḥammad ibn 'Isā ibn Sawrah ibn Mūsā ibn al-Dahhāk al-Sulamī al-Tirmidhi. Born in Termez (Uzbekistan), studied under <i>Imāms</i> Bukhārī and Muslim.	Jami' Al-Tirmidhi, or  Sunan Al-Tirmidhi	3,956
830-915 (215-303 A.H.)	Ahmed Ibn Shu'aib	Aḥmad ibn Shu'ayb ibn Alī ibn Sinān Abū 'Abd ar-Rahmān al-Nasā'i. Born in Khorasan (Turkmenistan), lived in Egypt and then Damascus.	Sunan Al-Nisai	5,270 <i>ḥadīths</i> in small edition 11,770 <i>ḥadīths</i> in large edition

## Chapter 13

### SECONDARY SOURCES: *ĪJMA'* AND *QIYĀS*

I charged your judges at the time, "Listen to complaints among your kinsmen, and administer true justice to both parties even if one of them is an alien. In rendering judgment, do not consider who a person is; give ear to the lowly and the great alike, fearing no man, for judgment is God's."

DEUTERONOMY 1:16-17a

#### SYNOPSIS

#### § 13.01 *ĪJMA'* (CONSENSUS OF ISLAMIC SCHOLARS)

- [A] Definition
- [B] Historical Background
- [C] Modern Perspectives

#### § 13.02 *QIYĀS* (ANALOGICAL REASONING)

- [A] Definition
- [B] Historical Background
- [C] Modern Perspectives

#### § 13.03 DESIRABILITY: SCALE OF RELIGIOUS AND LEGAL QUALIFICATIONS (*AL AḤKĀM AL KHAMSA*)

#### § 13.04 VALIDITY: SCALE OF VALIDITY

#### § 13.05 RELATIONSHIP BETWEEN SCALES

#### § 13.01 *ĪJMA'* (CONSENSUS OF ISLAMIC SCHOLARS)

##### [A] Definition

*Ījma'* is the first of the four sources of Islamic law considered a dependent source.<sup>1</sup> If the Qur'ān or *Sunnah* do not directly address a question, legal professionals may turn to *ijma'* for the answer to that question. *Ījma'* means "consensus." If a rule or interpretation has been agreed upon, it becomes definite and binding law in Islamic jurisprudence, so long as it does not conflict with either

<sup>1</sup> C.G. WEERAMANTRY, *ISLAMIC JURISPRUDENCE — AN INTERNATIONAL PERSPECTIVE* 39 (1988) (Kuala Lumpur, Malaysia: The Other Press, 2001 ed.) (emphasis added). [Hereinafter, WEERAMANTRY] See generally JOHN MAKDISI, *ISLAMIC PROPERTY LAW* ch. 1F (Durham, North Carolina: Carolina Academic Press, 2005) (concerning consensus and precedent) [Hereinafter, MAKDISI.]

the Qur'an or *Sunnah*.<sup>2</sup> Thus, *ijma'* is a methodology or tool, that is, an intellectual process, the application of which produces a legal conclusion.

But, what amount of consensus is needed and from whom? Justice Weeramantry defines *ijma'* as:

[T]he general consensus among Islamic scholars of a particular age in relation to the legal rule correctly applicable to the situation.<sup>3</sup>

Professor Kamali requires the unanimous agreement of the *mujtahidun* of the Muslim community of any period following the death of the Prophet Mohammed on any matter for a proper consensus.<sup>4</sup> He writes:

*Ijma'* is defined as the unanimous agreement of the *mujtahidun* of the Muslim community of any period following the demise of the Prophet Muhammad on any matter. In this definition, the reference to the *mujtahidun* precludes the agreement of laymen from the purview of *ijma'*. Similarly, the phrase "the *mujtahidun* of any period," refers to period in which there exists a number of *mujtahidun* at the time an incident occurs. Hence it would be of no account if a *mujtahid* or a number of *mujtahidun* become available only after the occurrence of an incident. The reference in the definition to "any matter" implies that *ijma'* applies to all juridical (*shari'i*), intellectual (*'aqli*), customary (*'urfi*) and linguistic (*lughawi*) matters. . . . Some *ulema* have confined *ijma'* to religious and other to *shari'i* matters, but the majority of *ulema* do not restrict *ijma'* to either.<sup>5</sup>

These two definitions, from Justice Weeramantry and Professor Kamali, attribute important decisions to the educated legal elite, not the Muslim community (*ummah*).

Note the term "*mujtahidun*" (plural). A "*mujtahid*" (singular) is any educated Muslim competent to interpret Islamic Law in practical contexts, possibly through the use of *ijtihad* (independent reasoning), and arrive at rulings that are binding, but only on himself. What are the qualifications for becoming a "*mujtahid*"? One answer is:

The qualifications for a *mujtahid* were set out by Abū'l Husayn al-Basri (died 467 A.H./1083 C.E.) in "*al Mu'tamad fi Usul al-Fiqh*" and accepted by later *Sunni* scholars, including al-Ghazali. These qualifications can be summed up as (i) an understanding of the objectives of the *Shari'a* and (ii) a knowledge of its sources and methods of deduction. They include:

- A competence in the Arabic language which allows him to have a correct understanding of the Qur'an. That is, he must appreciate the subtleties of the language so as to be able to draw accurate

deductions from the "clear and un-crooked Arabic" of this infallible source, and that of the *sunnah*.

- An adequate knowledge of the Meccan and Medinese contents of the Qur'an, the events surrounding their revelation and the incidences of abrogation (suspending or repealing a ruling) revealed therein. He must be fully acquainted with its legal contents (the *ayat al-ahkam*) — some 500 verses, according to al-Ghazali. He need not have a detailed knowledge the narratives and parables, nor of the sections relating to the hereafter, but he must be able to use these to infer a legal rule. He needs to be acquainted with all the classical commentaries on the *ayat al-ahkam*, especially the views of the Companions of the Prophet [*Ṣaḥābah*].
- An adequate knowledge of the *sunnah*, especially those related to his specialisation. He needs to know the relative reliability of the narrators of the *hadith*, and be able to distinguish between the reliable from the weak. He needs to have a thorough knowledge of incidences of abrogation, distinguish between the general and specific, the absolute and the qualified. One estimate (by Ahmad ibn Hanbal) suggests that 400,000 *hadith* need to be known.
- He should be able to verify the consensus *ijma'* of the Companions of the Prophet, the successors and the leading *imāms* and *mujtahideen* of the past, especially with regard to his specialization. Complementary to this, he should be familiar with the issues on which there is no consensus.
- He should have a thorough knowledge of the rules and procedures for reasoning by analogy (*qiyās*) so he can apply revealed law to an unprecedented case.
- He should understand the revealed purposes of [the] *Shari'a*, which relate to "considerations of public interest," including the Five Pillars protection of "life, religion, intellect, lineage" and property. He should also understand the general maxims for the interpretation of *Shari'a*, which include the "removal of hardship," that "certainty must prevail over doubt," and the achievement of a balance between unnecessary rigidity and too free an interpretation.
- He must practice what he preaches, that is he must be an upright person whose judgment people can trust.<sup>6</sup>

There is a distinction between the terms "*mujtahidun*" and "*fukahā*" (or "*mujtahid*" and "*faqih*," singular). But, it is subtle and not entirely clear-cut. "*Fukahā*" refers to Islamic jurists, which suggests this class of persons have had formal training in the *Shari'a*. They would all qualify as "*mujtahidun*," but they are more than that because of their training. The converse would not be true — not all "*mujtahidun*" would qualify as "*fukahā*." A loose analogy might be between an American lawyer, who holds a *Juris Doctor* (J.D.) degree and is licensed by a state

<sup>2</sup> Weeramantry, *supra*, at 39.

<sup>3</sup> Weeramantry, *supra*, at 39.

<sup>4</sup> Mohammad Hashim Kamali, *PRINCIPLES OF ISLAMIC JURISPRUDENCE* 230 (1989) (Cambridge, England: The Islamic Texts Society, 2003). [Hereinafter, Kamali]

<sup>5</sup> Kamali, *supra*, at 231 (emphasis added).

<sup>6</sup> *Ijtihad*, WIKIPEDIA, posted at <http://en.wikipedia.org/wiki/Ijtihad>.



bar, and an educated American who is knowledgeable about the law, but neither holds a J.D. degree nor has passed a bar exam.

Arguments are made that *ijma'* is not binding unless the entire Muslim community agrees to a particular interpretation after extensive discussion.<sup>7</sup> After Islam began to spread, true community discussion became more difficult to achieve, making universal consensus nigh impossible. *Ījma'* may still develop regionally or by School, but it may not be considered immutable until it is accepted by the entire Muslim community.<sup>8</sup> Only topics that are universally accepted cannot be subject to error.<sup>9</sup>

The manner of acceptance may differ depending on the issue at hand. *Ījma'* may be accepted actively by verbal consensus or action, or passively by staying silent and failing to object.<sup>10</sup> Establishing *ijma'* for transactional matters may be easier than for issues concerning proper worship.<sup>11</sup> For example, consensus for an acceptable business transaction may be manifest through silence, whereas the cleanliness of the body for prayer requires actual discussion before a final decision can be reached.<sup>12</sup>

The need for true consensus, rather than majority rule, is a notable feature of *ijma'*. Getting most *ulema* to agree on a particular interpretation is not enough to make it binding; everyone must agree.<sup>13</sup> This need stems from an innate distrust of the individual, and faith that good decisions will be made on behalf of the *ummah*. This notion is based on a *ḥadīth* of the Prophet: "My nation will not unanimously agree in error."<sup>14</sup>

If *ijma'* is determined by a consensus of legal scholars (*ulema* or *mujtahidun*?), several elements must be present when the issue arises. First, there must be a number of *mujtahidun* at that time (in order for there to be a plurality for a consensus). Next, there must be unanimity among the *mujtahidun* no matter where they are or who they are. Third, the consent must be expressly given. Finally, there must be complete agreement; majority voting is not enough.<sup>15</sup>

The *mujtahidun* who give their consent must meet certain standards. First, they must be in good moral standing, evidenced by their ability to give testimony in open court. Second, the *mujtahidun* must be Muslim. Third, the *mujtahidun* must be

qualified to make an informed decision on the issue at hand, especially if it is a specialized one.<sup>16</sup>

Once the scholars reach a consensus, the *ijma'* becomes binding on the entire Muslim community. Later *mujtahidun* cannot break the *ijma'* once it is formed. It would take the consensus of the entire body of *mujtahidun* to override *ijma'* of the past.<sup>17</sup>

The Four *Sunni* Schools recognize *ijma'* as a legitimate source of law, but not all equally so, and they vary in their use of the doctrine. The *Hanafi* School uses *ijma'* to achieve equity in disputes and accept the consensus of jurists of any age. The *Māliki* School premises its interpretation on the public interest and accepts only the *ijma'* of scholars from Medina. The *Shāfi'i* School is open, recognizing *qiyās* that has been accepted as a form of *ijma'*. Finally, the *Hanbali* School holds the narrowest view, acknowledge only the *ijma'* of the Companions of the Prophet (*Ṣaḥābah*).<sup>18</sup>

## [B] Historical Background

*Ījma'* only became necessary after the death of the Prophet. While Mohammed lived, any problems concerning the interpretation of the Will of God (Allāh) could be brought to him. Ultimately, failure to achieve consensus may have fueled the *Sunni* — *Shī'ite* schism when Abū Bakr was chosen to succeed Mohammed instead of 'Alī before a discussion could be held among all of Mohammed's Companions.

Michael Mumisa identifies four phases of *ijma'* development. Each one presupposes the consensus needed comes from an elite group, not the *ummah*. By examining history, Mumisa categorizes the need for interpretation and accumulation of legitimate power through the spread of Islam into distinct stages.<sup>19</sup>

First, immediately after Mohammed's death, the Companions become the authority for interpretation. Because they lived with Mohammed and learned directly from him, *ijma'* of the Companions (*ijma' al-shābah*) is seen by some as a superior interpretation in relation to *ijma'* from later scholars who may not be able to divine the 'illa of the rule as readily.<sup>20</sup> The emphasis on proximity to the Prophet led the *Māliki* School to regard the *ijma'* of the Companions as the only infallible source of *ijma'*.<sup>21</sup>

A generation later, *ijma' al-tabi'in*, consensus of the successors, still was relatively close in time to the Prophet. But, the scholars residing in Medina with Mohammed and the *Ṣaḥābah* began to disperse, and render their own

<sup>7</sup> MICHAEL MUMISA, *ISLAMIC LAW — THEORY AND INTERPRETATION* 84 (Beltsville, Maryland: Amana Publications, 2002). [Hereinafter, Mumisa]

<sup>8</sup> Mumisa, *supra*, at 86.

<sup>9</sup> JOSEPH SCHACHT, *AN INTRODUCTION TO ISLAMIC LAW* 30 (1964 Oxford, UK: Clarendon Paperbacks, 1982 ed.). [Hereinafter, Schacht]

<sup>10</sup> Mumisa, *supra*, at 84.

<sup>11</sup> Mumisa, *supra*, at 84.

<sup>12</sup> Mumisa, *supra*, at 84.

<sup>13</sup> WEERAMANTHY, *supra*, at 39.

<sup>14</sup> WEERAMANTHY, *supra*, at 39. See also *Ijma*, WIKIPEDIA, posted at <http://en.wikipedia.org/wiki/Ijma> (quoting this *ḥadīth* as: "My community will never agree upon an error").

<sup>15</sup> Kamali, *supra*, at 233.

<sup>16</sup> Kamali, *supra*, at 234.

<sup>17</sup> Kamali, *supra*, at 235.

<sup>18</sup> WEERAMANTHY, *supra*, at 39.

<sup>19</sup> Mumisa, *supra*, at 79.

<sup>20</sup> Mumisa, *supra*, at 79.

<sup>21</sup> WEERAMANTHY, *supra*, at 39.

interpretations. The dispersal of the *ulema* meant *bona fide*, universal consensus gained through discussion became all but impossible.<sup>22</sup> Notably, it is possible again through modern communications technologies, like the internet. Moreover, with the scholars scattered geographically, *ijtihād* became necessary, despite being unpalatable.

By this time, the Four Schools began to gather followers and cement philosophies. The Schools do not share the same perspective on what to do about the waning consensus and rise of *ijtihād*. *Imām* Mālik favored the *ijma'* of the original scholars of Medina, whereas *Imām* Hanifa preferred the consensus of the scholars at the Ancient School of Kufah (Iraq). Taking the strictest route, *Imām* Hanbal accepted *ijma'* only from the *Ṣaḥābah* and *Rashidun* Era.<sup>23</sup>

Finally, Mumisa argues Islamic law passed into the phase of *taklīd*, or blind following of the Four Schools. *Īma'*, he says, is accepted as a source of law during this period, instead of being seen as a tool of mere interpretation. Relying on the principle that the Muslim community cannot agree in error, a true consensus must be right.<sup>24</sup>

### [C] Modern Perspectives

*Īma'* in the modern world can be used to develop Islamic law to meet the needs of the rapidly changing world. Its very nature allows it to adapt ancient interpretations and apply them to current events. Because it is not the Word of God or his Prophet it is variable so long as it holds with the concepts embodied in the Qur'ān and *Sunnah*. *Īma'* is able to evolve where fixed, un-amendable text cannot. A consensus of scholars may change the way the holy text is interpreted if they have a very good reason to do it.<sup>25</sup>

While *ijma'* has the power to move the *Shari'a* forward, it also has the capacity to hold it back. Part of its legitimacy is based on the consensus of the Companions of Prophet (*Ṣaḥābah*). In that sense, *ijma'* is tradition. It is consensus on how things have been done since the time of Mohammed. Conservatives hold to the notion that past interpretations remain valid simply because they have stood for so long. Under this view, *ijma'* can be a force of stagnation, rather than evolution.<sup>26</sup>

Notably, the idea of consensus is not unique to Islamic law. In fact, it is a recognized component legal decision making on the grandest scale. Article 38 (1) of the Statute of the International Court of Justice (ICJ) lists the materials the court may use to render its judgments. Treaties and other written and signed international contracts are first in the hierarchy, but customary international law, "as evidenced of a general practice accepted as law," follows closely behind.<sup>27</sup>

<sup>22</sup> MUMISA, *supra*, at 79.

<sup>23</sup> MUMISA, *supra*, at 80.

<sup>24</sup> MUMISA, *supra*, at 80.

<sup>25</sup> SCHRAGT, *supra*, at 30.

<sup>26</sup> KARALI, *supra*, at 232.

<sup>27</sup> ICJ Statute, Article 38(1), posted at [www.icj-cij.org](http://www.icj-cij.org).

Customary international law may be ascertained by affirmation, when a nation adopts a national statute concerning the treatment of foreign nationals, or passively, indicated by how a nation typically treats foreign nationals, for example. This process is similar to the acceptance of *ijma'* by Islamic scholars verbally, by their actions, or by their silence. Note, however, that while international customary law is very influential and highly probative upon the ICJ, it, unlike *ijma'* on Islamic courts, is not binding.

Like customary international law, *ijma'* can be hard to pin-point, and even once it is identified, hard to find. *Īma'* is not a statute that is codified in a library in Medina, it is the practice and the common, consistent application of Islamic norms to problems. Evidence of *ijma'* is found in rulings and possibly rationales of some courts, much like American case law. However, that is still merely evidence that *ijma'* exists, not the *ijma'* itself. For non-*Shari'a* trained practitioners, *ijma'* is best gleaned through treatises on a particular subject matter. Islamic scholars who have authored these treatises are part of a long history of legal philosophy, and their intellectual exercises have been of high value.

### § 13.02 QIYĀS (ANALOGICAL REASONING)

#### [A] Definition

The fourth and final universally accepted source of law in Islamic jurisprudence is *qiyās*. "*Qiyās*" literally means "measurement" in Arabic.<sup>28</sup> It is the practice of "measuring" a rule given in the Qur'ān or *Sunnah* and applying it analogically to new, yet similar, set of facts. Like *ijma'*, it is a dependent source of law, casting back to the higher authority of the Qur'ān or *Sunnah* for its own legitimacy.<sup>29</sup> *Qiyās* may be used if all other sources of law fail to speak directly to a particular legal issue.<sup>30</sup> Also like *ijma'* *qiyās* is a methodology or tool, i.e., an intellectual process, the application of which produces a legal result.

*Qiyās* is said to be a tool used to compare cases and reach logical conclusions.<sup>31</sup> In this way, *qiyās* does not create law — the law already exists — but it is a useful tool to interpret that law.<sup>32</sup> Analogical reasoning relies on two kinds of similarities between cases. The original case must be factually similar to the new situation. The legal reasoning (*'illa*) underlying each must also correspond.<sup>33</sup> Thus, the *'illa* of the original case must be determined before *qiyās* may be applied.<sup>34</sup>

<sup>28</sup> MAWLEZZI DIEN, *ISLAMIC LAW: FROM HISTORICAL FOUNDATIONS TO CONTEMPORARY PRACTICE* 51 (Notre Dame, Indiana: University of Notre Dame Press, 2004). (Hereinafter, DIEN)

<sup>29</sup> See DIEN, *supra*, at 52. See generally MAKHSHI, *supra*, ch. LC-D (concerning reasoning by analogy and distinction).

<sup>30</sup> See WEERAMANTRY, *supra*, at 40.

<sup>31</sup> See DIEN, *supra*, at 51.

<sup>32</sup> See DIEN, *supra*, at 53.

<sup>33</sup> See DIEN, *supra*, at 53.

<sup>34</sup> See DIEN, *supra*, at 53.



'*illa*, the legal rationale behind a rule or injunction, is crucial to understanding and applying *qiyās* correctly. There are four steps for the identification and use of '*illa* in any given situation. First, there must be a clear attribute in the initial case, such as the prohibition on wine from grapes is for the prevention of intoxication. Second, the rationale must be ascertainable, i.e., it needs to be precise and invariable for individual situations. For example, intoxication is bad because it negatively affects the human mind no matter who you are or how intoxicated you become. Therefore, any sort of intoxicating beverage is bad.<sup>35</sup>

Third, the '*illa* must be commensurate to the injunction, meaning that the goal (prevention of intoxication) will be achieved through the imposition of the rule (ban on alcoholic beverages). Fourth, the legal rationale must be extendable to the new situation — a ban on all alcoholic beverages, not just wine made from grapes.<sup>36</sup> This last step is important because the broad injunction can only occur if the specifics of the initial case are not important to the rule.<sup>37</sup> If the '*illa* banning the drinking of wine from grapes was due to grapes being bad, not intoxication being bad, a ban on all alcoholic beverages could not be gleaned from this case.

In practice, it is individual reasoning directed at achieving systematic consistency and guided by precedent.<sup>38</sup> The individual doing the reasoning matters. Only a *mujtahid* (and educated Muslim competent to understand and apply the *Shari'a*) may issue valid decisions.<sup>39</sup> Such a decision binds the participants and may be relied on by later *mujtahid*. However, a decision based on *qiyās* is not binding on anyone else until it is accepted by the community at large as *ijma'*.<sup>40</sup> Conversely, *qiyās* may be a good method to discover the best practical application of *ijma'*.<sup>41</sup> *Qiyās* based solely on *ijma'* may not be water tight as *ijma'* is not law from God, but law from man and therefore may be disputed.<sup>42</sup>

## [B] Historical Background

The practice of *qiyās* became necessary shortly after the death of the Prophet. The Companions used it themselves.<sup>43</sup> The Caliph 'Umar, second of the *Rashidun*, validated analogical reasoning to solve new problems.<sup>44</sup> Reportedly, he gave the direction:

know the similarities and weigh the cases against them using analogical reasoning.<sup>45</sup>

<sup>35</sup> See DIEN, *supra*, at 55.

<sup>36</sup> See DIEN, *supra*, at 55.

<sup>37</sup> See DIEN, *supra*, at 55.

<sup>38</sup> See SCHACHT, *supra*, at 37.

<sup>39</sup> See WEERAMANTHY, *supra*, at 40.

<sup>40</sup> See MUMBA, *supra*, at 92.

<sup>41</sup> See MUMBA, *supra*, at 92.

<sup>42</sup> See DIEN, *supra*, at 53.

<sup>43</sup> See MUMBA, *supra*, at 95.

<sup>44</sup> See MUMBA, *supra*, at 96.

<sup>45</sup> MUMBA, *supra*, at 96.

Nevertheless, since that time, the validity of *qiyās* has been questioned by many critics.

*Qiyās* is accepted as a valid source of law by all Four *Sunni* Schools,<sup>46</sup> though the degree to which each uses and restricts it differs.<sup>47</sup> The inclusion of *qiyās* among the four sources of law was not without controversy. And, while it may be included, it is subject to very tough restrictions.<sup>48</sup>

The *Hanafi* School uses the most liberal approach to *qiyās* that is not based on strict analogy. Rather, *qiyās* is an "extension of the law from the original text to which the process is applied to a particular case by means of a common '*illa* (legal reasoning) which cannot be found by mere interpretation of the language of the text."<sup>49</sup> Followers of the Maliki school regard *qiyās* as "the accord of a deduction with the original text in respect of the '*illa* or effective cause of its law."<sup>50</sup> Here, the requirements are heightened in that the new case must have similar facts and causes in order for *qiyās* to apply.

The *Shāfi'i* School considers *qiyās* as "the accord of a known thing with a known thing by reason of the equality of the one with the other in respect of the effective cause of its law."<sup>51</sup> This definition equates *qiyās* to *ijtihād*.<sup>52</sup> *Imām* Shāfi'i may be responsible for the recognition of *qiyās* as a separate source of law. His philosophy is that every order from God has a reason behind it and *qiyās* seeks to apply that reason to similar situations.<sup>53</sup> However, he was very careful to impose strict logical bounds on this new tool. *Qiyās* may only be triggered by similar facts or issues under very refined logical rules. He was careful to prohibit teleological reasoning from the practice of *qiyās*. Only God may know the reasons behind the rule, and it is up to man to obey those rules, not to seek to ask why they are imposed.<sup>54</sup>

Finally, the *Hanbali* School was the last to accept *qiyās* into the fold. *Imām* Hanbal tried to take a very strict Traditionist path in his interpretation of the law and the problems it sought to solve. Using just the Qur'an and *Sunnah* of the Prophet worked for a while, but was ultimately unsatisfactory and the *Hanbalis* were forced to adopt their own form of *qiyās*.<sup>55</sup> The language of the primary sources is read very strictly and the '*illa* is very narrow. Conclusions made through *qiyās* should be supported in some way by text that is closer to the source than today's modern scholars. Even weak *hadiths* are preferred as support than purely individual rationale.<sup>56</sup>

<sup>46</sup> See MUMBA, *supra*, at 93.

<sup>47</sup> See SCHACHT, *supra*, at 60.

<sup>48</sup> See SCHACHT, *supra*, at 60.

<sup>49</sup> MUMBA, *supra*, at 94.

<sup>50</sup> MUMBA, *supra*, at 94.

<sup>51</sup> MUMBA, *supra*, at 94.

<sup>52</sup> See DIEN, *supra*, at 56.

<sup>53</sup> See DIEN, *supra*, at 52.

<sup>54</sup> See WEERAMANTHY, *supra*, at 53.

<sup>55</sup> See SCHACHT, *supra*, at 63.

<sup>56</sup> See MUMBA, *supra*, at 96.

### [C] Modern Perspectives

*Qiyās*, like *ijma'*, may be used as a tool to deal with problems facing the modern Islamic world. It can be used as a practical tool to handle issues brought on by technological advance and globalization. Whereas it may take years to develop a clear consensus in any particular school, *qiyās* can be applied on a case-by-case basis and the reasoning may be adopted or amended as necessary depending on the facts of each case. For example, *qiyās* has allowed the practice of *hiyal* (legal fictions) to be used to circumvent prohibitions on modern financial practices.<sup>57</sup>

Individual schools are using other rationales to adapt a strict analogical approach to *qiyās*. The *Hanbali* School uses *istihsān* (juristic preference, approval, that is, discretionary reasoning not based strictly on *qiyās*) to mitigate the harshness of strict *qiyās* when questions of equity arise.<sup>58</sup> The *Hanafi* School employs *qiyās* to meet the demands of the modern world when addressing new issues like technological advances in transportation and communication.<sup>59</sup> While the *Shāfi'i* School promulgated the idea of *qiyās*, they recognize that it can be truth to the one applying it, but not to the larger legal scholar community at large.<sup>60</sup> Therefore, it can be used to start a movement to make an interpretation *ijma'*, but is not binding on others until then.

While *qiyās* may be used to move Islamic society forward locally and globally, it may also be used as a tool for individual, personal gain, or lead to stagnation for society overall. Traditional *qiyās* requires both textual specificity and rational basis for the application of a rule or injunction.<sup>61</sup> The addition of *maṣlaḥah* (public interest) as a valid *'illa* could be the basis for a greater emphasis on human rights and individual equity. However, if *maṣlaḥah* is allowed into the *qiyās* decision making process, it could be hijacked by a corrupt government and passed off to the people as legitimate.<sup>62</sup>

### § 13.03 DESIRABILITY: SCALE OF RELIGIOUS AND LEGAL QUALIFICATIONS (*AL AḤKĀM AL KHAMSA*)

When can an act or omission be deemed desirable? That is, when is an act or omission required or not, or forbidden or not? To the American legal mind, the answer is in a binary paradigm: either an act or omission is desirable or undesirable, required or voluntary, forbidden or permitted. To the Islamic legal mind, this paradigm is too simplistic. It is too legalistic and discounts the importance of religious considerations.

<sup>57</sup> See WEERAMANTRY, *supra*, at 40.

<sup>58</sup> See WEERAMANTRY, *supra*, at 28.

<sup>59</sup> See DIEN, *supra*, at 56.

<sup>60</sup> See DIEN, *supra*, at 56.

<sup>61</sup> See DIEN, *supra*, at 54.

<sup>62</sup> See DIEN, *supra*, at 55.

The paradigm in Islamic jurisprudence (*fiqh*) as to desirability is a continuum.<sup>63</sup> This continuum is known in Arabic as *Al Aḥkām Al Khamṣa*, or the Scale of Five Qualifications. (*Al Aḥkām* means "provisions," "qualifications," or "sanctions," and "*Al Khamṣa*" means "five.") More fully, it is the Scale of Five Legal and Religious Qualifications. It is a theoretical continuum with enormous practical importance. The Scale appears to have been derived from Greek Stoic philosophy.<sup>64</sup> In the early days of the *Sharī'a*, there were non-Arab converts to Islam who were familiar with Greek Rhetoric and, therefore, acquainted with law and trained in oratory. Many of them lived in the Fertile Crescent, which Arab Muslims had conquered and assimilated into the great Arab-Islamic Empire. These non-Arab Muslim converts likely imported a similar kind of jurisprudential scale from Ancient Greek Stoicism and Islamicized it.

Whatever its origin, the *Al Aḥkām Al Khamṣa* is perhaps the single best example of the inextricability of law and religion in Islam, as Professor Schacht explains:

The central feature that makes Islamic religious law what it is, that guarantees its unity in all its diversity, is the assessing of all human acts and relationships, including those which we call legal, from the point of view of the concepts of obligatory / recommended / indifferent / reprehensible / forbidden. Law proper has been thoroughly incorporated in the system of religious duties. . . .<sup>65</sup>

Thus, in the Five Qualifications the fundamental character of Islamic Law as a sacred legal system is obvious, because this Scale incorporates religious duties.

Diagram 13-1 presents the *Al Aḥkām Al Khamṣa*. It is a sliding scale, or continuum. It has five points, making it more subtle than the American scale of justice with two sides. In Islamic *fiqh*, all actions or omissions may be put into one of the five categories of *aḥkām*. That is, the desirability of any past, present, or potential future act or omission is evaluated according to whether it is in one of the following five categories.<sup>66</sup> The act or omission could involve a matter of public legal behavior, such as negotiating and concluding a contract. As Professor Schacht puts it, "the legal subject-matter is subjected to religious scrutiny."<sup>67</sup> Or, the act or omission could pertain to a private religious matter, such as prayer and worship.

Overall, the evaluation is from both a legal and religious perspective. Both Muslim religious and legal scholars (*ulema* and *fukahā'*, respectively) are the evaluators. Thus, the *Al Aḥkām Al Khamṣa* is not strictly legal or religious. It is both, because of the subject matter to which it applies, and because of the scholars engaged in its application. Not surprisingly, in practice, applying the *Al Aḥkām Al Khamṣa*, requires recourse to all the sources of Islamic Law: *Qur'ān*, *Sunnah*, *ijma'*, and *qiyās*:

<sup>63</sup> See generally MAKDISI, *supra*, ch. 1.G (concerning legal terminology).

<sup>64</sup> See SCHACHT, *supra*, at 20.

<sup>65</sup> SCHACHT, *supra*, at 200.

<sup>66</sup> See SCHACHT, *supra*, at 121.

<sup>67</sup> SCHACHT, *supra*, at 122.



(1) *Ḥarām* (forbidden) —

*Ḥarām* acts are forbidden — that is, strictly prohibited. Technically, all other acts or omissions on the continuum are permissible, or “*ḥalāl*,” in the sense that they are not forbidden. The quintessential examples of *ḥarām* acts are consuming alcohol, pork, or pork products, and viewing pornography. However, in extreme (and largely theoretical) cases of necessity (*ḍarūrāh*), even certain *ḥarām* acts may become *ḥalāl*, but by no means recommended (*mandub*) much less obligatory (*wājib*), such as where only alcohol is available to stave off death or serious injury from dehydration.

During the *Umayyad* Caliphate, Traditionists emphasized the importance of relying on authentic words and deeds of the Prophet (*Sunnah*). Part of the Traditionist project was to identify, define, and elaborate, based on the *Sunnah*, “forbidden” (*ḥarām*) behaviors.

(2) *Makrūh* (reprehensible) —

An act or omission that is reprehensible, or *makrūh*, is not strictly prohibited. But, from a religious or legal standpoint, it is strongly discouraged.

(3) *Mubāh* (neutral, or permissible) —

An act or omission that is “*mubāh*” is one that is not objectionable. The religious and legal standpoint is one of indifference. Accordingly, the action is permitted, or allowed — “*jā’iz*.” The term “*jā’iz*” encompasses every act or omission that, “does not provoke a religious objection.”<sup>68</sup>

(4) *Mandub* or *Mustahabb* (recommended) —

A recommended act or omission sometimes is called “*sunnah*,” but this word is not used in the sense of the “*Sunnah* of the Prophet” or “*Sunnah* of the First Islamic Community.” That is, “*sunnah*” in this context is not referring to a source of law; rather, merely the permissibility of a proposed course. “*Mandub*” or “*mustahabb*,” then, are perhaps less confusing expressions.

For example, in Islamic Criminal Law, the next of kin of a murder victim has the right to take retaliation against the murderer. However, it is recommended that he waive this right, and instead accept payment of blood money (*diyyah*). As another example, in Islamic Inheritance Law, it is recommended, but not required, that heirs of a deceased person pay off the debts of the decedent.

(5) *Wājib* or *Farḍ* (obligatory) —

Some duties are obligatory for an individual, such as daily prayer (*ṣalah*) or the *Ramaḍān* fast. Other acts are required for the larger community, such as a funeral prayer or holy war (*jihād*).

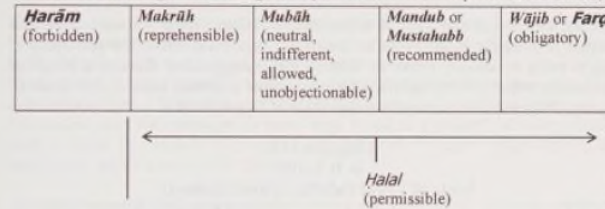
Can the same act or omission appear in more than one category on the continuum? Yes and no. From a strictly religious perspective, an act or omission can

<sup>68</sup> See SCHACHT, *supra*, at 122.

fit within only one category. That also is true from a strictly legal perspective. Perhaps in theory the two appraisals need not always produce the same classification. For example, an act could be considered *makrūh* from a religious perspective, but *mubāh* from a legal perspective. In practice, though, the religious and legal analyses are integrated together, and they yield one “bottom line” result: a single classification on this Scale. However, different *Sunni* Schools can and do differ on that bottom line, and there also can be majority and minority views within a single School.

Diagram 13-1:  
Is It Desirable?

Scale of Five Legal and Religious Qualifications (*Al Ahkām Al Khamsa*)



Manifestly, the *Al Ahkām Al Khamsa* is two scales in one: it is a gauge using religious criteria, familiar to the *ulema*, and a gauge using legal criteria, familiar to the *fukahā*. The religious dimension of the scale is somewhat theoretical, whereas the legal dimension is practical. Indeed, evaluation of an act or omission from a legal perspective focuses on legal validity, or *mashrū*’ (recognized by law).

## § 13.04 VALIDITY: SCALE OF VALIDITY

When can an act or omission be deemed legally valid? To the American legal mind, the answer is in a binary paradigm: either an act or omission is legally valid, in which case it has legal effect, or it is legally invalid, in which case it has no legal effect. To the Islamic legal mind, this paradigm is too simplistic, too legalistic, and not imbued with religious overtones.

How do Islamic legal scholars decide whether a transaction is valid under the *Shari’a*, and thus deem it legally valid (*mashrū*’)? They dissect the transaction into two constituent parts:<sup>69</sup>

(1) *Aṣl* (nature):

“*Aṣl*” refers to the nature of a transaction, *i.e.*, the essential element or elements of the transaction, or the act or actions, or omission or omissions, which make up a transaction. For example, daily prayer (*ṣalah*) consists of a series of physical

<sup>69</sup> See SCHACHT, *supra*, at 118.

movements (*ruk'ah*), involving standing, bowing, prostrating, and standing up again, along with reading a Qur'anic passage while standing.

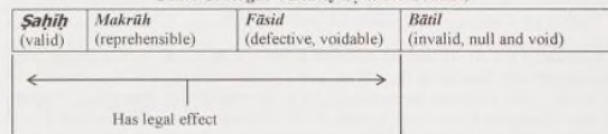
## (2) *Waşf* (circumstances):

"*Waşf*" refers to the circumstances of a transaction, i.e., the conditions implied in the nature of the transaction, or intimately connected with it. They are conditions that must exist if a transaction is to be legally valid. A condition, prerequisite, or stipulation for legal validity is called *şarṭ* (plural, *şhārṭ*).

For example, for prayer, a Muslim must have purified herself through ablutions, and face in the direction of the *Ka'ba*. The ablutions and orientation are the circumstances under which the prayer is offered.

Based on the *aşl* and *waşf* of a transaction, Islamic legal scholars determine whether it is legally valid. From an American legal perspective, the possibility is binary: valid, or invalid. From an Islamic legal perspective, there is a range of possibilities with four key points, which generates a second scale — the Scale of Validity. Diagram 13-2 summarizes the Scale of Legal Validity.

Diagram 13-2:  
Is It Valid?  
Scale of Legal Validity (*Ḥanafī* School)



As with the *Al Ahkām Al Khamsa* and the issue of desirability, the Scale of Validity contains no clear separation between legal and religious matter. The Scale of Validity is an admixture of law and religion, thus illustrating their inseparability in the *Shari'a*. The subject matter to which the Scale of Validity applies may be public legal behavior, like contracting, or personal religious behavior, like prayer. Scholars involved in ascertaining legal effect may be *ulema* or *fukahā'*, and taken into account legal or religious considerations, or both. As with the *Al Ahkām Al Khamsa*, the Scale of Validity requires recourse to all the sources of Islamic Law: Qur'ān, *Sunnah*, *ijma'*, and *qiyās*.

## (1) *Şahih* (valid) —

If both the *aşl* and *waşf* of a transaction are consistent with the *Shari'a*, then the transaction is *şahih*, or legally valid. That is, the transaction has legal effect, is operative, and creates binding rights and obligations.

## (2) *Makrūh* (reprehensible) —

From a legal perspective, a transaction may be reprehensible, or disapproved. Note the term *makrūh* is used in this sense, as well as in the religious context in the Scale

of Five Qualifications. Suppose from a legal perspective, both the nature and circumstances of a transaction comport with the *Shari'a*. But, from a religious perspective, the transaction is *harām*. From a legal perspective, the forbidden religious association renders the transaction *makrūh*, i.e., the transaction is strongly discouraged from a legal perspective, because it is forbidden from a religious viewpoint. But, from the strictly legal perspective, because its nature and circumstances are valid, the transaction has legal effect. By some accounts, *makrūh* is not a separate point on the continuum of the Scale of Validity, and exists only on the Scale of Five Qualifications, because a transaction that is considered reprehensible on the latter Scale still has legal effect on the former Scale.

## (3) *Fāsid* (defective, voidable) —

The *aşl* of a particular transaction may correspond with Islamic Law, but the *waşf* may be inconsistent with it, or vice versa. Such transactions are defective, or *fāsid*. A *fāsid* transaction is not legally invalid. However, the transaction is voidable.<sup>70</sup> Thus, a *fāsid* contract would be legally effective, but voidable at the discretion of the appropriate party. Moreover, depending on the defect, the legal effect of the transaction may be restricted in some way. *Fāsid* is a concept of categorization distinct from the Islamic Contract Law rights of rescission, cancellation, and ratification within a stipulated time.

## (4) *Bātil* (invalid, null and void) —

A transaction is *bātil*, or invalid, i.e., it has no legal effect and is null and void, if neither its *aşl* nor *waşf* is consistent with Islamic legal principles. During the *Umayyad* Caliphate, along with highlighting transactions that are *harām*, Traditionists sought to define and elaborate what might cause a transaction to be invalid, and thereby identify invalid transactions.

An important caveat about the Scale of Validity concerns a distinction among the Four *Sunni* Schools on the points. Only the *Ḥanafī* School distinguishes between *fāsid* and *bātil*. The *Māliki*, *Şāfi'i*, and *Hanbali* Schools do not treat *fāsid* and *bātil* as separate categories. For them, both categories connote a transaction is null and void.

# § 13.05 RELATIONSHIP BETWEEN SCALES

An obvious question is how the Scale of Five Qualifications relates to the Scale of Validity. The short answer is the two Scales are related, and overlap. The legal and religious analyses they entail are performed simultaneously or contemporaneously to the same fact pattern. Thus, the analyses are blended together: they entail "[t]he fusion of valid and invalid [legal concepts] with allowed and forbidden, respectively [religious concepts]."<sup>71</sup> They both pertain to legal and religious matters, and involve legal and religious considerations, as applied by legal and religious experts. They address different but connected questions: is the behavior desirable (the first scale),

<sup>70</sup> See SCHACHT, *supra*, at 121.

<sup>71</sup> SCHACHT, *supra*, at 122.



and is the behavior valid (the second scale)?

Of course, to the American legal mind, these questions are not connected. Whether a behavior is desirable triggers more of a moral or religious analysis than a legal review, for priests and philosophers; whether it is valid is distinctly a legal problem for lawyers and judges. To the Muslim legal mind, separating these two analyses is not only puzzling, but also unnatural, and can result in outcomes that are not merely unwise, but also unjust. Hence, the two Scales must be used in conjunction with one another. The American lawyer is trained to segregate and compartmentalize what the Muslim lawyer knows to be fused.

At the risk of syncretism, if the subtle, inter-disciplinary analysis among gradations under the two Scales must be reduced to an algorithm form, then perhaps the following is a rough guide:

*Step 1: Desirability —*

Under the Scale of Religious and Legal Qualifications (*Al Ahkām Al Khamsa*), what is the appropriate categorization of the behavior or transaction at issue?

*Step 2: Validity —*

Under the Scale of Validity, does the behavior or transaction have legal effect?

*Step 3: Nature of Rights and Duties —*

Assuming the behavior or transaction is not *ḥarām* under Step 1, and not *bātil* under Step 2, then it creates legal rights and obligations for the parties concerned. What is the appropriate category under the *Al Ahkām Al Khamsa* of these rights and obligations?

Sometimes, the analysis under the *Al Ahkām Al Khamsa* predominates. This phenomenon is evident when the categories of forbidden (*ḥarām*) and allowed (*mubāh*) are emphasized at the expense of invalid (*bātil*) and valid (*ṣaḥīḥ*), respectively. Other times, especially when a case goes to court raising the issue of the validity of a transaction, and whether it creates binding rights and obligations on the relevant parties, the analysis under the Scale of Validity is pre-eminent.

In normal circumstances, there is no violation under either Scale. The behavior in question raises no religious or legal objections, and thus is neither undesirable nor invalid. For example, a woman is not supposed to pray during her menstrual cycle. She is deemed unclean, and to do so is *ḥarām* on the Scale of Religious and Legal Qualifications, and any such prayer is *bātil* on the Scale of Validity. This example shows the application of both Scales to a matter of private worship.

Three other examples concerning acts during *ṣalāh* that are *ḥarām* and *bātil* act also illustrate the point that both Scales apply to religious behavior. First, suppose a worshipper laughs during prayer — does the prayer have any effect? No, regardless of whether the prayer is congregational and obligatory (like the five daily prayers) or in private and personal. The source of this response is *qiyās*, specifically, reasoning by analogy to the *Sunnah*. There are traditions concerning disrespectful behavior during prayer. Though none singles out laughter, by analogy laughing is

considered disrespectful. Second, prayers led by a woman have no legal effect. Here, too, the source is the *Sunnah* — by tradition, prayers are led by men. Third, drinking any beverage during prayer renders the act of worship null and void. All three instances are *ḥarām* under the *Al Ahkām Al Khamsa*. However, an exception exists for an *imām*: it is *ḥalāl* for him to sip water to clear his throat so he is audible, when reading from the Qurʾān during prayer.<sup>72</sup>

As still another illustration, consider a public, legal matter: a business deal, such as formation of a partnership (*sharikah*), issuance of Islamic bonds (*sukūk*), or simply entering into a contract (*ʿaqd*). Assume the deal is unobjectionable on the Scale of Five Qualifications. Accordingly, on this Scale, the deal is *mubāh*, i.e., the religious and legal standpoint is one of neutrality or indifference, so the deal is *jāʾiz* (allowed). Assume further that both the nature (*asl*) and circumstances (*wasf*) of the business deal comport with the *Shariʿa*. Then, on the Scale of Validity, the deal is *ṣaḥīḥ*. The deal creates binding rights and duties for the relevant parties. In turn, on the *Al Ahkām Al Khamsa*, these rights and duties are obligatory — they are *wājib*, and must be followed. Clearly, then, the analysis under the two Scales is an interactive one, involving a back-and-forth between the Scales.

But what about abnormal cases? Can a transaction be reprehensible (*makrāh*), even forbidden (*ḥarām*), on the Scale of Religious and Legal Qualifications, yet have legal effect on the Scale of Validity? The answer is “yes. Consider a contract of sale concluded at the time of the call to Friday (*Jumʿa*) prayers (*ṣalat*).<sup>73</sup> What is the legal effect of the sale?

On the *Al Ahkām Al Khamsa*, the transaction is forbidden. That is, from a religious and legal standpoint on this Scale, it is *ḥarām*. In particular, as a religious matter, it is the duty of a Muslim to heed the call of prayer on Friday (as it is the duty of a Catholic Christian to attend Sunday Mass) and not to engage in commerce at that time. But, on the Scale of Validity, the transaction is *fāsid*; it is defective and voidable. Therefore, it is legally effective, and binds the buyer and seller. Why is the deal not *bātil* on this Scale? The answer is the *asl* of the sale comports with the Islamic Law of Contracts. By assumption, the constituent elements of a contract exist, such as an offer (*ijāb*) and acceptance (*kabūl*). But, the *wasf* are troublesome: there is a problematic connection between time and transaction, i.e., timing of the transaction, renders it religiously objectionable. Therefore, the transaction is *fāsid*.

In sum, the majority view among the Four *Sunnite* Schools is that a contract concluded at the time of the call to prayer is *ḥarām* on the Scale of Five Qualifications, and *fāsid* on the Scale of Validity. To the American legal mind, these sorts of outcomes are unfamiliar. If a transaction is forbidden under United States law, then it cannot be valid. Some Muslim scholars who do not agree with this

<sup>72</sup> Contrasts may be drawn with the first two examples, and a comparison with the third one. While disrespectful behavior during a liturgical service is not acceptable, in Catholic Christianity, Tibetan Buddhism, and other faiths, humor is cherished, and it is sometimes observed that God has a sense of humor. Likewise, while gender-specific roles exist in several religions, women play important roles in liturgical services in many of them, including Catholic Christianity. And, while fasting for a proscribed period, such as one hour before taking Holy Communion at a Catholic Mass, is part of practice in many religions, it is understood in them that drinking water to alleviate a throat ailment is permissible.

<sup>73</sup> See SCHACHT, *supra*, at 122.

majority position, and argue the transaction is *bātil* on the second Scale precisely because it is *ḥarām* on the first Scale.

Another example concerns appointment of an Islamic judge (*qāḍī*) by a government ministry.<sup>74</sup> The *qāḍī* happens not to be "*ʿadl*," i.e., he is not of good character. Yet, being *ʿadl* is a pre-requisite for an Islamic judge. Appointment of a *qāḍī* who is not of good character is *ḥarām* on the Scale of Five Qualifications. Is the appointment valid on the Scale of Validity? Yes. On this Scale, the appointment is regarded as reprehensible (*makrūh*), and as Professor Schacht explains, "[t]he quality as *makrūh* does not prevent the legal effects from taking place."<sup>75</sup> Similarly, suppose there is no controversy surrounding the character of the judge, but the *qāḍī* accepts the testimony of a witness who is not *ʿadl*.<sup>76</sup> Based on that testimony, the *qāḍī* renders a judgment. On the Scale of Five Qualifications, founding a judgment on the testimony of a witness who is not of good character is *ḥarām*. On the Scale of Validity it is *makrūh*, meaning the judgment is deserving of censure, yet retains legal effect.

A provocative example concerns the sale of grapes to a buyer where the seller knows the buyer will use the grapes to make wine. Under the *Al Ahkām Al Khamsa*, the sale is *ḥarām*, which follows logically from the Criminal Law rule that consumption of alcohol (*shurb al-khamr*) is a claim of God (*ḥaqq Allāh*), triggering the severest of sanctions, a *ḥadd* (limit) punishment. On the Scale of Validity, the *Shāfiʿi* School regards the sale of grapes with knowledge the buyer is a winemaker as *ṣāḥih*. That is because the *Shāfiʿi* School emphasizes the transactional form of a contract, and holds there is no defect in its *ʿaql* or *waṣf*. That is, to this School, neither the knowledge nor intent of the seller matters, as long as they have respected the formal requisites for contracting. The *Hanafi*, *Mālikī*, and *Hanbali* Schools disagree. They hold the deal is invalid. For them, knowledge of the seller that the buyer will use grapes to make wine, or intent of the seller for the buyer to do so, renders the transaction *bātil*. Such knowledge or intent are *waṣf* justifying this categorization, or put differently, they do not exalt form over substance.

The illustration of selling wines to a vintner extends to selling a sword or gun. If the seller knows the buyer will use the weapon to kill someone, then does the sale have legal effect? "Yes," says the *Shāfiʿi* School, as long as the form of the transaction is proper. "No," say the other three Schools, because the knowledge or intention of the seller are *waṣf* making the bargain *bātil*.

<sup>74</sup> See SCHACHT, *supra*, at 122.

<sup>75</sup> See SCHACHT, *supra*, at 122.

<sup>76</sup> See SCHACHT, *supra*, at 122.

## Chapter 14

### CONTROVERSIAL ADDITIONAL SOURCES

Distinguished friends, today I wish to refer to a task . . . which I firmly believe Christians and Muslims can embrace. . . . That task is the challenge to cultivate for the good, in the context of faith and truth, the vast potential of human reason. . . . And as believers in the one God we know that human reason is itself God's gift and that it soars to its highest plane when suffused with the light of God's truth. In fact, when human reason humbly allows itself to be purified by faith, it is far from weakened; rather, it is strengthened to resist presumption and to reach beyond its own limitations. . . . Genuine adherence to religion — far from narrowing our minds — widens the horizon of human understanding. It protects civil society from the excesses of the unbridled ego which tend to absolutize the finite and eclipse the infinite; it ensures that freedom is exercised hand in hand with truth, and it adorns culture with insights concerning all that is true, good and beautiful.

*This understanding of reason, which continually draws the human mind beyond itself in the quest for the Absolute, poses a challenge; it contains a sense of both hope and caution. Together, Christians and Muslims are impelled to seek all that is just and right.*

Address of His Holiness Pope Benedict XVI, Meeting with Muslim Religious Leaders, Members of the Diplomatic Corps, and Rectors of Universities in Jordan, Mosque Al Hussein bin Talal, Amman, Jordan, 9 May 2009 (emphasis added)

#### SYNOPSIS

##### § 14.01 INDIVIDUAL REASONING (*IJTIHĀD*)

- [A] Doctrinal Development and Methodology
- [B] Definition
- [B] Closing of Gate to *Ijtihād* Around 900 A.D.
- [C] Was the Gate Really Closed?
- [D] Does the Gate Need Re-Opening?

##### § 14.02 IMITATION (*TAKLĪD*)

- [A] Importance and Evolution of *Taklīd*
- [B] Rejection of Custom (*ʿUrf*)

##### § 14.03 JURISTIC PREFERENCE (*ISTIḤSĀN*)

##### § 14.04 PUBLIC INTEREST REASONING (*ISTIṢLĀḤ*)

##### § 14.05 CREATIVITY, *MUFTĪS*, AND *FATWĀS*

- [A] *Mujtahid* in Every Generation?



[B] Nature of *Muflis* and *Fatwās*§ 14.06 *SHĪ'ITE* DISTINCTIONS

## [A] Five Roots

[B] *Ījma'* and Consistency with *Imām*[C] *Ḥadīth* of *Imām* Qualify[D] Lesser Role for *Qiyās*[E] Greater Role for *Ijtihād*§ 14.01 INDIVIDUAL REASONING (*IJTIHĀD*)

## [A] Doctrinal Development and Methodology

Under the Classical Theory of the *Shar'ā*, there are Four Sources of Islamic Law:

- (1) The Qur'ān.
- (2) The Traditions of the Prophet (*Sunnah*), in particular, the *ḥadīths*, which are the non-prophetic sayings of the Prophet Muhammad.
- (3) Analogical reasoning (*qiyās*), but not any other form of reasoning, such as deductive (reasoning from the general to the specific) or inductive (reasoning from the specific to the general) reasoning.
- (4) Consensus (*ijma'*).

Of the Four Sources, the most important are the first two. These are the most traditional of sources, what God (Allāh) through the Archangel Gabriel (Jibreel) revealed to the Prophet, and what Muhammad himself said and did. So important are these primary sources that Professor Schacht concludes his book speaking about the Closing of the Gate to independent reasoning (*ijtihād*), implicitly referring to them:

The traditionalism of Islamic law, which is perhaps its most essential feature, is typical of "sacred law."<sup>1</sup>

In sum, in the Classical Theory, Islamic Law is derived from these four roots: they comprise the *uṣūl al-fiqh* (roots of the jurisprudence).

Consequently, interpretation and independent reasoning — *ijtihād* — is not one of the roots. Likewise, approval, or juristic preference (*istiḥsān*) is excluded from the Classical Theory of the *uṣūl al-fiqh*. So, too, excluded is taking into account the public interest, or what modern American lawyers call public interest reasoning (*istiṣlāḥ*). And, *ra'y* (individual opinion), certainly is excluded.

Such exclusions raise a serious difficulty: how does doctrine develop over time and in new circumstances? Consider the observations of Saint Vincent of Lérins (died circa 445 A.D.):

<sup>1</sup> JOSEPH SCHACHT, AN INTRODUCTION TO ISLAMIC LAW 211 (Oxford, England: Oxford University Press (Clarendon Paperbacks) 1982) (emphasis added). [Hereinafter, SCHACHT.]

Is there to be no development of religion in the Church of Christ? Certainly, there is to be development, and on the largest scale.

Who can be so grudging of men, so full of hate for God, as to try to prevent it? But it must truly be development of the faith, not alteration of the faith. Development means that each thing expands to be itself, while alteration means that a thing is changed from one thing into another.

The understanding, knowledge, and wisdom of one and all, of individuals as well as of the whole Church, ought then to make great and vigorous progress with the passing of the ages and the centuries, but only along its own line of development, that is, with the same doctrine, the same meaning, and the same import.

The religion of souls should follow the law of development of bodies. Though bodies develop and unfold their component parts with the passing of the years, they always remain what they were. There is a great difference between the flower of childhood and the maturity of age, but those who become old are the very same people who were once young. Though the condition and appearance of one and the same individual may change, it is one and the same nature, one and the same person.

. . . Whatever develops at a later age was already present in seminal form; there is nothing new in old age that was not already latent in childhood.

There is no doubt, then, that the legitimate and correct rule of development, the established and wonderful order of growth, is this: in older people the fullness of years always brings to completion those members and forms that the wisdom of the Creator fashioned beforehand in their earlier years.<sup>2</sup>

Saint Vincent raises two issues, one substantive, and the other methodological. First, should a religion develop? The answer is "yes." It ought not to remain forever in the same state in which it originally was established. But, it must not develop into something that is fundamentally different from what it was at the beginning. Second, because it should develop, by what means should it do so? The two questions are related. The larger the number of intellectual tools that may be used to shape the development of the religion, the greater the risk the religion may take on features that were not latent in it when it was founded. Conversely, the greater the discipline on the types of permissible reasoning, the less likely the essence of the religion will be lost.

As time passes, these issues exist in all faiths. In Islam and the *Shar'ā*, there is little if any debate as to whether there ought to be evolution. The nub of the problem is the second issue: What means are acceptable to assist in the development of rules and practices? To use the metaphor of Saint Vincent, in Islam, as in Christianity, the

<sup>2</sup> The First Instruction by Saint Vincent of Lérins, Priest, Cap. 23: PL 50, 667-668, *The Development of Doctrine*, quoted in THE DIVINE OFFICE — THE LITURGY OF THE HOURS, vol. IV at 363-364 (Second Reading for Friday, Twenty-Seventh Week in Ordinary Time) (New York, New York: Catholic Book Publishing Corp., Inc., 1975) (emphasis added).

concern is that the child grow into an adult, *i.e.*, that the religion and law expand fully to be themselves, but not to lose themselves entirely. Beyond the four Classical *uṣūl al-fiqh*, *ijtihād* and certain other methodological tools are controversial. They hold the potential not only for positive development, but also for taking Islam and the *Shari'a* off track.

### [B] Definition

What exactly is *ijtihād*? How does it relate to the term "*ra'y*"? How does *ijtihād* differ from *istiḥsān* and *istiṣlāḥ*? To begin, like *ijma'* and *qiyās*, each of them is a methodology or tool. Hence, each of them is a root or source of jurisprudence (*uṣūl al-fiqh*) in a dualistic sense of being an intellectual process the application of which leads to a legal result. In contrast, the Qur'an and *Sunnah* are memorialized in writings, to which these tools are applied.

"*Ra'y*" is a generic term that means individual or personal opinion. The term may be used in a legal or non-legal context. Under the Classical Theory of the *Shari'a*, *ra'y* is not supposed to form the basis for a legal rule, which is to say that the personal views of a judge (*qāḍī*), religious or legal scholar (*alem* or *faqih*, respectively), or legislator ought not to enter into the formulation and rationale for a legal rule. In contrast, "*ijtihād*" is used specifically in a legal context, and refers to the use of independent reasoning in an effort to draw a valid conclusion from the Qur'an, *Sunnah* of the Prophet, *qiyās*, or *ijma'*.

"*Ijtihād*" literally means "effort." The word comes from a *ḥadīth* in which the Prophet asks one of his followers by what criteria he would settle disputes:

"The Qur'an," the man replied.

"And then what?" the Prophet asked.

"The *Sunnah*."

"And then what?"

"Then I will make a personal effort [*ijtihād*] and act according to that."

And this the Prophet approved.<sup>3</sup>

As suggested by the text, *ijtihād* may be used when the Qur'an and *Sunnah* do not directly answer a question at hand. Thus, "*ijtihād*":

means exerting oneself to form an opinion (*zann*) in a case (*kadiyya*) or as to a rule (*ḥukm*) or law (*lisan*) . . . by applying analogy to the *Kur'an* and the *sunnah*.<sup>4</sup>

<sup>3</sup> CYRIL GLASSE, THE NEW ENCYCLOPEDIA OF ISLAM: REVISED EDITION OF THE CONCISE ENCYCLOPEDIA OF ISLAM 209 (New York, New York: AltaMira Press, 2002) [Hereinafter, GLASSE.]

<sup>4</sup> J. SCHACHT & D.B. MACDONALD, *Idjtihad*, ENCYCLOPEDIA OF ISLAM, (P. Bearman, Th. Bianquis, C.E. Bosworth, E. van Dorstel & W.P. Heinrichs, eds., 2nd ed., 2008), posted at Brill Online, University of Kansas Libraries, [http://www.brillonline.nl/www2.lib.ku.edu/2048/subscriber/entry?entry=islam\\_COM-0351](http://www.brillonline.nl/www2.lib.ku.edu/2048/subscriber/entry?entry=islam_COM-0351).

*Ijtihād* is a process of independent legal reasoning. It is an inference derived from the holy sources that has a probability of being correct.<sup>5</sup> If such a decision is accepted by the *umma*, then the conclusion reached by *ijtihād* becomes binding through *ijma'*.

Only specially educated religious and legal scholars (*ulema* and *fukahā'*, respectively) may practice *ijtihād*. The term "*ijtihād*" is related to "*jihād*," which means "struggle." "*Ijtihād*" connotes a personal struggle to find the Truth through study of the sacred sources and *Shari'a*. The struggle is to interpret the Will of God (Allāh) and how best to submit to it. A "*mujtahid*," literally "one who strives," must be a learned individual who knows the *Shari'a* and is able to exercise authority to make original decisions on canon law.<sup>6</sup> For *Sunnis*, the Gate to *Ijtihād* has been shut, and the last men to qualify as *mujtahidūn* (plural of *mujtahid*) were the founders of the Four Schools.

### [B] Closing of Gate to *Ijtihād* Around 900 A.D.

Up until the middle of the 9th century (850s), Islamic religious and legal scholars (*ulema* and *fukahā'*, respectively) never doubted the right of each individual scholar to develop his own resolutions to legal issues.<sup>7</sup> Poorly reasoned conclusions simply would be, and indeed were, rejected by the scholars. The constraint on the use of individual reasoning was disapproval, and thereby the preclusion of a proposition from gaining support to achieve the status of a consensus (*ijma'*).

Over time, the problem of who ought to be able to exercise this right, and whether there was such a right in the first place, was considered. Maybe contemporary scholars did not have the same freedom to exercise their own reasoning as those who had preceded them. The first to raise these matters — who ought to be able to exercise the right, and whether there was such a right, to interpret the text of the Qur'an — appears to have been *Imām* Muhammad Shāfi'i, namesake of the *Shāfi'i* School. Starting in the middle of the 9th century, Islamic scholars increasingly accepted the idea that their great predecessors could not possibly be equaled. Only these Classical giants had the right to independent reasoning. As Professor Schacht puts it, the contemporary *ulema* were "epigones," meaning they were of a later and less distinguished generation.<sup>8</sup>

Thus, as Professor Schacht observes, by 900:

the point had been reached when the scholars of all schools felt that *all essential questions had been thoroughly discussed and finally settled*, and a consensus gradually established itself to the effect that *from that time onwards no one might be deemed to have the necessary qualifications for independent reasoning in law*, and that all future activity would have to be

<sup>5</sup> MOHAMMAD HASHIM KAMALI, PRINCIPLES OF ISLAMIC JURISPRUDENCE 469 (1989) (Cambridge, England: The Islamic Texts Society, 2003). [Hereinafter, KAMALI.]

<sup>6</sup> GLASSE, *supra*, at 327.

<sup>7</sup> See SCHACHT, *supra*, at 70.

<sup>8</sup> SCHACHT, *supra*, at 70.



confined to the explanation, application, and, at the most, interpretation of the doctrine as it had been laid down *once and for all*.<sup>9</sup>

Thus, the "Closing of the Gate," or "Closing of the Door," to *ijtihād* occurred.<sup>10</sup> Independent reasoning no longer could be accepted as a source of Islamic Law. All the grand questions had been answered, and no future scholar possibly could rival the great ones of the past. All that was left for future scholars was to describe and elaborate the rules of the *Shari'a* using the Four Sources under the Classical Theory.

This Closing would have been impossible were it not for the "Seal of the Prophet." That is, suppose it were part of Islamic religious belief that Muhammad was not the final instrument for the revelation of God (Allāh). It then would be impossible to draw a line and declare that all problems have been solved and resolutions provided. There would be, by definition, an expectation of future revelations. Moreover, the Closing would be impossible if it were held that even though Muhammad is the final Prophet, understanding the message he recited from God is a continuous process. People never can fully comprehend this message while on this earth. But, through study, prayer, meditation, and complemented by advancements in technology, people come to a closer approximation of the whole Truth. If this approach is taken, which indeed is the one of Catholic Christianity — i.e., that over time, the people of God come to understand His message better — then it is impossible to declare the message finally and fully comprehended. Notably, this approach also is one held by many Muslims.

In any event, the Closing of the Gate marks the end of the formative period of the *Shari'a*. At that point, the Classical Theory of the *uṣūl al-fiqh* was worked out, and, as Professor Schacht observes:

The whole sphere of law had been permeated with the religious and ethical standards proper to Islam; Islamic law had been elaborated in detail; the principle of the infallibility of the consensus of the scholars worked in favour of a progressive narrowing and hardening of doctrine; and, a little later, the doctrine which denied the further possibility of "independent reasoning" (*ijtihād*) sanctioned officially a state of things which had come to prevail in fact.<sup>11</sup>

This closing occurred in the late 900s, at the end of the *Abbasid* Caliphate, when the Four *Sunni* Schools of Law developed. As a result of the closing, the *Shari'a* became more rigid, and thereby less in tune with actual practice.<sup>12</sup> Put simply, the process of ossification began, leading to ever-greater "disconnects" as the centuries progressed.

<sup>9</sup> SCHACHT, *supra*, at 71 (emphasis added).

<sup>10</sup> See, e.g., the title of Chapter 10 of Schacht's book ("The 'Closing of the Gate of Independent Reasoning' and the Further Development of Doctrine").

<sup>11</sup> SCHACHT, *supra*, at 69.

<sup>12</sup> See SCHACHT, *supra*, at 69.

## [C] Was the Gate Really Closed?

Can independent reasoning be completely stopped? Can every case be decided purely on precedent established a millennia ago? The answer to these questions is clearly "no," because there are always variations in each case. Many Islamic scholars assert that if indeed the Gate to *Ijtihād* was closed, then it was closed only in respect of established rules, i.e., rules set down centuries ago and set out in respected treaties. But, as to new issues, for which there are no established rules, they embrace the use of *ijtihād* in the search for conclusions.

Nevertheless, the ossification of Islamic legal thought, because of the Closing of the Gate to *Ijtihād*, is a major hurdle for the advancement of the law itself and has had sweeping implications worldwide. For example, despite the equity and tolerance Islam teaches, some interpretations of religious and legal doctrine are anything but equitable and just. Women cannot marry outside the Muslim faith, whereas men can. Also, in some Muslim countries marital rape is not considered a crime, or at least not enforced as such. Some reports get worse: a young woman in Nigeria, forced to have premarital sex with three of her father's associates, received 180 lashes after giving birth to a child conceived during the incident.<sup>13</sup>

Additionally, the rigidity of interpretation is alarming for non-Muslims supposedly living outside the scope of application of the *Shari'a*. Islamic extremists, and certain Fundamentalist sects, are unable to accept the existence of other views within Islam, much less outside of it, which they regard as heretical. In consequence, many people outside the Islamic world have died or live in fear of harm. For Americans, the 9/11 terrorist attacks are the most horrific, but not the only, example. After the 1988 publication of *The Satanic Verses*, the official policy response of Iran was to issue a *fatwā* in February 1989 against author Salman Rushdie calling for his life.

The decision to close the Gate to *Ijtihād* created enormous consternation within the Islamic world as well. It is a factious point splitting *Shi'ites* and *Sunnis*. *Shi'ites* do not believe the Gate ever was closed, because God (Allāh) never leaves His people without guidance. Within the *Sunni* tradition, the Four Schools hold a monopoly on interpretation.

Through the centuries, prominent Muslim legal scholars have called for the official re-opening of the Gate to deal with new challenges Muslims face. Ibn Taymiyya fought against the closure in the 14th century.<sup>14</sup> His fight is noteworthy because he was a Traditionist, meaning he stressed the importance of the first two of the Four Sources: the Qur'an and *hadith*. Yet, given the above-quoted *hadith*, Taymiyya presumably would argue it is an obligation to practice *ijtihād*. At the turn of the 20th century, renowned Egyptian jurist Muhammad Abduh lifted the torch for *ijtihād*.<sup>15</sup> Impressively, in 1983, King Fahd of Saudi Arabia, in an address

<sup>13</sup> IRSHAD MANJI, *THE TROUBLE WITH ISLAM* 123–24, 26 (New York, New York: St. Martin's Griffin, 2003).

<sup>14</sup> See C.G. WEERAMANTRY, *ISLAMIC JURISPRUDENCE: AN INTERNATIONAL PERSPECTIVE* 42 (Kuala Lumpur, Malaysia: The Other Press, 2001). (Hereinafter, WEERAMANTRY.)

<sup>15</sup> See WEERAMANTRY, *supra*, at 42.

to a congress of theologians in Mecca, called for a re-emergence of *ijtihād* by a group of Islamic scholars, rather than on an individual level. From his words, it is important note the King recognized there are problems in need of solutions and that only a spirited discussion of these matters can solve them.<sup>16</sup> Since the King's address, scholars and leaders alike have called for reform. For instance, in his 1997 book, *A History of Islamic Legal Theories*, Wael B. Hallaq, argues the Gate to *Ijtihād* never fully closed. He says it is still practiced today, in a limited way.<sup>17</sup>

#### [D] Does the Gate Need Re-Opening?

Without doubt, there are contemporary scholars who argue strenuously that *ijtihād* must be re-introduced into Islamic legal thinking. That is, they argue that even if the Gate to *Ijtihād* was closed — a dubious proposition in itself, many submit — that Gate must be re-opened. For example, in his 2004 book, *Western Muslims and the Future of Islam*, Tariq Ramadan urges:

[In the Qur'ān,] everything is permitted except that which is explicitly forbidden by a text. Thus, the scope for the exercise of reason and creativity is huge . . . and people have complete discretion to experiment, progress, and reform as long as they avoid what is forbidden. So the fact that the fundamental principles of Islam, and its prohibitions, are stated can never allow Muslims to dispense with a study of the context and the societies in which they live.<sup>18</sup>

Further, he states:

[Islam] requires that our minds find solutions that allow [Muslims in the western world] to remain consistent with the essential axis of being . . . and to live in step with our times and our societies.

...

Muslims who want to remain faithful to their Islamic terms of reference and who, as members of Western societies, are set completely apart, are called to develop civic awareness founded on their sense of moral responsibility.<sup>19</sup>

In brief, Ramadan argues in favor of Muslims actively engaging in the pluralistic western societies in which they live, and to use *ijtihād* in applying the *Shari'a* to contemporary problems. He does not want to see Muslims segregate themselves and thereby contribute both to their own ghetto-ization and the ossification of Islamic Law.

<sup>16</sup> See WEERAMANTHY, *supra*, at 43–44.

<sup>17</sup> See WAEL B. HALLAQ, *A HISTORY OF ISLAMIC LEGAL THEORIES* (Cambridge, England: Cambridge University Press, 1997).

<sup>18</sup> TARIQ RAMADAN, *WESTERN MUSLIMS AND THE FUTURE OF ISLAM* 35 (Oxford, England: Oxford University Press 2004). [Hereinafter, RAMADAN.] See also Adham A. Hashish, *Ijtihad Institutions: The Key to Islamic Democracy Bridging and Balancing Political and Intellectual Islam*, 9 RICHMOND JOURNAL OF GLOBAL LAW AND BUSINESS 61–84 (winter 2010) (arguing in favor of a relationship between *ijtihād* and democracy).

<sup>19</sup> RAMADAN, *supra*, at 113, 152.

### § 14.02 IMITATION (TAKLĪD)

#### [A] Importance and Evolution of Taklīd

*Taklīd* (imitation) also is excluded from the Four Classical Sources of Islamic Law. The old meaning of the term used by the Ancient Schools of Law is a reference to the Companions of the Prophet (*Ṣaḥābah*). The more recent meaning of the term implicates the works of one of the founders of the Four Schools. *Imām* Shāfi'i rejected the connection of the term "*taklīd*" with the *Ṣaḥābah*, as advocated by the Ancient Schools. The Closing of the Gate to *Ijtihād* brought about this change in the meaning of the word "*taklīd*."<sup>20</sup> With the Gate closed, "*taklīd*" meant reference to, and indeed acceptance of, the doctrines of one of the Four Schools.

The grand masters who had been entitled to *ijtihād* were referred to as "*mujtahid*." A distinction was drawn according to different levels of expertise in Islamic Law, which there always have been, of course, as there are in any legal system:

- The highest level of *faqīh* (Islamic legal scholar) is known as an Unrestricted Jurist-Scholar, or "*Mujtahid Mutlaq*." Among Sunnites, it is believed that there are few, if any, such scholars at this level today. A *mujtahid mutlaq* has satisfied all the conditions for independent reasoning (*ijtihād*). Among *Shī'ites*, it is believed that the most prominent scholars meet these conditions.
- Below this level is a Restricted Jurist-Scholar, or "*Mujtahid Muqayyad*." This type of scholar has mastered the methodology of his School of Law (*madhhab*), and can apply it to reach the traditional rulings of that School, and to pass new rulings within that School or within his area of legal specialty.

With this distinction, all of those legal scholars who are short of the highest level — which essentially is everyone — are bound to practice *taklīd*. They are called "*mukallid*."

Practicing *taklīd* is a kind of intellectual abstinence. A religious scholar is not to derive independently a legal doctrine from the Qur'ān, *Sunnah*, or *ijma'*, but rather concern himself only with doctrines that are promulgated by one of the Four Schools. Where are these doctrines found? The logical place would be in the works of the grand masters to whom *ijtihād* had been allowed. In fact, it is in books that a School has acknowledged to be an authoritative compilation of legal doctrine. In brief, the doctrines are in treatises, many of which date from the late Middle Ages.

It must be emphasized that these books are treatises, or handbooks, not legal codes. Thus, Professor Schacht concludes "Islamic law is not a corpus of legislation, but the living result of legal science."<sup>21</sup> This conclusion is pregnant with meaning.

<sup>20</sup> See SCHACHT, *supra*, at 71.

<sup>21</sup> SCHACHT, *supra*, at 71.



- 1st: It reminds us that there was a gradual transition from *ijtihād* to *taklīd* around 900 A.D.
- 2nd: Islamic Law is not all contained in one book, or a series of books. That makes it different from the Civil Law, which emphasizes Codes.
- 3rd: Treatises occupy a place of special importance in Islamic Law, particularly those treatises accepted as authoritative by a School of Law. It is to those treatises that a scholar would turn to "find" the law.
- 4th: Ultimately, the legal doctrines discussed in a treatise are based on one of the Four Sources of Islamic Law agreed upon under the Classical Theory.
- 5th: Islamic law is a "result" of legal science, including *ijtihād*, practiced centuries ago. That suggests (rightly) ossification. It also is a "living" result, in that it is applicable to everyday life today.

### [B] Rejection of Custom ('Urf)

Further, all Four Sunni Schools of Islamic Law reject custom, or what American lawyers would call "law merchant" (*lex mercatoria*), as a source of law.<sup>22</sup> In Arabic, "custom" is called "*urf*" or "*aada*." This rejection makes sense.

The roots of Islamic jurisprudence (*uṣūl al-fiqh*) are — to switch metaphors — supposed to give the *Sharī'a* a systematic foundation. Custom is not always (perhaps not usually) systematic. It can vary from place to place, and one period to the next. However, it is misleading to say custom never enters into legal decision-making. It does. For example, a custom may help interpret a declaration, disposition, or contract.

### § 14.03 JURISTIC PREFERENCE (*ISTIḤSĀN*)

"*Istiḥsān*," literally "seeking the good" or "aiming for the best," is a debated source of Islamic Law. Still grounded in the teachings of the Qur'ān and *Sunnah*, *istiḥsān* expresses the idea that equity and justice, as defined by God (Allāh), must factor into the formulation and interpretation of law.<sup>23</sup> It is closely related to the American (indeed, non-Muslim Western) legal concept of equity derived from Natural Law. However, where American-style equity recognizes the validity of Natural Law over positive law, *istiḥsān* judges what is equitable by the standards laid out in the highest source of law, the holy texts.<sup>24</sup>

*Istiḥsān* is a flexible method of interpretation related to the principles of analogical reasoning (*qiyās*) and independent reasoning (*ijtihād*). *Istiḥsān* allows a judge to use his or her personal opinion to rule in an equitable way that might avoid unfairness caused by literal enforcement of an existing law.<sup>25</sup> As Professor Kamali

<sup>22</sup> See, e.g., U.C.C. Section 1-103.

<sup>23</sup> GLASSE, *supra*, at 231.

<sup>24</sup> KAMALI, *supra*, at 323.

<sup>25</sup> KAMALI, *supra*, at 325.

puts it:

Juristic preference is a fitting description of *istiḥsān*, as it involves setting aside an established analogy (*qiyās*) in favor of an alternative ruling that serves the ideals of justice and public interest (*maṣlahah*) in a better way.<sup>26</sup>

In this way, *istiḥsān* uses *maṣlahah* to trump *qiyās*, though Qur'ānic principles must be observed.

There is some debate among the Four Schools as to whether *istiḥsān* is a valid source of law. Three of the Four Schools — the *Hanafi*, *Māliki* and *Hanbali* Schools — officially accept it as a legitimate form of interpretation. The *Shāfi'i* School, however, completely rejects *istiḥsān* in its formulation of the *uṣūl al-fiqh*.<sup>27</sup>

### § 14.04 PUBLIC INTEREST REASONING (*ISTIḤSĀN*)

"*Istiḥsān*" is a term closely related to *istiḥsān*. Literally, it means "seeking what is correct or wholesome."<sup>28</sup> This term has come to mean what is good for society overall. In turn, what is in the common good (to use a Catholic Christian expression) justifies policies that benefit the public interest. While the Qur'ān and *Sunnah* provide general principles to follow, methods like *istiḥsān* and *istiḥsān* provide a specific framework for the application of the principles.<sup>29</sup> Though the two concepts are similar, there is one striking difference. *Istiḥsān* may be used when there is no indication of right or wrong in the sources already. It can start from scratch, using *maṣlahah* as a basis. In contrast, *istiḥsān* relies on analogies already drawn using *qiyās*, although it may overrule them.<sup>30</sup>

The idea of *maṣlahah* is at the heart of *istiḥsān*. In this context, "*maṣlahah*" means "benefit" or "interest" to the public.<sup>31</sup> Ultimately, a lawgiver is supposed to use *istiḥsān* to create a set of considerations that not only prevents harm, but also secures benefits for society that are consistent with the objectives of the *Sharī'a* (i.e., religion, life, intellect, lineage and property).<sup>32</sup> *Istiḥsān* cannot overcome specific requirements, injunctions, or punishments meted out by the Qur'ān. But, it can shape the way they are implemented. For example, the Qur'ān requires that men and women dress modestly, but it does not define exactly what "modestly" entails. Thanks to *istiḥsān*, this particular issue has been interpreted in a variety of ways across time and place.

To be recognized as valid, the use of *istiḥsān* must meet three conditions:

- (1) The *maṣlahah* must be genuine, as opposed to just plausible. Speculation that a measure will be beneficial without ascertaining the balance between

<sup>26</sup> KAMALI, *supra*, at 325.

<sup>27</sup> KAMALI, *supra*, at 324.

<sup>28</sup> GLASSE, *supra*, at 232.

<sup>29</sup> GLASSE, *supra*, at 232.

<sup>30</sup> KAMALI, *supra*, at 361.

<sup>31</sup> KAMALI, *supra*, at 351. See generally JOHN MAKDISI, *ISLAMIC PROPERTY LAW* ch. 1.E (Durham, North Carolina: Carolina Academic Press, 2005) (concerning public policy).

<sup>32</sup> KAMALI, *supra*, at 351.

its possible benefits and harms is not sufficient.

- (2) The proposed policy must be generally beneficial. It should confer a benefit or prevent a harm to people as a whole, not to a specific group of people.
- (3) The policy must not conflict with a principle that is already part of the explicit text of the Qur'an or *Sunnah*, or established by consensus (*ijma'*).<sup>33</sup>

If a proposed policy meets these conditions, then a legislature may enact that policy through an appropriate measure, thereby making the policy a valid part of state law.

*Istislāh* is not accepted by all Four Schools to the same degree. The *Hanafi* and *Shāfi'i* Schools have adopted a flexible view of it. The *Māliki* School rejects its use. Because the *Shāfi'i* School does not accept *istihsān* as a valid source of law, it recognizes *istislāh* within the context of *qiyās*, rather than as an independent proof. The *Hanbali* School has received *istislāh* as a type of *istihsān* and therefore a valid source of law.<sup>34</sup>

## § 14.05 CREATIVITY, MUFTIS, AND FATWĀS

### [A] *Mujtahid* in Every Generation?

Has every member of the *ulama* accepted the Closing of the Gate to *ijtihād* since it was closed? The answer clearly is "no."<sup>35</sup> There have been scholars who urged every generation has a *mujtahid*. Moreover, Islamic jurisprudence has not simply stagnated since the purported Gate Closing to individual reasoning. The *ulema* have been creative in their responses to new facts, though this creativity sometimes is subtle. ore generally, does it follow that with the closing of the door to *ijtihād*, Islamic Law has been a stagnant pool? The answer is "absolutely not."

To be sure, there is rigidity to Islamic legal doctrine. But, as Professor Schacht points out:

[t]his essential rigidity of Islamic law helped it to maintain its stability over the centuries which saw the decay of the political institutions of Islam.<sup>36</sup>

Furthermore, rigid does not mean immutable. There have been developments. For example, decisions regarded as authoritative, called *fatwās* (technically in Arabic, "*fatawā*") which are issued by *muftis*, have nudged along theory and doctrine.

### [B] Nature of *Muftis* and *Fatwās*

*Muftis* are specialists in Islamic Law who can give an authoritative opinion on an issue of doctrine. They have been creative in applying the *Shari'a* to modern problems. An opinion of a *mufti* is called a "*fatwā*." (A *mufti* is not the only authority entitled to issue a *fatwā*.) The technical definition of a "*fatwā*" is a

published opinion or decision regarding religious doctrine or law made by a recognized authority.<sup>37</sup>

That authority is the *mufti* in the *Sunni* world, or an *Ayatollah* in the *Shi'ite* world.

The Islamic legal world has had *muftis* since its earliest days. An example offered by Professor Schacht is Ibrahim Nakha'i.<sup>38</sup> After all, Muslims have sought specialist guidance on how to behave in accordance with the *Shari'a*. That is especially so given that the *Shari'a* concerns "dos" and "don'ts" in all walks of life, from the Penal Law to religious duties, from Family Law to dress etiquette. Through their *fatwās*, *muftis* help fill the need for guidance. Indeed, just as some Americans find with their own law, some Muslims find the *Shari'a* a difficult to access and follow. The presentation of that law by *muftis* through their *fatwās* is far more digestible.

Accordingly, Professor Schacht points out:

[t]he doctrinal development of Islamic law owes much to the activity of the *muftis*.<sup>39</sup>

Indeed, he contends this debt is a far greater one than is owed to the judgments issued by the tribunals of the *qādi* (as their influence waned after the formative period closed in the *Abbasid* Caliphate). The *fatwās* of *muftis* often are collected in handbooks of the relevant School of Law. The process is essentially one in which a *mufti* studies a matter, reaches a decision, and the *ulema* acknowledge by consensus (*ijma'*) that the decision is correct. Then, the *fatwā* is incorporated into a treatise on law from that School.

It is important to appreciate a *mufti* is a private citizen, not a government official. Also, a *mufti* is not a *qādi*. Rather, a *qādi* may consult a religious scholar about difficult questions, and included among the circle of persons the *qādi* may consult are *muftis*. Indeed, *muftis* often are attached to the tribunals of *qādis*.

The authority of a *mufti* is based solely on his reputation as an Islamic legal scholar *par excellence*. Given his status, a *fatwā* issued by him has no official standing. It is not enforced by a government sanction. Thus, for example, each side in a case will cite to as many *fatwās* in support of their arguments as it can. The *qādi* is not bound by the *fatwās*, but perhaps is unlikely to entirely disregard the authoritative ones.

While *muftis* are not government agents, governments are not been insensitive to the need of Muslims for specialist guidance on *Shari'a* matters. Thus, nearly ever since the Four *Sunni* Schools were established, governments in Islamic states have appointed the most outstanding scholars in their jurisdictions as *muftis*. Typically, the government designates one *mufti* as the "Chief *Mufti*" or "Grand

<sup>33</sup> KAMALI, *supra*, at 358-59.

<sup>34</sup> KAMALI, *supra*, at 363.

<sup>35</sup> See SCHACHT, *supra*, at 72-73.

<sup>36</sup> See SCHACHT, *supra*, at 75.

<sup>37</sup> Anthony Chase, *Legal Guardians: Islamic Law, International Law, Human Rights Law, and the Salman Rushdie Affair*, 11 AMERICAN UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLICY 375, fn. 1 at 375 (1996) (quoting GLASSE, *supra*.) Probably the most infamous *fatwā* in the western world is that of the *Ayatollah Khomeini* in the *Salman Rushdie* affair over Rushdie's novel, *The Satanic Verses* (1988).

<sup>38</sup> See SCHACHT, *supra*, at 73.

<sup>39</sup> See SCHACHT, *supra*, at 74-75.



*Mufti*," who in Arabic is called the "*Shaykh Al Islam*." But, appointment of a religious scholar as a *mufti*, or for that matter, as the *Shaykh Al Islam*, i.e., government imprimatur, is not the source of authority of that scholar. As Professor Schacht writes, the governmental appointment "does not add to the intrinsic value of their opinions."<sup>40</sup>

## § 14.06 SHĪ'ITE DISTINCTIONS

### [A] Five Roots

The *Shari'a* according to *Shi'a* scholars consists of the following elements. These sources of law — the *usūl al-fiqh* for *Shi'ites* — are listed in order of importance:

- (1) The literal word of God as found in the Qur'an.
- (2) The *Sunnah* of the Prophet Muhammad.
- (3) Consensus, in particular, the *ijma'* of the community (*ummah*).
- (4) The opinion of the Prophet Muhammad, or the opinion of one of the *Shi'ite Imāms*.
- (5) Human reason, or in effect, *ijtihad* (independent reasoning).

Manifestly, only the first two are the same as those as for *Sunnites*. Even with respect to the Qur'an, at least one source suggests the sacred text used by *Shi'a* is longer than that used by *Sunni* Muslims.<sup>41</sup> It is said to contain statements concerning 'Ali. However, no such text has appeared, or at least is widely available.

### [B] *Ijma'* and Consistency with *Imām*

There are three key differences in the *Shi'ite* versus *Sunni* *usūl*. First, concerning *ijma'*, the consensus for *Shi'a* may be of the full *ummah*, at least at a particular time and place. It is not necessarily a consensus restricted to a narrow group of scholars. However, any consensus must be consistent with the opinion of a *Shi'ite Imām*, which puts the *Imām* essentially in a position of wielding a veto over a proposed *ijma'*.

One scholar who influenced greatly *Ja'fari usūl al-fiqh* was Muhammad ibn Muhammad ibn Al Nu'mān Al Hārithi.<sup>42</sup> Known as "the Learned Shaykh," or Al Shaykh Al Mufid, he lived from 948 to 1022 A.D., and taught in Baghdad.<sup>43</sup> Among his many contributions to *Shi'a* legal thought, Al Mufid redefined the use of community consensus:

<sup>40</sup> See SCHACHT, *supra*, at 74.

<sup>41</sup> See RUT JACKSON, FIFTY KEY FIGURES IN ISLAM 18 (New York, New York: Routledge, 2006). [Hereinafter, JACKSON.]

<sup>42</sup> HEINE HALM, *SHI'ISM* 49 (Janet Watson & Marian Hill trans., New York, New York: Columbia University Press, 2nd ed., 2004). [Hereinafter, HALM.]

<sup>43</sup> See HALM, *supra*, at 49; www.babylon.com/definition/al\_Mufid/.

The consensus of the community is only right when it corresponds to the opinion of the *Imām*, and thus the opinion of the *Imām* is always decisive and for all practical purposes replaces the consensus which can only ever be established with great difficulty.<sup>44</sup>

Obviously, there is no figure among *Sunnites* comparable to a *Shi'ite Imām*, hence the power to forge a consensus remains (at least in theory) decentralized. However, perhaps it is debatable whether this distinction makes *ijma'* more difficult to forge among *Shi'ites*. Arguably, if the *ummah* knows the views and predilections of an *Imām*, then they become known parameters within which the *ummah* can formulate its proposed consensus. Conversely, with no single figure exerting such influence on *Sunni* scholars, arguably they have greater range of possibilities for a consensus, and such a range can mean more, and more serious, disagreements than otherwise would occur.

### [C] *Hadith* of *Imām* Qualify

Second, in *Shi'ism*, the opinions of an *Imām*, as well as those of Muhammad, are a source of law. To be sure, the opinions of the Prophet matter to *Sunnites*, too, but such opinions — if authentic — are manifest in a *hadith*. For *Shi'a*, the number of persons whose opinions "count" extends to their *Imāms*, whose opinions are recorded in places other than a standard compilation of *hadiths*.

More specifically, among *Ja'fari* (Twelver) *Shi'ites*, a *hadith* that is traceable to Muhammad and a *hadith* of any one of the Twelve *Imāms* are given equal weight. Obviously, *Sunnites* do not recognize any statements of these *Imāms* as *hadiths*. Moreover, *Shi'ites* reject *hadith* "related on the authority of the enemies of the *Imāms* such as 'Umar, 'A'isha, and 'Uthman are rejected in Twelver law."<sup>45</sup> In other words, if a figure in Islamic history opposed 'Ali and his partisans, and also happened to be the source of a *hadith*, then that *hadith* that is rejected by *Shi'ites*. After all, the logic goes, the transmitter was not objective. This exclusion means a substantial number of *hadiths* accepted by *Sunnites* are rejected by *Shi'ites*. 'A'isha accounts for roughly 2,210 *hadiths* (of which *Imāms* Bukhari and Muslim — *Sunni* compilers — recount 316), none of which is a root of *Shi'ite* jurisprudence (unless, perhaps, it is independently transmitted and authenticated).

### [D] Lesser Role for *Qiyās*

A prominent student of Al Mufid, Al Murtaḍā 'Alī ibn Tāhīr, was a proponent of the use of human reason. To Al Murtaḍā, a saying attributed to Muhammad or a *Shi'ite Imām* is to be rejected as "unauthentic" if it does not conform to human reason. Al Murtaḍā believed reliance on the authority of others "would inevitably lead to unbelief."<sup>46</sup> But, the role for reason Al Murtaḍā advocates is similar to that advocated by his teacher, Al Murtaḍā: reason is relevant only in "side issues," and

<sup>44</sup> HALM, *supra*, at 50. Al Mufid also refused to accept a belief in pre-destination, which characterizes some *Sunni* thinking, instead arguing in favor of the existence of free will. These beliefs are a part of *Shi'a* jurisprudence. See *id.*, *supra*, at 50.

<sup>45</sup> BILL, *supra*, at 21.

<sup>46</sup> HALM, *supra*, at 51.

is not to be used to resolve problems that had been or could be dealt with using traditional sources.<sup>47</sup>

In *Shī'ism*, the use of analogical reasoning (*qiyās*) may have been spurred by the need to explain the occultation of the Twelfth *Imām*, the *Al Māhdi*, and its length. This belief has been summarized as follows:

The arguments with which Shaykh al-Mufid, Sharif al-Murtadā and even Shaykh al-Tūsī sought to substantiate the *ghayba* [concealment] of the twelfth *Imām* by rational argument (*dalīl 'aqlī*) stem from the old Mu'tazilite principles that God is just and that man is responsible for his own actions. Since man is fallible and consequently in need of guidance, divine grace (*lutf*) cannot but grant mankind the benefit of rightful guidance at all times by an *Imām* who is immune (*ma'jūm*) from sin and error. Since the ruling Caliphs are notoriously sinful and fallible and act tyrannically, there must be a Hidden *Imām*; without the latter's existence mankind would be forsaken by God, man would indubitably go astray and could not be called to account by a just God . . . So long as usurpers reign and true believers continue to be persecuted, the True *Imām* is prevented from exercising his rights and is threatened in life and limb; he not only may but must therefore remove himself from the clutches of the tyrannical false *Imām*.<sup>48</sup>

On balance, the role of human reasoning by analogy, i.e., *qiyās*, does not play as large a part in *Shī'ite* as in *Sunni* jurisprudence. For *Jafari Shī'ites*, analogical reasoning plays a distinctly subsidiary, if any, role in making legal determinations. Al Mufid argued it is necessary to follow a directly relevant text, if one existed, and his argument is accepted as doctrine, and practiced by *mujtahidān* (the plural of *mujtahid*; literally, persons who strives, in the sense of educated Muslim competent to interpret Islamic Law in practical contexts, possibly through the use of *ijtihād*).<sup>49</sup>

## [E] Greater Role for *Ijtihād*

While the *uṣūl al-fiqh* of Twelver *Shī'ism* excludes analogical reasoning (*qiyās*), it includes human reason (*aql*). Put differently, the *Jafaris* replace the narrow category of *qiyās* with the broader category of reasoning. In the *Shī'ite* approach to the *uṣūl*, if a *mujtahid* can resolve a problem through reason, then the solution is deemed to be in agreement with revelation.<sup>50</sup> This approach is redolent of the Catholic Christian view that faith and reason cannot conflict.

In turn, independent reasoning (*ijtihād*) plays an explicit, and therefore larger, role as a recognized source of law in *Shī'ite* than in *Sunni* jurisprudence. The nature and practice of *ijtihād* in *Shī'ite fiqh* was outlined, elaborated, and mainstreamed by Al Ḥasan ibn Yūsuf 'Alī ibn Al Muṭahhar Al Ḥillī (known as Al 'Allāma; "the most learned one"), who was born in 1250 A.D. (648 A.H.).<sup>51</sup> He did so

in his book *Mabādi' Al-Wuṣāl ilā 'Ilm Al-Uṣūl* (*The Points of Departure from which Knowledge of the Principles is Attained*).<sup>52</sup> As a result of the work of *Shī'ite* scholars like 'Allāma, *Jafari fiqh* allows for the use of *ijtihād* to interpret Islamic Law.<sup>53</sup> *Shī'ite* scholars rely not only a conventional approach to the *Sharī'a*, but also emphasize a dynamic *fiqh*, which contemplates an evolutionary, contextual approach to understanding Qur'anic commandments.<sup>54</sup> Thus, in *Shī'ism*, to the present day, the Gate to *Ijtihād* remains open, and only *Shī'a* unambiguously recognize *ijtihād* as a valid source of law.<sup>55</sup> *Shī'ites* believe there always is someone who may correctly interpret the Qur'ān, namely, the Twelve *Imāms*, and their deputies (as it were), who are the highest religious authorities who await the Hidden *Imām* to be revealed.<sup>56</sup>

But, until the occultation of the 12th *Imām* is over, who among *Shī'ites* is authorized to practice *ijtihād*? *Shī'a* Muslims are required to have one or more teachers whom they follow in the absence of communication with the 12th and Hidden *Imām*, the *Al Māhdi*. These men (and they are invariably men) attempt to live virtuously and make legal judgments through the "exertion" of intellectual effort, human reason, and tradition.<sup>57</sup> This intellectual exertion is known, of course, as *ijtihād*, and the men who practice *ijtihād* are known as "*mujtahid*."<sup>58</sup> *Shī'ites* accept that the practice of *ijtihād* is fallible, and therefore was not used by Muhammad or the *Imāms* who *Shī'ites* believe are infallible.<sup>59</sup> But, *mujtahid* are well educated in Islamic studies, and able to use reason in conjunction with tradition to solve contemporary problems.<sup>60</sup> That is, *mujtahid* have "studied sufficiently and achieved a level of competence necessary to obtain permission (*ijāza*) to practice *ijtihād*."<sup>61</sup> *Mujtahid* interpret religious law for *Shī'ites*, and are allowed to do so through the concession of other *mujtahidān*.<sup>62</sup> A renowned *mujtahid* can attain the title of *Āyatollah* (sign of God).<sup>63</sup>

<sup>52</sup> See HALM, *supra*, at 65.

<sup>53</sup> See *Jafari Jurisprudence*, WIKIPEDIA, posted at [http://en.wikipedia.org/wiki/Ja%27fari\\_jurisprudence](http://en.wikipedia.org/wiki/Ja%27fari_jurisprudence) [hereinafter, *Jafari Jurisprudence*]; Islamic Republic of Iran Constitution, Article 2, available at <http://www.irandonline.com/iran/iran-info/Government/constitution.html>.

<sup>54</sup> *Jafari Jurisprudence*, *supra*.

<sup>55</sup> IJSHAD ABDAL-HAQ, *Islamic Law: An Overview of Its Origin and Elements*, in UNDERSTANDING ISLAMIC LAW: FROM CLASSICAL TO CONTEMPORARY 9 (Hisham M. Ramadan ed., Oxford, England: AltaMira Press, 2006).

This claim undoubtedly is a broad one, and some skepticism is in order. It is found in various sources, but never seems to be discussed in great detail or specificity. As a result, there is some suspicion, perhaps, that this claim is (put diplomatically) an uncharitable characterization of *Shī'a* theology by a *Sunni* author.

<sup>56</sup> GLASSE, *supra*, at 327.

<sup>57</sup> MOMEN, *supra*, at xx; HOURANI, *supra*, at 182; HALM, *supra*, at 65.

<sup>58</sup> See MOMEN, *supra*, at xx.

<sup>59</sup> See HALM, *supra*, at 65-66.

<sup>60</sup> See HALM, *supra*, at 66.

<sup>61</sup> MOMEN, *supra*, at xxi.

<sup>62</sup> See BILL, *supra*, at 17.

<sup>63</sup> See BILL, *supra*, at 17.

<sup>47</sup> HALM, *supra*, at 51.

<sup>48</sup> HALM, *supra*, at 53.

<sup>49</sup> See HALM, *supra*, at 50.

<sup>50</sup> See OXFORD DICTIONARY OF ISLAM, *supra* at 154.

<sup>51</sup> HALM, *supra*, at 64-65.



Thus, it is permissible for a *mujtahid* to apply reasoning to work out a legal issue, including a complex problem encountered in the modern world. A maxim *Shī'a* scholars accept is: "In the absence of the Imam, reason is the best guide."<sup>64</sup> Moreover, *mujtahidān* do more than interpret religious law for faithful *Shī'a*. They also lead Friday prayers, as do *Sunni imāms*, and collect taxes such as the *khuums*.<sup>65</sup> Significantly, their teachings only hold authority as long as they are alive. Once they die, their teachings hold no precedent.<sup>66</sup> That is not to say the teachings of a deceased *mujtahid* are irrelevant; they may have some persuasive force, but they are not binding in any authoritative sense.

There is a further interesting point relating to the *Shī'ite* view of *ijtihad* as a source of the *Sharī'a*. *Shī'ites* believe the process of revelation through *ijtihad* applied to *hadiths* is continual. In *Usuli Shī'ism*, which is a dominant form of Twelver *Shī'ism* and is based in Najaf, Iraq, the content of the *Sharī'a* is determined by the *majā'yya*.<sup>67</sup> This rule-making authority has been delegated from the Al Māhdi, a lineal descendant of the Prophet.<sup>68</sup> Because of this mandate, *Shī'a* have an opportunity to develop interpretations unconfined by the purportedly objective, neutral interpretations of *Sunni* legal scholars.<sup>69</sup> This liberty permits *Shī'a* to re-define, with justification, prominent legal issues, and solutions thereto.

More extremely, this liberty allowed a prominent Iraqi *Usuli Shī'ite* scholar and cleric, Muhammad Bāqir Al Sadr (1935-1980), to doubt certain *hadiths*.<sup>70</sup> Sadr distinguishes the adjudicatory rulings (*quadhā'*) of the Prophet from his religious rulings (*nahī*).<sup>71</sup> If a *hadith* is a mere adjudicatory ruling, like the prohibition of the sale of uncaught fish, then it potentially can be dismissed as addressing a specific temporal concern before or during the life of Muhammad. In contrast, a religious ruling from Muhammad cannot be set aside casually on such grounds.<sup>72</sup>

<sup>64</sup> BOLL, *supra*, at 18.

<sup>65</sup> See BOLL, *supra*, at 24.

<sup>66</sup> See BOLL, *supra*, at 24.

<sup>67</sup> Haider Ala Hamoudi, *You Say You Want a Revolution: Interpretive Communities and the Origins of Islamic Finance*, 48 VIRGINIA JOURNAL OF INTERNATIONAL LAW 249, 254-55 (Winter 2008). [Hereinafter, Hamoudi.]

<sup>68</sup> Hamoudi, *supra*, at 254-55.

<sup>69</sup> Hamoudi, *supra*, at 254-55.

<sup>70</sup> The most notable accomplishment by Sadr is *Iqtisāduna* ("Our Economics"), written in 1977. In this book, and throughout his life, he advocated the *Sharī'a* should be:

a means through which to reformulate the entire practice of Islamic finance in a manner that realizes more completely the aspirations of the broader Muslim community in its call for uniquely Islamic forms of human association in Muslim societies.

Quoted in Hamoudi, *supra*, at 249-250. Concerned about the development of *Shī'ite* Islamic finance as a response to growing Marxist influence, Professor Hamoudi proposes to use the influential work of Sadr to re-orient Islamic finance to render it subservient to social justice concerns.

Sadr also was the founder of the Islamic Dawa political party, and was commissioned by the Kuwaiti government in 1980 on how to use their oil proceeds appropriately. He was the father of Moqtada Al Sadr, who led a *Shī'ite* militia in Iraq that often clashed violently with United States forces following the American-led invasion of that country in March 2003.

<sup>71</sup> Hamoudi, *supra*, at 279.

<sup>72</sup> Hamoudi, *supra*, at 279.

Notwithstanding this distinction, it may be inquired whether applying *ijtihad* to *hadiths* could yield jurisprudence antithetical to the foundations of *Shī'ism*, or whether there are sufficient checks to ensure the stability of those foundations.

## PART SIX

### PRACTICE

#### Chapter 10

#### PROBLEM 10.1

Reaction of 1,2-dibromocyclohexane with sodium hydroxide in dimethyl sulfoxide (DMSO) at 100°C yields cyclohexene. Propose a mechanism for this reaction.

**Solution:** The reaction of 1,2-dibromocyclohexane with sodium hydroxide in DMSO at 100°C yields cyclohexene. The mechanism involves the formation of a cyclic alkoxide intermediate.

**Step 1:** Deprotonation of 1,2-dibromocyclohexane by sodium hydroxide to form a cyclic alkoxide intermediate.

**Step 2:** Elimination of bromide ion from the intermediate to form cyclohexene.

**Step 3:** Protonation of the intermediate to form cyclohexene.

**Step 4:** Elimination of bromide ion from the intermediate to form cyclohexene.

**Step 5:** Protonation of the intermediate to form cyclohexene.

**Step 6:** Elimination of bromide ion from the intermediate to form cyclohexene.



## Chapter 15

### FIVE PILLARS OF ISLAM

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... [W]e cannot fail to be concerned that today, with increasing insistency, some maintain that religion fails in its claim to be, by nature, a builder of unity and harmony, an expression of communion between persons and with God. Indeed some assert that religion is necessarily a cause of division in our world; and so they argue that the less attention given to religion in the public sphere the better. Certainly, the contradiction of tensions and divisions between the followers of different religious traditions, sadly, cannot be denied.

Address of His Holiness Pope Benedict XVI, Meeting with Muslim Religious Leaders, Members of the Diplomatic Corps, and Rectors of Universities in Jordan, Mosque Al-Hussein bin Talal, Amman, Jordan, 9 May 2009 (emphasis added)

#### SYNOPSIS

##### § 15.01 FIRST PILLAR: BEARING WITNESS (*SHAHĀDA*)

##### § 15.02 SECOND PILLAR: PRAYER (*SALAḤ*)

- [A] Five-Fold Daily Prayer
- [B] Comparison with Catholic *Liturgy of the Hours*
- [C] First Call (*Adhān*) and Second Call (*Iqāma*) to Prayer
- [D] Commerce and Prayer
- [E] Direction of Prayer (*Qibla*)
- [F] Women and Prayer

##### § 15.03 THIRD PILLAR: ALMSGIVING (*ZAKĀT*)

- [A] Virtues of Charity and Community
- [B] Distinction with *Zakāt al Fitr*
- [C] Effects and Beneficiaries
- [D] Formula and Administration
- [E] Does Intent (*Niyah*) Matter?
- [F] *Shīʿite* Distinction: *Khums* (Wealth Tax)

##### § 15.04 FOURTH PILLAR: FASTING (*SAWĪM*) AND *RAMAḌĀN*

##### § 15.05 FIFTH PILLAR: PILGRIMAGE (*ḤAJJ*)

- [A] *Miqat* (Six Starting Points)
- [B] Muslims Only
- [C] Female Pilgrims

- [D] Preparation at *Meqaat*
- [E] Steps in 'Umrah
- [F] Three Types of Hajj and Steps

## § 15.01 FIRST PILLAR: BEARING WITNESS (SHAHĀDA)

Bearing witness through public proclamation, private prayer, and most of all, example, is a concept familiar to persons of faith. In respect of the first two methods, Catholic Christians do so through their public and private recitation of the Nicene Creed and Apostle's Creed. Islam, too, has its succinct summary of the faith, to which all Muslims are called to declare. Known as the "*Shahāda*," it is the First Pillar of Islam.

"*Shahāda*" is a noun that means witness, specifically, know and believe without doubt or suspicion, as if witnessed. "*Shahāda*" comes from the verb (infinitive) "*yashadu*," which means "to witness," and "*shahida*," which means (past tense) "he witnessed." The entire declaration of the *Shahāda* sometimes — particularly on the Indian Subcontinent — is called the "*Kalimah*," which literally translated means the "word." In Romanized Arabic, the *Shahāda* states:

"*Lā ilāha illa Allāh, Muhammadu rasūl Allāh.*"

This testimony means:

There is no deity but God (Allāh), and Mohammed is the Messenger of God (Allāh).

The first clause is theological, because it translates literally as "No God but (except) God." The connotation is that there is nothing in the universe that is worthy of worship but God. The connotation is not that there is nothing in the universe but God, because there are things in the universe that are not good, indeed that are evil, which are not God. Moreover, to declare that the entire universe is God would wrongly impart to Islam the belief that God is immanent (i.e., indwelling, inherent, and permanently pervading the universe) that it does not have, but which is a part of some Asian faiths and philosophies, such as Hinduism and Shintoism.<sup>1</sup> Like Catholic Christianity, Islam holds that everything that is created is created by God, and belongs to God, i.e., the universe is God's creation. But, neither of these faiths believes that God is everywhere and resonating in all things, and neither is pantheistic. Rather, to both faiths, God is transcendent.

A related point is both faiths would agree in a Catholic adage: "We do not see in order to believe, but rather believe in order to see." That is, both faiths accept there is plenty of empirical evidence for the existence of God, if only we are open-minded enough to examine that evidence, which includes testimonial and documentary evidence. But, neither faith needs scientific proof for the existence of God to believe in God. That is the wrong way around. Belief in God opens the eyes of the believer to the reality of God.

<sup>1</sup> OXFORD AMERICAN DICTIONARY AND THESAURUS (New York, New York: Oxford University Press, 2003) at 783 (entry for "immanent").

The words of the *Shahāda* do not come directly from any *surah* (chapter) or *ayah* (verse) in the Qur'ān. Rather, the declaration is sourced in various *hadiths*, the principal one being one in which the Prophet Muhammad said that Islam is built on Five Pillars. *Imām* Bukhari recounts as follows:

Allāh's Apostle . . . said: Islam is based on (the following) five (principles):

1. To testify that none has the right to be worshipped but Allāh and Muhammad is Allāh's Apostle.
2. To offer the (compulsory congregational) prayers dutifully and perfectly.
3. To pay *Zakāt* (i.e., obligatory charity).
4. To perform *Hajj* (i.e., Pilgrimage to Mecca).
5. To observe fast during the month of *Ramādān*.<sup>2</sup>

Similarly, *Imām* Muslim explains that the second of the Four Rightly Guided Caliphs (*Rashidun*) was sitting with the Prophet and said "Muhammad, inform me about Al-Islam." In reply:

The Messenger of Allāh . . . said: Al Islam implies that you testify that there is no god but Allāh and that Muhammad is the Messenger of Allāh, that you pray, pay *Zakāt*, fast [during the month of] *Ramādān*, and perform pilgrimage to the (House) . . . [assuming] you are solvent enough (to bear the expense of the journey).<sup>3</sup>

Notably, the words of the *Shahāda* are not identical for *Sunnīs* and *Shī'ites*.

Typically, *Shī'ites* add the following clause at the end of the *Shahāda*: "*Aliun wali Allāh*." This add-on means: "Ali is the friend of [close to] God (Allāh)." Manifestly, it bespeaks the importance of 'Ali in *Shī'ism*, namely, 'Ali is the most important human figure in Islam after the Prophet. The term "*wali*" refers to a guardian, and is commonly used in the *Shari'a*, particularly in Family Law. When *Shī'ites* use the term "*wali*" in respect of 'Ali, they mean to indicate that 'Ali (and by extension, his successors as *Imāms*) rightly have guardianship over the Muslim community

<sup>2</sup> THE TRANSLATION OF THE MEANINGS OF SAHIH AL-BUKHARI, ARABIC-ENGLISH by Dr. Muhammad Muhsin Khan vol. I, book II (The Book of Belief (Faith)), p. 17, *hadith* no. 7 (Islamic University, Medina, Kingdom of Saudi Arabia; Dar Ahya Us-Sunnah, Al Nabawiya, March 1978). (Hereinafter, *BUKHARI*) This *hadith* is recounted in the compilations of *Imāms* Bukhari and Muslim. Another version of this *hadith* is as follows:

On the authority of Abū 'Abd al-Rahman 'Abdullah bin 'Umar bin al-Khattab, . . . who said: I heard the Messenger of Allāh, . . . say: "Islam has been built upon five things — on testifying that there is no other god but Allāh, and that Muhammad is His Messenger; on performing *salah*; on giving the *zakah*; on *Hajj* to the House; and on fasting during *Ramādān*."

See [http://en.wikipedia.org/wiki/Five\\_Pillars\\_of\\_Islam#cite\\_note-practices-21](http://en.wikipedia.org/wiki/Five_Pillars_of_Islam#cite_note-practices-21).

<sup>3</sup> SAHIH MUSLIM — BEING TRADITIONS OF THE SAYINGS AND DOINGS OF THE PROPHET MUHAMMAD AS NARRATED BY HIS COMPANIONS AND COMPILED UNDER THE TITLE AL-JAM'-'US-SAHIH BY IMAM MUSLIM, RENDERED INTO ENGLISH BY ABDEL HAMID SIDDIQI, WITH EXPLANATORY NOTES AND BRIEF BIOGRAPHICAL SKETCHES OF MAJOR NARRATORS, CORRECTED AND REVISED BY DR. HASAN UL LA, book 1 (The Book of Faith), p. 5, *hadith* no. 8 (Lahore, Pakistan: Sh. Muhammad Ashraf Booksellers and Exporters, 1990).



(ummah). This point, of course, is a key source of debate between *Sunnīs* and *Shī'ites*.

Also noteworthy is the fact *Shī'ites* do not regard the *Shahāda* as a separate Pillar of Islam. Rather, they link it to the "*Aqidah*," essentially meaning "Islamic theology." *Shī'ites* regard the *Shahāda* as part of the beliefs concerning Islam to be studied.

The *Shahāda* not only is the First of the Five Pillars of Islam, but also the most important of them. Two points underscore its significance. First, the *Shahāda* is the route to conversion. Any non-Muslim seeking to convert to Islam need only recite the *Shahāda* publicly, preferably in front of an *imām*. However, "publicly" is not interpreted too strictly. There need not be a crowd of thousands. A declaration in front of a few family members, and even perhaps simply in front of God, suffices.

Second, it occasionally has been suggested by Islamic religious scholars (*ulema*) a Muslim could lead a religiously and morally execrable life. But, if upon his or her death, before God (Allāh) on the Day of Judgment, that person honestly and sincerely proclaims the *Shahāda*, his or her sins would be forgiven. That likely is an overstatement; entry into Paradise perhaps is not so easy, and this view is not accepted by the majority of the *ulema*. Yet, the suggestion illustrates the importance of bearing witness.

## § 15.02 SECOND PILLAR: PRAYER (SALAH)

### [A] Five-Fold Daily Prayer

"Liturgy" is a term associated with Catholic Christianity, not Islam. Yet, there is a "Muslim liturgy." The Cistercian Abbot, Dom Jean-Baptiste Chautard (1858-1935), explains this term in his spiritual classic, *The Soul of the Apostolate*:

... Liturgy ... [is] the public, social, official worship given by the Church of God, or, the whole complex of means which the Church uses especially in the Missal, Ritual, and Breviary, and by which she expresses her religion to the adorable Trinity, as well as instructs and sanctifies souls.<sup>4</sup>

In Islam, a great deal of worship is "public," as it is conducted in a mosque, "social," as it is performed with one or more other persons, and "official," as it follows a process laid out by religious scholars (*ulema*) and leaders of prayer (*imāms*). While Muslims, like Catholics, certainly can and do pray privately, and seek a direct relationship with the Creator, community and communal forms of praise, thanksgiving, and petition are essential. Both faiths rely for their worship on sacred texts and compliments to them. Through liturgy, both of them express their religion to God. And, through liturgy, Islam and Catholicism seek to teach and make holy their

<sup>4</sup> DOM JEAN-BAPTISTE CHAUTARD, *THE SOUL OF THE APOSTOLATE* 212 (Trappist, Kentucky: the Abbey of Gethsemani, Inc., 1946, A Monk of Our Lady of Gethsemani, trans.) 212 (emphasis original). The book, published posthumously, was based in a 1907 pamphlet, *L'Apostolat des Catechismes et de la Vie Interieure*, (*The Apostolate of Catechism and the Interior Life*), which grew into book-length form after the First World War.

adherents. Islamic liturgy is manifest not only in daily prayer, but also in the great pilgrimage, the *Hajj*.

That daily prayer is an obligation incumbent on all Muslims is evident from *surah* 17, *ayat* 78-79, of the Qur'an:

<sup>78</sup>So perform the regular prayers in the period from the time the sun is past its zenith till the darkness of the night, and [recite] the Qur'an at dawn — dawn recitation is always witnessed — <sup>79</sup>and during the night wake up and pray, as an extra offering of your own, so that your Lord may elevate you to a [highly] praised status.<sup>5</sup>

This passage does not, however, indicate that prayer is required five times per day. Indeed, no passage in the Qur'an clearly identifies this Pillar of Islam.

Rather, the origin of this Pillar is amusing. It is the *Sunnah* of the Prophet. By tradition, Muslims believe a negotiation took place involving the Prophet Muhammad, Moses, and God (Allāh) during the *Isra'* and *Miraj*, with "*Isra'*" meaning moving from one place to another, in this instance the Prophet moving from Mecca to Jerusalem, and "*Miraj*" referring to going up, in this instance, the Prophet going up to Heaven from Jerusalem. At issue was how many times a Muslim should pray each day. Allāh advised 50 times. Moses advised Muhammad that many ordinary people would find such a large number too difficult, and counseled Muhammad to ask Allāh again. Muhammad did so, seeking a reduced figure. Allāh obliged, and the deal was set at five.

Table 15-1 summarizes the five daily prayers and their approximate times. The precise times are published in newspapers, mosque bulletins, and on the Internet. The Table also summarizes the similarities and differences among the prayers in terms of the number of *rak'ah* (*rak'at*, plural). A single, complete *rak'ah* involves standing, bowing, prostrating (i.e., on the floor, on one's knees, touching one's forehead to the floor), and standing up again. Each *rak'ah* also involves reading a passage from the Qur'an while in the standing position.

Praying on multiple occasions during the day is a crucial manifestation of a devout belief that God (Allāh) comes before all other activities and events of the day. To be sure, there are some tasks that cannot be abandoned — a surgeon in the middle of an operation, a professor in the middle of a lecture, a mother in the middle of nursing her child. It is, therefore, permissible under the doctrine of necessity (*ḍarūrāh*) to postpone the prayer until it is safe and convenient to do so.

Table 15-1:  
Summary of Five Daily Muslim Prayers

Name of Prayer	Approximate Time of Day	General Outline
<i>Fajr</i>	Early morning just before sunrise. e.g., 5:30 a.m.	<i>Fajr</i> is the shortest of the 5 prayers, involving just 2 <i>rak'at</i> .

<sup>5</sup> THE QUR'AN — A New Translation by M.A.S. Abdel Haleem 17:78 at 180 (Oxford, England: Oxford University Press, 2004). [Hereinafter, QUR'AN.]

Name of Prayer	Approximate Time of Day	General Outline
<i>Duhur</i>	Noon. e.g., 12 noon.	<i>Duhur</i> involves 4 <i>rak'at</i> .
<i>'Aṣur</i>	Late afternoon. e.g., 4:00 p.m.	Same as <i>Duhur</i> .
<i>Maghrib</i>	Just after sunset. e.g., 6:30 p.m.	<i>Maghrib</i> involves 3 <i>rak'at</i> .
<i>Isha'</i>	One hour after sunset. e.g., 8 p.m.	Same as <i>Duhur</i> .

### [B] Comparison with Catholic *Liturgy of the Hours*

Devout belief, manifest through frequent prayer, is shared by Catholic Christianity. All Priests are required, and the laity is invited, to practice the Divine Office. Doing so involves praying seven times each day, and such prayer may be communally in a Church, or individually in a home or office. Known as the *Liturgy of the Hours*, the regular daily prayer dates from the earliest days of Christianity, and thus technically is not unique to Catholicism.

The number of times practicing Muslims versus Catholics pray every day is not what matters, though perhaps there is no harm in adherents of different faiths competing in a friendly manner to out-do each other in prayer and good works. Rather, the salient point is both Islam and Catholic Christianity propose to their adherents that continuous prayer throughout the day — in effect, having God on one's mind regularly — is ideal.

Table 15-2 summarizes the Liturgy of the Hours. The format of the prayers, coupled with the readings from the Old and New Testaments of the Bible, are set forth in a book titled *Liturgy of the Hours*, sometimes called the *Breviary*, which is available in hard copy and on the Internet. Briefly, most of the prayers involve reading or singing an introductory hymn, thereafter reading two Psalms and a Canticle (based on the Old Testament), or 3 Psalms, and a passage from the New Testament, and concluding with a brief prayer. The prayers are organized according to the Liturgical Season — Advent, Christmas, Ordinary Time, and Easter — and generally follow a four-week cycle. Recitation of the Psalms is particularly significant, as they are the prayers that Jesus would have learned and said as a child and young adult in the synagogue.

### [C] First Call (*Adhān*) and Second Call (*Iqāma*) to Prayer

Each of the five daily Islamic prayers is initiated by a call to prayer, invariably delivered in Arabic. Technically, there are two calls. The first one, which is *adhān*, announces that it is time to pray. The second call, known as "*iqāma*," which means "to set up," states that it is time to line up for the beginning of the prayer. It is issued immediately before the prayer starts. In essence, both the *adhān* and *iqāma* summarize Islamic belief, proclaiming that God is Great, that there is no God but Allāh, Muhammad is the Messenger of God, salvation is found through obedience to the Will of God, and prayer is an important expression of this obedience.

Table 15-2:  
Summary of Catholic *Liturgy of the Hours*

Name of Prayer (English)	Name of Prayer (Latin)	Approximate Time of Day	General Outline
Office of Readings		Early in the morning, upon rising.	Invitatory Psalm (typically Psalm 95), followed by a hymn, 3 Psalms, 2 Readings, and Responsory Prayer. The 1st Reading typically is from the Old Testament, and the 2nd Reading typically is from an early Christian writer, Catholic Saint, Second Vatican Council, or other renowned source.
Morning Prayer	<i>Lauds</i>	Before 9:00 a.m.	Introduction, Hymn, Psalm, Canticle, another Psalm, Reading from New Testament, Responsory Prayer, Canticle, and final Prayers and Intercessions.
Mid-Morning Prayer	<i>Terce</i>	Between 10:00 and 11:00 a.m.	Introduction, Hymn, 1 of 3 Psalms of the Day, Reading from Old or New Testament, Concluding Prayer.
Midday Prayer	<i>Sext</i>	Around 12:00 noon.	Introduction, Hymn, 1 of 3 Psalms of the Day, Reading from Old or New Testament, Concluding Prayer.
Afternoon Prayer	<i>None</i>	Between 2:00 and 5:00 p.m.	Introduction, Hymn, 1 of 3 Psalms of the Day, Reading from Old or New Testament, Concluding Prayer.



Name of Prayer (English)	Name of Prayer (Latin)	Approximate Time of Day	General Outline
Evening Prayer	<i>Vespers</i>	Between 8:00 and 10:00 p.m.	Introduction, Hymn, 2 Psalms and Canticle or 3 Psalms, Reading from New Testa- ment, Responsory Prayer, Canticle, and final Prayers and Intercessions.
Night Prayer	<i>Compline</i>	Before bedtime.	Introduction, Hymn, 2 Psalms, Reading from New Testament, Short Responsory Prayer, and Con- cluding Prayer.

The *adhān* is issued by a *muezzin* from a minaret of a mosque, often via a recording through a loudspeaker. The *adhān* has 8 lines, invariably delivered in Arabic:

- (1) God (Allāh) is the Greatest.
- (2) I bear witness that there is no god but God.
- (3) I bear witness that Muhammad is the Messenger (*Rasāl*) of God.
- (4) Make haste towards worship.
- (5) Come to the true success.
- (6) Prayer is better than sleep.
- (7) God is the Greatest.
- (8) There is no god but God.

The sixth line is used only for prayers at dawn (*fajr salat*). The first line is repeated four times (except for the *Mālikī* School, which repeats it twice). The second through seventh lines are repeated twice. The last line is stated once.

For *Shī'ites*, There are minor differences in the first line of the *adhān*, which is God is greater than any description, and in the fourth through seventh lines, those lines being, respectively, "Hasten to prayers, Hasten to deliverance, Hasten to the best act, God is greater than any description." *Shī'ites* repeat the first line four times, and the other lines twice. Some *Shī'ite* scholars recommend adding "I bear witness that 'Alī is the Vice-Regent of Allāh," though it is not formally part of the *adhān* (or *iqāma*, explained below). This recommendation bespeaks the importance of 'Alī in *Shī'ism*.

The *iqāma*, also proclaimed by a *muezzin*, is nearly the same as the *adhān*, but it is delivered more quickly, in a monotone fashion, and differs as to the sixth line of the call. Accordingly, the *iqāma* is:

- (1) God (Allāh) is Greatest, God is Greatest.
- (2) I assert that there is no god but God.
- (3) I assert that Muhammad is the Messenger (*Rasāl*) of God.
- (4) Come to the prayer.
- (5) Come to salvation.
- (6) Stand for prayer.
- (7) God is Greatest, God is Greatest.
- (8) There is no god but God.

Each of the first six lines is repeated twice (with minor variations in the *Ḥanafī* and *Mālikī* Schools, and the *Shī'ites*).

*Sunnis* and *Shī'ites* disagree as to the origin of the *adhān*. *Shī'a* say it was developed by the Prophet Muhammad alone on the command of Allāh. *Sunnis* say it came to one of the Companions of the Prophet (*Ṣaḥābah*), and later one of the Four Rightly Guided Caliphs (*Rashidun*), Omar, in a dream. That is, Allāh revealed the *adhān* to Omar in a dream. Muhammad liked it, in preference to bells (used by Christians) or a horn (used by Jews). In turn, Muhammad had Bilal ibn Ribāh, a freed slave, issue the call because of his beautiful voice. *Shī'ites* agree that Bilal was the first to issue this call.

## [D] Commerce and Prayer

One illustration of the importance of the Five Pillars of Islam, that is, how they are indeed foundational obligations that are supposed to take priority over day-to-day secular matters, concerns their relationship to commerce. When the call to prayer is issued, are Muslims supposed to cease all trading activity? That is, is it appropriate to negotiate, conclude, and perform contractual obligations at the time of prayer? The issue is not unfamiliar to observant Jews or Christians, nor even to non-religious practitioners old enough to recall laws in the United States and Europe forbidding trading on Sundays. Most such laws have long been repealed, but the issue is a ripe one under the *Shar'ia*.

The general answer, subject to qualifications, is that a contract concluded at the time of prayer is voidable. Practically speaking, that means either side could cancel the contract. This answer is particularly true if the contract is formed at the time of the Friday (*Jum'a*) prayer. As that is the single most important congregational observance during the week, attention should be given to it. Engaging in commercial transactions at that time is akin to doing deals on Sunday when it is time for Mass at a Catholic Church. *Surah* 62, *āyat* 9-11 of the Qur'ān states:

"Believers! When the call to prayer is made on the day of congregation, go quickly to the prayer and leave off your trading — that is better for you, if only you knew — <sup>10</sup>then when the prayer has ended, disperse in the land and seek out God's bounty. Remember God often so that you may prosper. <sup>11</sup>Yet they scatter towards trade or entertainment whenever they observe it, and leave you [Prophet Muhammad] standing there. Say [to them],

"God's gift is better than any entertainment or trade: God is the best provider."<sup>6</sup>

Simply put, all trading activities must cease while *Jum'a* prayers are occurring.<sup>7</sup> God (*Allāh*) is more important, and offers more, than any worldly activity. Or, to put the point in familiar Christian terms found in *The Gospel According to Matthew* (chapter 4, verse 4) and *The Gospel According to Luke* (chapter 4, verse 4), man does not live by bread alone, but by every word that comes from God.

Yet, the analogy to Christianity bespeaks the qualification to the rule under the *Shar'ia*. In practice, in many markets and in many Muslim countries, all trading activity does not cease at the time of Friday congregational prayer. All over America, on Sunday morning, many vendors — from small liquor stores to major retail chains — are open. Business continues on, uninterrupted, as if the market participants were ignoring their religious duties. In truth, how those participants feel about their duties varies from one person to another, and cannot be judged by another. Also in truth, many of them simply cannot pull away from their commercial obligations. Taxi cab drivers must continue to ensure the safe and efficient journey of their passengers. Surgeons must continue to perform their operations for the betterment of their patients. Thus, business continues. Of course, it is advisable for, and indeed incumbent on, one who misses prayers to make them up at the earliest possible convenience.

### [E] Direction of Prayer (*Qibla*)

It is commonly thought that Muslims must face "east" when praying. The truth is that the direction a Muslim faces for prayer does matter. But, whether the proper direction is east depends on the location from which a Muslim prays. The key point is to face the direction of Mecca, specifically, the *Ka'ba*.

The Arabic term "*qibla*" refers to the proper direction for prayer. This direction is indicated in a mosque, and in certain buildings (such as hotels), by a niche or marking in the wall or on the ceiling. The *qibla* matters for two reasons beyond prayer. First, it is the correct direction in which a Muslim should be buried (specifically, with his or her face in that direction) after death. (Consequently, archaeologists or other researchers can identify a Muslim burial ground via the direction of remains.) Second, the *qibla* is the direction in which the head of an animal being slaughtered to make *halal* meat should point.

<sup>6</sup> Qur'an, *supra*, 62:9-11 at 372-73.

As the translator observes in a footnote to 62:11, the reference to Muhammad "standing there" is to two occurrences that happened during his life. First, during congregational prayers, when a famine had struck, some worshippers rushed out in pursuit of a caravan. Second, also during congregational prayers, some worshippers left hurriedly to follow a musical band playing for a wedding. At both instances, the Prophet was left at the pulpit (*minbar*), and 62:11 is what God (*Allāh*) instructs Muhammad to say to Muslims when such temptations and distractions happen. See *id.*, fn. A at 373.

<sup>7</sup> See JAMILA HUSSAIN, *ISLAMIC LAW AND SOCIETY — AN INTRODUCTION* 159 (Annandale, New South Wales, Australia: The Federation Press, 1990).

Interestingly, the *Ka'ba* in Mecca was not the original direction of the *qibla*.<sup>8</sup> Rather, the *qibla* pointed toward Jerusalem, specifically, the shrine Muslims call the "Noble Sanctuary" and Jews dub the "Temple Mount." At least as 200 A.D. (i.e., early 1st to early 3rd centuries A.D.), Jews have faced the Temple Mount when praying, and that practice is referred to in the Old Testament of the Bible, specifically, in *The First Book of Kings* (chapter 8, verse 35). During prayer, Muslims faced this direction from 610-623. Consequently, Muslims sometimes refer to the Noble Sanctuary as the "First of the Two *Qiblas*." Based on accounts from the Companions of the Prophet Muhammad, the direction changed to the second *Qibla* — the *Ka'ba* — suddenly, during a noon prayer in Medina in 623. That prayer occurred in what is now called the Mosque of the Two *Qiblas* (*Masjid al Qiblatain*). The Prophet led that prayer, facing Jerusalem, but he received a revelation from God (*Allāh*) in which he was instructed to re-orient the *qibla* to the *Ka'ba* — to "turn your face towards the *Masjid al Haram*." Immediately, he followed the revelation, as did the other worshippers. Henceforth, from any point in the world, the *qibla* became the direction of the *Ka'ba*.

It is important to appreciate that facing the direction of the *Ka'ba* does not mean worshipping the *Ka'ba* (or the contents thereof). Rather, it is God (*Allāh*) who is worshipped. The *Ka'ba* is the focal point for prayer, but the target of the prayer is the One God. It also is worth emphasizing that Christianity, along with the other two Abrahmic faiths, Judaism and Islam, shares a tradition of prayer in a particular direction. In the Latin rite Mass of the Catholic Church, i.e., the Tridentine Mass, prayer was offered *ad orientum* — to the east. The logic is the east is the direction from which the sun rises. In turn, the sun symbolically reminds worshippers of the Son of God, Jesus Christ, to whom prayer is directed.

### [F] Women and Prayer

The idea of gender-specific roles is not unique to Islam. Catholic Christianity has an all-male priesthood, and only a priest can celebrate a Mass. Buddhist services often are presided over by male-only monks. However, nuns and female laity perform important roles in Masses, including serving as Eucharistic ministers, and there certainly are female Buddhist monks. In contrast, when watching a mixed-congregational prayer at virtually any mosque in the world, non-Muslim observers often are struck by two points. First, the entire prayer is male orchestrated. Likewise, men deliver the sermon. Second, women typically are accorded inferior physical positions in which to sit or stand. That position is in the back, and often is behind a grill or screen.

As to the first point, traditionally, and continuing to the present day, a woman is forbidden from leading a public, mixed-congregational Muslim prayer. Throughout the ages, the "*imām*," or leader of prayer, almost invariably has been a man. Likewise, the first and second calls to prayer (*adhān* and *iqāma*, respectively), issued by a *muezzin* (the caller to prayer), are from a male voice. The sermon (*khuṭba*) itself is delivered by a male cleric, the *khatib*. The consensus opinion (*ijma'*) among all Four *Sunni* Schools, and among *Shi'ite* scholars, is that a

<sup>8</sup> See *Qibla*, WIKIPEDIA, posted at <http://en.wikipedia.org/wiki/Qibla>.



woman cannot lead a mixed group in prayer. This *ijma'* is not based on any Qur'anic injunction; rather, it is grounded in the *hadith*. However, assuming she is well-versed in the Qur'an, some *Sunni* and *Shi'ite* scholars agree she is permitted to lead other women in prayer, and possibly her own family, both males and females, in private prayer. The exception is justified on the ground with an all-female group, or with men who are close family members (*mahram*), there is no opportunity to be distracted from prayer by impure sexual thoughts.

As yet, there is no strong movement in the Islamic World to alter these traditions. However, in recent decades, on occasion, women have led prayers for both men and women. Examples of female *imams* include:

- 1995, South Africa<sup>9</sup>

The earliest reported case of a woman leading a public, mixed congregational Islamic prayer, at least in the non-Muslim western world, occurred in 1995 in Johannesburg, South Africa, in a building owned by the Muslim Youth Movement of South Africa. Indeed, the congregation met every Friday for the *Jum'a* (Friday) *salah* (prayer), and every night during *Ramaḍān* for the special *tarāwīḥ* prayer. The *imams* were female as well as male. Moreover, the *khatibs*, i.e., the persons delivering the *khutba* (sermon), were females as well as males.

Further, in 1994, Amina Wadud delivered the Friday sermon (*khutbatul Jum'a*) at the Claremont Main Road Mosque in Cape Town — the first woman to do so in South Africa. Ms. Wadud is an African-American Muslim and Professor of Islamic Studies at Virginia Commonwealth University in Richmond, Virginia. Since 1994-1995, women have often delivered the *khutbatul Jum'a* at this Mosque, as well as the Masjidul Islam in Johannesburg. The practice has expanded to Durban, where since 2003 at an open-air venue on the North Beach, on the Indian Ocean, two *khutbas* are delivered in connection with *Eid* prayer, one by a man and one by a woman. The event, designed by families, is organized by Taking Islam to the People.

- 2004, Canada<sup>10</sup>

In 2004, Yasmin Shadeer led prayer (*salah*) for a public, mixed-congregation organized by the United Muslim Association at a mosque in Toronto — the first time such an event occurred in Canada. Also that year, at the Etobicoke Mosque in Toronto, which is run by the United Muslim Association, a 20-year-old woman, Maryam Mirza, delivered the second half of the *khutba* on *Eid al-Fitr*. The following year, Raheel Raza led a Friday service in Toronto, leading the prayer and delivering the *khutba* to celebrate Earth Day. The event, organized by the Muslim Canadian Congress, was in the backyard of the home of an activist, Tarek Fatah.

Pamela Taylor, who converted to Islam in 1986, led a mixed congregational prayer in Toronto on 8 March 2007 organized by the Canadian Muslim Union. She did so in conjunction with International Women's Day, and observed that Islam accords equal status to women and men. Ms. Taylor is a co-founder of Muslims for

<sup>9</sup> See *Women as Imams*, WIKIPEDIA, posted at [http://en.wikipedia.org/wiki/Women\\_as\\_imams#Mixed-gender\\_congregations](http://en.wikipedia.org/wiki/Women_as_imams#Mixed-gender_congregations). [Hereinafter, *Women as Imams*.]

<sup>10</sup> See [www.wlum.org/node/3949](http://www.wlum.org/node/3949).

Progressive Values, which is based in Los Angeles, California. The following year, at the invitation of the Muslim Canadian Congress, delivered the *khutbatul Jum'a*, and led mixed-gender *salah*, in Toronto at the UMA Mosque on Canada Day.

Since 2008, the Noor Cultural Centre in Toronto has included women on their Board of *Khatibs*. Women deliver a full-length sermon before the second call to prayer (*adhān*), followed by a male *khatib*, who delivers a sermon in Arabic after the second *adhān*. Women and men alternate issuing the call to prayer. At the El-Tawhid Juma Circle in Toronto, founded by a lawyer-activist, El-Farouk Khaki and an academic, Laury Silvers, all Muslims — whether male or female, heterosexual or homosexual — are welcome to lead prayers and deliver a sermon.

- 2005, United States<sup>11</sup>

On 18 March 2005, Professor Amina Wadud led public, mixed congregational Friday prayers (*salat al Jum'a*). Professor Wadud declared:

I don't want to change Muslim mosques. I want to encourage the hearts of Muslims, both in their public, private and ritual affairs, to believe they are one and equal.<sup>12</sup>

The service, in New York sponsored by the Muslim Women's Freedom Tour, Progressive Muslim Union, and website "Muslim WakeUp!," gained world-wide notoriety. Because three mosques refused to host the event, the venue selected was an art gallery in Soho. A bomb threat forced a change of venue, to Synod House, which is located on the Upper West Side and owned by the adjacent Episcopal Cathedral of Saint John the Divine. The approximately 60 women and 40 men were seated together, with no segregation by gender. The *adhān* was issued by another woman, Suheyla El-Attar. With less fanfare, women have led prayers in other mosques in the United States, for example, as Nakia Jackson did at *Eid* in 2006 and 2007.

- 2005, Spain<sup>13</sup>

In October 2005, Professor Amina Wadud led a public, mixed gender congregational prayer in Barcelona.

- 2008, United Kingdom<sup>14</sup>

Professor Amina Wadud again led a public, mixed-gender Muslim prayer service on Friday, 17 October 2008, the first time for such an event in the United Kingdom. The venue was Wolfson College, Oxford University.

Obviously, all the examples are from non-Muslim western, democratic countries. In no Muslim-majority country has a woman led a mixed congregational prayer — at least not one that has attracted any media attention. In one instance, in 2004 on the last Friday of *Ramaḍān*, a 40-year old woman attempted to do so at one of the

<sup>11</sup> See *Women as Imams*, *supra*.

<sup>12</sup> Quoted in *Women as Imams*, *supra*.

<sup>13</sup> See *Women as Imams*, *supra*.

<sup>14</sup> See *Women as Imams*, *supra*.

largest mosques in Bahrain filled with 7,000 worshippers.<sup>15</sup> She donned male clothes and an artificial beard and moustache. However, as she was about to being the sermon, some of the worshippers realized she was a female, and they along with the *imām* of the mosque (Sheikh Adnan Al Qattan) seized her and turned her over to the police.

As to the second commonly observed phenomenon, it hardly is the case every mosque in the world could be described as “women friendly.” Non-Muslim women are asked — as at the *Umayyad* Mosque in Damascus, *Jama Masjid* in New Delhi, and National Mosque in Brunei — to cover themselves with garments that often are smelly, if not dirty, and hot, even if they otherwise have their heads, arms, and legs covered. Muslim women are relegated to separate, unequal parts of a mosque to prayer, which seems to bespeak a sense of male power, privilege, and entitlement. The reason is an admixture of Islamic Law and tradition. There is no Qur’anic passage that forbids women from praying in a mosque. During the time of the Prophet, many of them indeed did pray in mosques. However, under the *Shari’a*, women are not required to pray in a mosque.

The logic is women are responsible for taking care of the home and family. To obligate them to go to mosque once, never mind five times a day, would turn prayer from an act of loving submission to a burdensome chore. Thus, they are free to pray at home. A corollary rationale sometimes heard, and articulated by men, is it would be distracting to both sexes if either were present in the mosque, seated next to each other. This rationale is nonsense. It exalts the immaturity of some persons into a rule segregating the genders. Moreover, throughout history mixed congregations of Buddhists, Christians, Hindus, and Sikhs have prayed together, in the same physical space and conditions, with no apparent consistent, widespread distraction from spiritual matters.

Nothing in the Qur’an expressly states that women, should they choose to come to a mosque to pray, must be confined to the back, or to a confined space. Accordingly, in some mosques, such as at the *Jama Masjid* in New Delhi, India, women and men mix more-or-less freely at Friday prayers. However, in most mosques, including the famous ones of Istanbul, women are segregated in the back, behind a screen with a grill-like pattern with small holes and a modest door. There is a *hadith* whereby it is stated that if women and men pray together in a mosque, it is better that they sit in separate rows, such as men on the right and women on the left, or men in the front and women in the back. This *hadith* appears to be the strongest basis for the practice of segregating women. However, strictly interpreted, it does not seem to require separate physical spaces, and it certainly does not countenance according to women an inferior space.

<sup>15</sup> See *Women as Imams*, *supra*.

## § 15.03 THIRD PILLAR: ALMSGIVING (ZAKĀT)

### [A] Virtues of Charity and Community

Giving the legally obligatory alms is evidence of an attitude of moderation toward wealth. By paying alms, a person avoids the extremes of niggardliness and extravagance. The Caliph ‘Umar, the second of the Four Rightly Guided Caliphs (*Rashidun*) explained:

Whoever pays the *zakāh* (legal alms), honours his guest (with hospitality), and gives in order to alleviate misfortune, is free of niggardliness.<sup>16</sup>

The Qur’an itself establishes *zakāt* as a “right of the poor to a share of the wealthy.”<sup>17</sup> *Surah* 51 tells the story of Abraham and his aged wife Sarah, and in so doing recounts the generosity of Abraham to strangers:

<sup>24</sup>[Muhammad], have you heard the story of the honoured guests of Abraham? <sup>25</sup>They went in to see him and said, “Peace.” “Peace,” he [Abraham] said, [adding to himself] “These people are strangers.” <sup>26</sup>He turned quickly to his household, brought out a fat calf, <sup>27</sup>and placed it before them. “Will you not eat?” he said, <sup>28</sup>beginning to be afraid, but they said, “Do not be afraid.” They gave him good news of a son who would be gifted with knowledge. <sup>29</sup>His wife then entered with a loud cry, struck her face [in incredulity and embarrassment], and said, “A barren old woman?” <sup>30</sup>but they said, “It will be so. These are your Lord’s words, and He is the Wise, the All Knowing.”<sup>18</sup>

Abraham and Sarah were, of course, blessed with a son as the well-treated strangers said. As the passage intimates, it is easy to give to persons we know and like, but harder — and a greater service to God — to give to persons we do not know, and perhaps if we did might not like. In Catholic Christian terms, we are called to love everyone, even if we do not necessarily like everyone.

To love others is to want for them what is objectively and truly good (a definition offered by Aristotle, among others).<sup>19</sup> Certainly, to Muslims and Christians alike, the ultimate good end is eternal life in the presence of God. Almsgiving is a physical manifestation of love toward that ultimate goal. Almsgiving helps alleviate the suffering of the less fortunate, which at the very least is an objective and truly good end for them on this earth, and bespeaks a sense of gratitude as to the source of wealth, and detachment from that wealth, or at least its worst excesses.

<sup>16</sup> Quoted in MOHAMMAD HASHIM KAMALI, *THE RIGHT TO LIFE, SECURITY, PRIVACY AND OWNERSHIP IN ISLAM* 247 (Cambridge, England: Islamic Texts Society, 2008). [Hereinafter, KAMALI.]

<sup>17</sup> KAMALI, *supra*, at 277.

<sup>18</sup> Qur’an, *supra*, 51:24-30 at 343-344.

<sup>19</sup> For example, in *Nicomachean Ethics*, Book VIII, § 3, ¶ 3, Aristotle states:

Perfect friendship is the friendship of men who are good, and alike in virtue; for these wish well alike to each other *qua* good, and they are good themselves.

ARISTOTLE, *THE NICOMACHEAN ETHICS* 145 (Oxford, England: Oxford University Press, 2009, David Ross & Lesley Brown eds.).



Charity, of course, is a practice the Qur'an encourages, for example in *surah* 57, *ayah* 7:

Believe in God and His Messenger, and give out of what He has made pass down to you: those of you who believe and give will have a great reward.

Accordingly, one of the Five Pillars of Islam is the religious obligation to give alms (*zakāt*). In brief:

The Qur'an has objectively proclaimed *zakāh* as the right of the poor to a part of the property of the rich (51:4) [which speaks of "1. . . those [winds] that scatter far and wide, 2and those that are heavily laden, 3that speed freely, 4that distribute [rain] as ordained!"] This manner of reference to *zakāh* also features in the Prophet's instruction to Mu'adh b. Jabal, who was told, upon his departure to become the judge and governor of the Yemen, to "1. . . take it from the wealthy and give it to the poor among them". . .<sup>20</sup>

Thus, every able Muslim (*i.e.*, who has property above a minimal or quorum amount, the *nisāb*), and able Muslim business (*i.e.*, with property above a *de minimis* threshold), is required to give annually to charity an amount equal to 2 ½ percent of his or her gross assets (less necessary expenses).<sup>21</sup> The amount given comes from productive assets.

The central theoretical purpose of *zakāt* is to promote a sense of community among Muslims (sometimes called "fraternity," or "*ukhuwwah*"), bonding through empathetic love the advantaged with the disadvantaged. Bluntly put, *zakāt* reminds all Muslims that God is the source of material blessings, and the rich ought not to think they are self-reliant and in control. Precisely because they are rich, they have a religious and legal obligation to share. In Catholic Christian terms, *zakāt* manifests the solidarity of the rich with the poor. Giving alms to them is an exercise of charity and generosity in favor of the least advantaged by persons to whom God has given much.

## [B] Distinction with *Zakāt al Fitr*

It is important not to confuse the third pillar, *zakāt*, with a related but distinct practice, "*zakāt al fīr*" (literally, "fast-breaking alms"). This practice is linked to the fourth pillar, the *Ramādān* fast (*sawm*). *Zakāt al fīr* is based on *surah* 9, *ayah* 34-35 of the Qur'an. It also is sourced in the *hadīth*, as Dr. Muhammad Ahmad Al-Musayyar explains:

The evidence of the above is the *hadīth* recorded in the two authentic books of *hadīth* (namely Al-Bukhari and Muslim), and reported by Ibn 'Umar . . . : "The Messenger of Allah . . . prescribed *zakāt al fīr* as one *saa'* (an old measurement) of dates or wheat on every person whether male or

<sup>20</sup> Kamali, *supra*, at 252.

<sup>21</sup> The rate of 2 ½ percent applies to all asset categories, including currency, precious metals (*e.g.*, gold and silver), livestock, and merchandise. However, some *fukuhā* indicate the percentage is higher on agricultural products and natural resources. See Kamali, *supra*, at 252.

female from among the Muslims." In another authentic *hadīth*, the Messenger of Allah is reported to have ordered that *zakāt al fīr* be paid out before going to the *Eid* Prayer. This is done with a view to make all Muslims feel happy in that day.<sup>22</sup>

Essentially, then, during the month of *Ramādān*, on the eve of *Eid al Fitr* the head of a household gives alms to the poor, wholly apart from and in addition to payment of *zakāt*, on behalf of the family in that household. The amount payable for *zakāt al fīr* is the equivalent of the old measurement indicated in the above-quoted passage, in the form of food customary to the area. To distinguish the two practices, *zakāt* is sometimes called "*zakāt al māl*," vis-à-vis *zakāt al fīr*.

Significantly, unlike the *zakāt al māl*, there is no minimum threshold (*nisāb*) for offering *zakāt al fīr*, other than that payment is made if the person making it has food for one day worth of meals. Thus, unlike *zakāt al māl*, *zakāt al fīr* is paid by rich and not-so-rich alike. For the rich, the payment expresses gratitude for their wealth. For the not-so-rich, offering *zakāt al fīr* serves three purposes: it expresses gratitude for receiving *zakāt al māl*; gives them equal standing, along with the rich, with God (Allāh); and bolsters their dignity by proving they are empowered to give as well as receive.

## [C] Effects and Beneficiaries

From a practical standpoint, *zakāt al māl* has two effects. First, it helps shield the poor from even more dreadful material circumstances than they presently endure. That is, while *zakāt* does not wholly alleviate their suffering, to some degree it mitigates their misery. Second, *zakāt* accomplishes a modest degree of peaceable redistribution of wealth. It is a kind of taxation of the rich, calculated in a way (a fixed percentage of gross assets less necessary expenses) that the greater the ability to give, the greater the obligation. In that sense, in Catholic Christian terms, *zakāt* is akin to an exercise of the preferential option for the poor.

Who are the precise beneficiaries of *zakāt*? The Qur'an identifies eight classes of underprivileged persons who hold a legal right to receive almsgiving:

Alms are meant only for the poor, the needy, those who administer them [*i.e.*, the officials responsible for collecting and distributing the *zakāt*], those whose hearts need winning over, to free slaves and help those in debt, for God's cause, and for travelers in need. This is ordained by God; God is all knowing and wise.<sup>23</sup>

Two points about this passage are worth observing.

First, this list of the beneficiaries is not exclusive. The government of a Muslim country may add a new category, especially if one mentioned in the Qur'an no longer exists. Thus, Professor Kamali suggests in a country in which slavery has long since

<sup>22</sup> Posted at [www.islamonline.net/serveit/Satellite?cid=1119503547630&pagename=IslamOnline-English-Ask\\_Scholar%2FFatwaE%2FFatwaE.AskTheScholar%ixzz13VoWLh3j](http://www.islamonline.net/serveit/Satellite?cid=1119503547630&pagename=IslamOnline-English-Ask_Scholar%2FFatwaE%2FFatwaE.AskTheScholar%ixzz13VoWLh3j). The author is Professor of Islamic Creed, Faculty of Theology, Al Azhar University, Cairo, Egypt.

<sup>23</sup> Qur'an, *supra*, 9:60 at 121.

disappeared, it would be appropriate to give *zakāt* to ex-convicts who have served their prison sentences and seek to re-integrate into society.<sup>24</sup> Similarly, a government has the discretion to allocate *zakāt* disproportionately to a category of poor people with a present, exigent need relative to other categories.

Second, upon receiving a *zakāt* distribution, the poor acquire ownership over the funds or property distributed. It would be incongruous with the purposes of *zakāt*, as well as its status as a legal right of the poor, if the rich retained title to their funds or property, and allowed the poor temporary possession and enjoyment of the assets.

### [D] Formula and Administration

As for how *zakāt* is calculated, the basic formula is simple enough.<sup>25</sup> Every Muslim, individual or business, is to pay an amount equal to 2 ½ percent of his, her, or its gross assets, less a deduction for necessary expenses. Necessary expenses would include food, clothing, shelter, and medical care. Payment is on an annual basis, typically occurring at the end of the lunar calendar year, or at the end of *Ramādān*.<sup>26</sup> *Zakāt* is owed on an asset only if it has been owned for a full lunar calendar year.

The gross asset base includes:

- Agricultural produce, i.e., harvests, such as cereals, grains, pulses, and other primary commodities.
- Livestock, such as camels, cattle, goats, and sheep.
- Natural resources, such as minerals from mines, as well as buried treasure.
- Wealth, such as manifest in savings in the form of bank balances, cash in hand, financial instruments (e.g., stocks and bonds).
- Precious metals and jewelry (particularly, gold and silver).
- Traded goods, such as inventories of goods used in trading.<sup>27</sup>

Most of these asset categories have associated with them a minimum limit, or *de minimis* threshold. Below this “*nisāb*,” no *zakāt* is owed. For example, the *de minimis* threshold is roughly 653 kilograms (1,440 pounds) of crops in total. The *nisāb* for gold and silver is ounces (85 grams) and 21 ounces (595 grams), respectively.

Notably, real property, specifically, the personal residence of a Muslim, is excluded from the gross asset base, unless the property owner is selling the

<sup>24</sup> See KAMALI, *supra*, at 247.

<sup>25</sup> There are computer software programs and internet-based resources available for calculating *zakāt*, akin to TurboTax and other devices many Americans use to assist them in preparing their income taxes. See, e.g., Hidaya Foundation Zakāt Calculator, posted at [www.hidaya.org/zakat-calculator.html](http://www.hidaya.org/zakat-calculator.html).

<sup>26</sup> See, e.g., QU’AN, *supra*, ¶141 at 91 (relating to “paying what is due on the day of harvest” in respect of “cultivated and wild gardens,” i.e., “palms, crops of diverse flavors, the olive, the pomegranate, . . .”).

<sup>27</sup> The *jizyah* (the per capita tax levied by a Muslim state on its non-Muslim residents) sometimes is included in the asset base.

property. Among other justifications for this exclusion may be liquidity. Real property is not a liquid asset, but the obligation to pay *zakāt* is manifest in cash, the most liquid of all instruments. A property owner holding a large amount of valuable land (e.g., worth U.S. \$2 million) may lack current funds to pay *zakāt* on that land (e.g., U.S. \$50,000, assuming no expense deduction), unless he or she sells it to raise cash. Likewise, vehicles (or animals) used for transportation are excluded from the asset base.

The figure of 2.5 percent, or 1/40, is not set out in the Qur’ān. Rather, its source is the *ḥadīth*, in compilations by *Imāms* Al Bukhari and Muslim in their books on minimums and amounts. Indeed, as the Qur’ān establishes no specific figure, there are actually different tax rates depending on the type of asset at issue. Table 15-3 summarizes these rates, as well as the applicable *de minimis* thresholds.

Table 15-3  
Zakāt Tax Rates and Nisāb for Different Asset Classes<sup>28</sup>

Asset Category	Nisāb (De Minimis Threshold above which Zakāt applies)	Zakāt Tax Rate (percentage of value of asset or head of livestock)
Agricultural production	653 kilograms (1,440 pounds)	5 percent for crops from irrigated land 10 percent for crops from non-irrigated (i.e., rain-fed) land
Bank balances, cash in hand, and financial instruments	Equivalent value of 21 ounces (595 grams) of silver	2.5 percent
Natural resources (mined products)	No nisāb	2.5 percent
Livestock: Cattle and Buffalo	30 head	First 59 head: 1 Up to 89 head: 2 Up to 150 head: 3 Plus — First 39 head: 1 1-year old Up to 59 head: 1 2-year old Up to 69 head: 2 1-year old
Livestock: Goats and Sheep	40 head	First 40 head: 1 Up to 120: 2 More than 200: 3 Plus — 1 for every additional 100 head

<sup>28</sup> This Table is adapted from *Zakat*, WIKIPEDIA, posted at <http://en.wikipedia.org/wiki/Zakat>.



Asset Category	Nisāb (De Minimis Threshold above which Zakāt applies)	Zakāt Tax Rate (percentage of value of asset or head of livestock)
Livestock: Camels	5	5-24 camels: 1 sheep or goat for every 5 camels 25-35 camels: 1 1-year old female camel 36-45 camels: 1 2-year old female camel 46-60 camels: 1 3-year old female camel 61-75 camels: 1 4-year old female camel 76-90 camels: 2 2-year old female camels 91-120 camels: 2 3-year old female camels 121 or more camels: 1 2-year old camel for each additional 40 camels, or 1 3-year old camel for each additional 50 camels, plus donation of food and other items to persons in need
Precious Metals and Jewelry (Gold and Silver)	3 ounces (85 grams) of gold 21 ounces (595 grams) of silver	2.5 percent
Traded Goods	Equivalent value of 21 ounces (595 grams) of silver	2.5 percent

To be sure, other than the *nisāb*, there are exceptions to the *zakāt* obligation. Most importantly, a Muslim is not required to give alms if doing so would impose severe financial hardship on him, her, or the business. Thus, as per the previous example, an owner is not expected to sell real property to obtain the necessary liquidity to cover the obligation. This exception comes under the general doctrine of necessity (*ḍarūrāh*).

The *zakāt* is administered in different ways in different Islamic countries. At one extreme, collection and distribution is centralized in a government ministry, such as a Ministry of Finance or Ministry for Religious Affairs. The relevant authority may directly engage in the necessary activities, or supervise it as done by others it charges with these responsibilities. At the other extreme, administration is decentralized, being left to local mosques. Each is free to establish its own *modus operandi* (method of procedure or operation). In some Muslim countries, the government has the authority penalize property owners for non-compliance with the *zakāt* obligation.

As indicated, both Muslim individuals and businesses are liable for *zakāt*. The two different *zakāt* administrative methods are practiced in Saudi Arabia, depending on the nature of the payor. For Muslim individuals in the Kingdom, the decentralized methodology is used: they pay through their mosques. For Muslim businesses, the centralized approach is used: the Department of *Zakāt* and Taxes in the Ministry of Finance collects the *zakāt* from these enterprises.<sup>29</sup>

### [E] Does Intent (*Niyyah*) Matter?

Does the obligation to pay *zakāt* depend on legal intent (*niyyah*)? That is, assuming a property owner is sufficiently wealthy to contribute the requisite alms, but is either mentally incompetent, or a minor, is the contribution required? The majority opinion among *Sunnite* Scholars is that status, in the sense of ability or lack thereof to form intent to give alms, is irrelevant.

That is because the nature of *zakāt* is dualist: it is both an act of both worship (*ʿibādah*) and social obligation (*muʿānah*). The former may require intent, but the latter is about the interest of the community in the prudent management of property. In turn, the goal of *zakāt* is to achieve a fair distribution of wealth in society (or, at least, one fairer than the *status quo*). If paying *zakāt* were contingent on the ability to form the intent to do so, then this "*niyyah*" exception would be so large as to defeat the goal. Thus, ability is without regard to the status of a property owner as mentally incompetent or a minor. Even from an incapacitated person who is incapable of forming a legally valid intent (*niyyah*), *zakāt* is obligatory. In practice, the payment may be arranged by the appropriate guardian for the property owner. The majority opinion strikes some *Shariʿa* scholars as startling, and there is a different, minority, view. One Companion of the Prophet, ʿAbd Allāh bin Masʿūd, stressed that *zakāt* is an act of worship (*ʿibādah*), at least that dimension of it outweighs the social obligation (*muʿānah*). Any prayer depends on intent. Hence, as prayerful behavior, *zakāt* depends on *niyyah*.

### [F] Shiʿite Distinction: *Khums* (Wealth Tax)

*Shiʿites* adhere to the same practice of *zakāt* as do *Sunnis*. But, *Shiʿites* bear an additional obligation relating to the virtues of charity and community: *khums*, which in loose terms is a tax on wealth. Imposed annually, *khums* is a levy of one-fifth (1/5) on the net increase in wealth during the preceding year.<sup>30</sup>

Specifically, *khums* is an annual tax of 20 percent levied on net income (i.e., gross revenues less expenses), net increases in real estate holdings, precious metals and jewelry, and war booty:

<sup>29</sup> Interestingly, the differential levy (or potential therefore) of imposing *zakāt* on Muslim and non-Muslim businesses was an issue during the negotiations for the accession of Saudi Arabia to the World Trade Organization (WTO). See Raj Bhala, *Saudi Arabia, the WTO, and American Trade Law and Policy*, 38 THE INTERNATIONAL LAWYER 741-812 (Fall 2004).

<sup>30</sup> See JAMES A. BILL & JOHN ALDEN WILLIAMS, *ROMAN CATHOLIC & SHIʿI MUSLIMS: PRAYER, PARISON AND POLITICS* 21 (Chapel Hill, North Carolina: The University of North Carolina Press, 2002); MOJIB MOJIB, *AN INTRODUCTION TO SHIʿI ISLAM: THE HISTORY AND DOCTRINES OF TWELVE SHIʿISM* 179-80 (London, United Kingdom: Yale University Press, 1985) (Hereinafter, *MOJIB*).

[The *khums*] is levied by Shi'is on net income (after paying all expenses), net increase in land holdings, stored gold, silver and jewelry, mined products, items taken from the sea and war booty.<sup>31</sup>

The tax also is levied on net increases in livestock holdings (e.g., sheep). Accordingly, *khums* is not precisely a tax on wealth or net worth, but on accumulated increases thereto.

To what ends do funds collected as *khums* go? Money that is collected as *khums* is a gift given to God (Allāh), the Prophet Muhammad and his family, orphans, travelers, and other needy persons:

This tax is to be spent on the Prophet, his family, orphans, the needy and travelers.

Among Shi'is, half of the *khums* (i.e., a one-tenth tax or a tithe) is considered to be the share of the Imam (*sahl al-Imām*), being the Imam's inheritance from the Prophet. This share of the Imam is paid by the believers to their *marja'at-taqlid* [source of emulation] in his capacity as the representative (*nā'ib al-ām*) of the Imam.<sup>32</sup>

Note that half of the *khums* is deemed the share of the *Imām* (*sahl al-Imām*), as it is the inheritance of the *Imām* from the Prophet. Yet, because the 12th or Hidden *Imām*, Al Mahdi, is in the Greater Occultation, and not visible to mankind, *khums* funds are spent on the needy, and on any cause deemed to be in accordance with the Will of Allāh.<sup>33</sup>

Shi'ites cite *surah* 8, *ayah* 41, of the Qur'ān as the legal source for *khums*:

Know that one-fifth of your battle gains belongs to God and the Messenger, to close relatives and orphans, to the needy and travelers, if you believe in God and the revelation We send down to Our servant on the decisive day, the day when the two forces met in battle. God has power over all things.<sup>34</sup>

However, *Sunnis* do not regard *khums* as a distinct tax from the obligation to pay *zakāt*. Rather, they regard this passage as restricted to the context of spoils from battle, and interpret it to mean that the one-fifth collection is divided into the five beneficiary groups it identifies (God and the Prophet, close relatives, orphans, needy, and travelers). Thus, for *Sunnites*, the 2 ½ percent collection of *zakāt* is what matters, and only in the event of war booty is a separate, 20 percent collection taken up. Moreover, in certain *Sunni* Schools and under particular interpretations, the *khums* is payable only on a narrow range of items, such as property (movable and immovable), treasure troves and war booty.<sup>35</sup>

<sup>31</sup> MOMEN, *supra*, at 179.

<sup>32</sup> MOMEN, *supra*, at 179-180.

<sup>33</sup> See *Khums*, WIKIPEDIA, posted at <http://en.wikipedia.org/wiki/Khums>. [Hereinafter, *Khums*.]

<sup>34</sup> QUR'AN, *supra*, 8:41 at 113.

<sup>35</sup> See *Khums*, *supra*.

## § 15.04 FOURTH PILLAR: FASTING (SAWM) AND RAMADĀN

Fasting is hardly an unusual religious practice. For Catholic Christians, every Friday during the Season of Lent (40 days before Easter) is a day of fasting. The faithful are to consume only one meal, and two smaller meals that in sum should not exceed the main meal. For Jews, fasting is prescribed for particular occasions by the Torah. For Buddhists, particularly monks, the last meal of the day should be noon. Thereafter, until breakfast the following day, attention should be on meditation. Among Hindus, a caste of holy persons known as "*sādhus*," live on a simple diet, such as chapattis (bread) and milk. Despite many ritualistic variations, the common denominator across all these faiths is that fasting is a spiritually cleansing process. The devout humbles herself, subordinating her sensual desires for physical satisfaction and pleasure to a more powerful and transcendent reality, and a more important and eternal goal.

For Muslims, the lunar month of *Ramādān* is the most spiritually cleansing period of the year. During that month, Muslims fast from the first to the last light of day. Because the Qur'ān was revealed by God (Allāh) to the Prophet Muhammad during the month of *Ramādān*, the fasting occurs then. *Surah* 2 explains:

<sup>183</sup>You who believe, fasting is prescribed for you, as it was prescribed for those before you, so that you may be mindful of God. <sup>184</sup>Fast for a specific number of days, but if one of you is ill, or on a journey, he should fast on other days later. For those who can fast only with extreme difficulty, there is a way to compensate — feed a needy person. But if anyone does good of his own accord, it is better for him, and fasting is better for you, if only you knew. <sup>185</sup>It was in the month of Ramadan that the Qur'ān was revealed as guidance for mankind, clear messages giving guidance and distinguishing between right and wrong. So any one of you who is present that month should fast, and anyone who is ill or on a journey should make up for the lost days by fasting on other days later. God wants ease for you, not hardship. He wants you to complete the prescribed period and to glorify Him for having guided you, so that you may be thankful. <sup>186</sup>[Prophet], if My servants ask you about Me, I am near. I respond to those who call Me, so let them respond to Me, and believe in Me, so that they may be guided.<sup>36</sup>

Additionally, the *Sunnah* refers to the fast. *Imām* Bukhari records the following *hadith*:

When you see the crescent (of the month of *Ramādān*), start fasting, and when you see the crescent (of the month of *Shawwāl*), stop fasting; and if the sky is overcast (and you can't see it) then regard the month of *Ramādān* as of 30 days.<sup>37</sup>

<sup>36</sup> QUR'AN, *supra*, 2:183-186 at 20.

<sup>37</sup> BUKHARI, *supra*, vol. III, book XXXI (The Book of Fasting), p. 69, *hadith* no. 124. Similarly, in another *hadith*, the Prophet said:

"The month [of fasting] is like this and this," (at the same time he showed the fingers of both his hands thrice) and left out one thumb on the third time.



(*Shawwāl* is the 10th month of the Islamic lunar calendar, which immediately follows *Ramādān*.)

Fasting from sunrise to sunset is no easy task. No beverages, even water, not to mention food, are to pass the lips of a fasting Muslim. Oddly, a small minority of Muslims — in rural Bangladesh, for example — spit out their saliva, believing the rules of the fast preclude swallowing it. The fast also covers sexual intercourse during the daylight hours, as *surah* 2, *ayah* 187 indicates:

*You [believers] are permitted to lie with your wives during the night of the fast: they are [close] as garments to you, as you are to them. God was aware that you were betraying yourselves, so He turned to you in mercy and pardoned you: now you can lie with them — seek what God has ordained for you — eat and drink until the white thread of dawn becomes distinct from the black. Then fast until nightfall. Do not lie with them during the nights of your devotional retreat in the mosques: these are the bounds set by God, so do not go near them. In this way God makes His messages clear to people, that they may guard themselves against doing wrong.<sup>38</sup>*

The reference to “devotional retreat” (known in Arabic as “*ʾitikāf*”) concerns a voluntary act whereby a Muslim, male or female, voluntarily secludes himself or herself in a mosque for an extended period (such as a full day, or even 2 or 3 days) for the exclusive purpose of prayer. During this retreat, the Muslim may choose to return home briefly for a necessity, such as taking a shower (or, if at night, to eat or drink) or attending a funeral, but must abstain from intimate relations with his or her spouse. Note that despite the reference to “wives” in the passage, suggesting only men may do the devotional retreat, a woman, too, may engage in it, albeit with permission of her husband or guardian. That is confirmed by a *ḥadīth* from the Prophet Muhammad, recorded by *Imām* Bukhari.<sup>39</sup>

*Id.*, vol. III, book XXXI (The Book of Fasting), p. 73, *ḥadīth* no. 132.

<sup>38</sup> *Qurʾān*, *supra*, 2:187 at 21 (emphasis added).

<sup>39</sup> *One ḥadīth states:*

243. Narrated ʾĀisha [a wife of the Prophet] . . . [May Allah be Pleased with her]: The Prophet . . . used to practise *ʾitikāf* in the last ten days of *Ramādān* till he died and then his wives used to practise *ʾitikāf* after him.

BUKHARI, *supra*, vol. III, book XXXIII (Chapters of *ʾitikāf*), p. 135, *ḥadīth* no. 243. Note that ʾĀisha is famous for her knowledge of Islamic jurisprudence. She responded to many questions for male and female Muslims about Islamic law, and taught the subject after the death of the Prophet. She thus stands as a role model for professional women and men alike.

Another *ḥadīth* also lends support to the proposition that women can do *ʾitikāf*, as follows:

ʾĀisha . . . said, “The Prophet . . . used to practice *ʾitikāf* in the last ten days of *Ramādān* and I used to pitch a tent for him, and after offering the morning prayer, he used to enter the tent.” Hafsa [another wife of the Prophet] asked the permission of ʾĀisha to pitch a tent for her and she allowed her and she pitched her tent. When Zainab bint Jahsh [another wife of the Prophet] saw it, she pitched another tent. In the morning the Prophet . . . noticed the tents. He said, “What is this?” He was told of the whole situation. Then the Prophet . . . said, “Do you think that they intended to do righteousness by doing this?” He therefore abandoned the *ʾitikāf* in that month and practiced *ʾitikāf* for ten days in the month of *Shawwāl* [the month immediately after *Ramādān*].”

BUKHARI, *supra*, vol. III, book XXXIII (Chapters of *ʾitikāf*), pp. 138–139, *ḥadīth* no. 249. The inference

In brief, fasting is a comprehensive obligation. Moreover, as the Islamic calendar is a lunar one, *Ramādān* does not always fall during the same season every year. The physical difficulty of fasting is exacerbated when *Ramādān* occurs during the long days of summer, as opposed to short days of winter. But, three questions must be examined.

First, why endure the hardship? That is, what is the purpose of the *Ramādān* fast? Simply put, it is to remember God — as the *surah* 2, *ayah* 185 says, to glorify God by showing thanks to Him for providing the *Qurʾān* as a guide to discern right from wrong. By abstaining from food, beverages, and intimacy from dawn to dusk, the mind of the Muslim is focused (or supposed to be) on Allāh. Hence, abstinence is spiritually cleansing, in that it clears out thoughts of worldly pleasures. There is, additionally, the benefit that *Ramādān* causes the rich to humble themselves and empathize with the poor. The rich, whose needs and wants are taken care of in abundance, do not have to worry about quenching their thirst, feeding their bellies, or finding time for relationships with the opposite sex. Not so with the poor, whose lot in life is hard and filled with uncertainty. Thus, during the daylight hours of *Ramādān*, the rich live a slice of the life that is the year-round existence of hundreds of millions of poor around the world. In so doing, the entire world-wide Muslim community (*ummah*), for all its diversity, is unified.

Notably, at sundown of each day, the *Ramādān* fast traditionally is broken with a date. Following the breaking of the fast, there is a call to the fourth of the five daily prayers (*maghrib*). After the prayers comes a large, and typically scrumptious, assortment of foods known as the *Iftar* Buffet. (“*Iftar*” literally means “breakfast,” and is used on normal days throughout the year.) The fifth and final prayer (*isha*) follows the Buffet. The last day of *Ramādān*, which marks the end of the fasting month, is *Eid al Fitr*, which literally means “Festival to Break Fast.” The celebration begins on the following morning, which is the first day of the 10th month in the Islamic (*Hijri*) calendar, *Shawwāl*. On that morning, a fantastic array of delicacies is served buffet-style. Analogies in the American holiday calendar are the Thanksgiving or Christmas dinner. It is a great honor for a guest — particularly a non-Muslim — to be invited by a Muslim family to share in either an *Iftar* Buffet or the *Eid al Fitr* celebration. The invitation should be treated as such, and as a gastronomic matter, it would be a sin to reject it.

Second, is God deliberately trying to make the life of Muslims burdensome by calling them to a month of fasting? The answer is “no.” As *surah* 2, *ayah* 184–185 (quoted above) explains, God grants an exception to the ill and the traveler. Here, again, the general *Shariʿa* doctrine of necessity (*ḍarūrāh*) is applied. No one should fast if it would endanger their health or journey. Rather, they should await their recovery, or the end of their journey, and then make up the skipped fasting days. And, what if a person must take medication everyday, for his or her whole life (e.g., to control blood pressure)? The *Qurʾān* offers this response: feed someone else. Thus, such a person can give to charity so that a poor person can enjoy a meal

as women may engage in *ʾitikāf*, as three of the wives of the Prophet did. But, the Prophet apparently was displeased by the use of tents in the mosque, or at least by the congestion caused by the tents. What is interesting about both *ḥadīths* there is no indication in either of them that a woman needs the permission of her husband, or male guardian, to perform *ʾitikāf*.

everyday for a month. By doing that, a Muslim who cannot fast has an opportunity to reflect on his or her gifts from, and spiritual connection to, God. *Surah 2, ayah 186* adds a note of comfort for the Muslim who finds fasting difficult: God is not far away, and ready for him or her to call for help.

Third, do Muslims work during *Ramaḍān*? The answer is very definitely “yes.” While offices may open a bit later, or close a bit earlier, than usual, and the pace of work may be a bit less frenetic than normal, they are to fulfill their normal professional, as well as family, obligations. Indeed, Islamic history boasts notable achievements during the month of *Ramaḍān*. For example, during *Ramaḍān*, a general, Tariq bin Ziyad established the Muslim Caliphate called “Al Andalus,” which is Andalusia, in Southern Spain, with its first Caliph being Al Walid I, who ruled from 711-750 A.D. He and his Moorish forces brought Islam to the European continent, at a time when Europe was in the Dark Ages. By Islamic accounts, at least, the influence of the Moors helped push Europe out of the Dark Ages, and eventually into the Enlightenment. Only in 1492, following a defeat at Granada, were the Moors forcibly expelled from Spain, by Christian forces. That would prove to be the only lasting victory of Christian forces in the Crusades. As another example, during the month of *Ramaḍān* in 1260, Muslim forces fought against Mongols in the Great Battle of Ain Jalut. Their victory in that battle ended the threat and reality of Mongol destruction of cities in the Middle East.

A final point about *Ramaḍān* is important to appreciate. Muslims believe — spiritually if not literally — that during the month of *Ramaḍān*, the gates of Heaven are open, and the gates of hell are closed. That is not to say that any Muslim who dies during the month of *Ramaḍān* is assured of going to Heaven. Rather, it means that any bad acts committed by a Muslim during *Ramaḍān* are clearly committed by him or her, out of free will. The devil is locked inside hell during that month. Therefore, no Muslim can blame the devil for a bad act. With the devil behind the gates, the excuse that “the devil made me do it” will not be accepted on the Day of Judgment.<sup>40</sup>

## § 15.05 FIFTH PILLAR: PILGRIMAGE (HAJJ)

The Fifth and final Pillar of Islam is one of the most amazing religious spectacles on earth. It is a pilgrimage known as the “*Hajj*.” Physically, the journey is to Mecca and Medina, the two holiest sites of Islam, where that faith was born. These sites lie in the western Kingdom of Saudi Arabia, in the Hejaz province, near the Red Sea coast and the sprawling trading center of Jeddah. Spiritually, many Muslims who have completed it say it is the most moving experience of their lives. Every year, the *Hajj* attracts roughly 2-3 million Muslims. Pilgrims who have completed it are called “*Hajjis*,” and some — for example, in Malaysia and Pakistan — even put this appellation on their business sign or card, though doing so out of pride surely must be a dubious practice.

*Surah 2, ayah 189* of the Qur’ān speaks about the *Hajj*:

<sup>40</sup> See *Ramadan*, BBC News, 9 July 2009, posted at [www.bbc.co.uk/religion/religions/islam/practices/ramadan\\_1.shtml](http://www.bbc.co.uk/religion/religions/islam/practices/ramadan_1.shtml).

They ask you [Prophet] about crescent moons. Say, “They show the times appointed for people, and for the pilgrimage.”<sup>41</sup>

The *Hajj* occurs two months following *Ramaḍān*, that is, in the twelfth month, called “*Dhi Al-Hijja*,” of the Islamic lunar calendar. That is, performing the pilgrimage during the appointed month is referred to as the “*Bigger*” or “*Higher*” *Hajj*. To be sure, Muslims are welcome and indeed encouraged to perform a pilgrimage to Mecca and Medina at any time of the year when they can do so. Such a journey, which may be done in any of the other 11 months, is known as the “*Smaller*” or “*Lower*” *Hajj*, or “*Umrāh*.”

The general *Shari’a* doctrine of necessity (*darārah*) is relevant to this Pillar of Islam, as it is to the others. A Muslim is not required to undertake the *Hajj* if doing so would cause serious physical or financial hardship. That said, doing the pilgrimage is invariably regarded by pilgrims as one of the, if not the, spiritually highest and most joyous occasions of their lives.

### [A] *Meqaat* (Six Starting Points)

To begin, there are six cities in the Kingdom of Saudi Arabia from which either the *Hajj*, or “*Umrāh*” commence. Collectively, they are called the “*Meqaat*.” Except for the last one listed below, these cities are around Mecca, of varying distances of approximately 75-150 miles. A pilgrim is free to choose to start from any of the six cities.

- Tha Al-Holifa

This starting point is for pilgrims from Medina and the surrounding area.

- Al Johffah

Located in the western part of the Kingdom, near the Red Sea, this location used to be a mosque, but now a large city — Rābigh — is built up around the mosque. Al Johffah is the starting point for pilgrims from the Levant (Jordan, Lebanon, Palestine, and Syria) and North Africa (Algeria, Egypt, Libya, Mauritania, Morocco, and Tunisia).

- Qarn Al Menazel

This starting point is used by pilgrims from most of the Gulf region, namely, Bahrain, Kuwait, Oman, Qatar, and United Arab Emirates (UAE), and from the central and eastern parts of the Kingdom itself.

- Yellumlam

This starting point is for pilgrims from Yemen, as well as some Somali pilgrims (though most of them travel via sea and begin in Jeddah). Some Omani pilgrims also use this starting point, which (like their other options) avoids driving through the *Rub Al Khali* (Empty Quarter).

<sup>41</sup> QUR’AN, *supra*, 2:189 at 21.



- That 'Irq

This starting point is used by pilgrims from Iraq. It also is used by pilgrims transiting through Iraq from countries such as Afghanistan and Pakistan (or, in earlier days when travel via camel caravan was common, Iran).

- At Tan'im

This starting point is for people living in Mecca. At the time of the Prophet, At Tan'im was located just outside the city limits of Mecca, though nowadays with the urban growth, the city has spread around it. At Tan'im is convenient for Meccans, as they can avoid travelling a long distance outside the city limits to start their pilgrimage.

Medina, while important in Islamic history as part of the *Hijra*, is not a part of the *Hajj* or '*Umrāh*. Still, many pilgrims go there to visit the holy mosque and grave of the Prophet.

### [B] Muslims Only

Of critical importance is that only Muslims are able to perform either the *Hajj* or '*Umrāh*. That means Mecca and its surroundings constitute a restricted zone to which, and in which, non-Muslims may not travel. All pilgrims who are not Saudi citizens require a visa to enter the Kingdom, unless they are citizens of the Gulf Cooperation Council (GCC) countries (*i.e.*, in addition to Saudi Arabia, Bahrain, Kuwait, Oman, Qatar, and the UAE). The Kingdom offers *Hajj* and '*Umrāh* visas for such foreigners. This visa functions as the permit for them to perform the pilgrimage, and thereby to enter Mecca and its surrounding area. All other pilgrims, that is, citizens of Saudi Arabia or another GCC country, need a permit to travel to Mecca to perform the *Hajj*, but not for '*Umrāh*. The permit allows for one *Hajj* in a five-year period.

The reason for not requiring a permit for Saudi and GCC citizens to perform an '*Umrāh* relates to the tremendous pressure on Saudi officials to organize pilgrimages and ensure the safety of pilgrims. An '*Umrāh* can be performed anytime during the year, whereas there is limited time (less than a month) for the *Hajj* season. In any given year, there are 2-3 million Muslims descending on Mecca and the surrounding area during this season. In some past years, particularly during 1987-2006, there have been debacles in organization and safety, and even violence and death. These sad occurrences, summarized in Table 15-4, prompted the Saudi authorities to make major structural changes, including the provision of tents, and the building of bridges around the areas in which the devil is ritually stoned. In this respect, it must be noted that the House of Saud, that is, the Saudi Royal Family, derives not only enormous prestige, but also political and even religious legitimacy, from properly securing events and pilgrims at the *Hajj*. The very title of the Saudi King includes the phrase "Custodian of the Two Holy Mosques," referring to the Mosques at Mecca and Medina.

Table 15-4:  
Deaths of Pilgrims During Recent *Hajj* Seasons<sup>42</sup>

Year	Number of Deaths	Cause
2006	345	Crushed during ritualistic stoning of the devil.
2004	251	Trampled in stampede.
2003	14	Crushed.
2001	35	Trampled in stampede.
1998	118 (possibly more)	Trampled in stampede.
1997	343 (1,500 injured)	Fire.
1994	270	Trampled in stampede.
1990	1,426	Killed in tunnel leading to holy sites.
1987	400	Saudi authorities compelled to put down forcefully pro-Iranian militants and demonstrators

Accordingly, as a pilgrim is driving along the route from any of the *Meqat* locations to Mecca, there are security checkpoints. They are staffed by the Saudi military and police, not the religious police (*mutawin*). Every car is stopped and each pilgrim is asked to produce the relevant documentation, *i.e.*, passport, visa, and/or permit.

By some accounts, until the time of the Ottoman Empire, non-Muslims could go to Mecca and observe the *Hajj* and '*Umrāh*. After all, during the time of the *Rashidun*, and in the *Umayyad* and *Abbasid* Caliphs, Christians and Jews lived in Mecca and the Mecca area. Moreover, there is no Qur'anic passage or *hadith* explicitly forbidding non-Muslims from Mecca. Reputedly, the Ottomans restricted travel to Mecca to Muslims out of concern about the growing numbers of pilgrims and the potential for disturbances.

### [C] Female Pilgrims

Note also that a male pilgrim may perform the *Hajj* and '*Umrāh* alone, or of course with family members or friends. A female pilgrim must be accompanied by her guardian (*wali*), such as her father, husband, or eldest brother, or by another male relative, including her adult son, step-son, grandson, uncle, or nephew. Consequently, the accompanying person will need to have the requisite documentation to perform the *Hajj* and '*Umrāh*. Under one circumstance, a woman could perform the pilgrimage alone, namely, if she has no family. In that event, she would join a group, say of fellow pilgrims from her home country. The group could be all-female, though in all likelihood such a group would be guided by a male travel agent.

What is the logic behind the practice of women being accompanied by a male guide? Traditionally, the logic is to help and support a woman to meet the physical demands of the pilgrimage. The ritualistic stoning of the devil is the most physically challenging of the practices. Of course, this logic is regarded as

<sup>42</sup> See *Hajj Approaches Spiritual Climax*, BBC News, 4 January 2007, posted at [bbc.news.co.uk](http://bbc.news.co.uk).

paternalistic by many male and female Muslims, who appreciate the fact there are plenty of instances of women being stronger than men. Accordingly, an explanation for the practice simply is tradition.

### [D] Preparation at *Meqaat*

Technically, each starting point among the six *Meqaat* is a mosque. There, or in close proximity, are shower and bathroom facilities. Accordingly, at the chosen *Meqaat* city, a pilgrim showers, which qualifies as the ablution before prayer. Then, the pilgrim changes clothes from their normal attire to a white, two-piece garment for men (one piece covering the shoulder, and the other on the bottom), and a single-piece gown for women which may be of varying colors. Pilgrims sometimes can be identified by the color of their garments they choose. For example, women from Southeast Asia often sport bright colors (such as yellow), women from the Gulf tend to wear black, and women from Sub-Saharan Africa display white. The general term for clothes worn by men or women for the 'Umrah or Hajj is "*ihram*." To the degree the traditional religious garb is similar, if not identical, its symbolism is clear: to be clad the same way shows all persons are equal before God (Allāh), and each stands before Him on the Day of Judgment.

Having changed clothes, the pilgrim prays in the mosque once (standing, bowing, prostrating on the ground, and standing up again, done twice, i.e., two "*rak'ah*"), and then declares an intention (*niyya*) to do the Hajj, or 'Umrah, or both. The declaration is said orally, in a normal-level and tone of voice: "I intend to do the Hajj," or "I intend to do the 'Umrah." Note that many pilgrims fly to the Kingdom for their pilgrimage. There is no airport in Mecca, but Jeddah — about a 45 minute drive from Mecca — has an international airport. When an aircraft carrying passengers flies over one of the six *Meqaat* cities, the Captain announces the location and invites any would-be pilgrims to declare their *niyya*. Because taking a shower in the plane is not possible, the pilgrims do so before boarding (e.g., at their homes), and perform the necessary prayer in advance.

### [E] Steps in 'Umrah

The term "*Umrah*" connotes visiting Mecca, walking around the *Ka'ba* seven times (called "*tawaf*"), and walking between the Mountains of *Safa* and *Marwa* seven times (called "*sa'i*"). Theoretically, a pilgrim can perform the 'Umrah in a few hours. Practically, however, because of crowds and physical exertion, it takes several hours or a full day, depending on the starting point (*meqaat*).

Why do pilgrims walk around the *Ka'ba* seven times? The answer is the Prophet Abraham did so, and all pilgrims regard themselves as following this practice. As for the distance between the two Mountains, it is roughly one-half mile. Why walk between these peaks? The answer is Hagar (in Arabic, "*Hajar*"), wife of Abraham, did so. Why she did so is a fascinating bit of Ancient history and Muslim belief. In brief, some 'Umrah and Hajj practices are re-enactments of the trials of Abraham and Hagar.

Hagar walked between these Mountains seven times searching for a caravan that might have water to share with her and her child, Ishmael. (Abraham had

returned to Palestine, to his other wife, Sarah.) Recall that God ordered Abraham to leave Palestine take Hagar and Ishmael to the place where the *Ka'ba* is located and leave them there. (At the time, the *Ka'ba* did not exist. There is historical debate as to whether the *Ka'ba* existed before Abraham and had been destroyed.) Abraham did so, and Hagar eventually ran out of water. As she traversed between the Mountains to look for the caravans, she saw water appear from the ground. The Archangel Gabriel (Jibreel) had appeared, unbeknownst to her, and struck that spot with a staff, from which water sprang — known as "*Zamzam*" water. Hagar tried to collect the water, uttering "*zamzam*," which in Arabic means "to collect," or "to gather." Thereafter, a caravan arrived, and seeing the water, settled there. The city of Mecca was built, and when Abraham returned, he rebuilt the *Ka'ba*. All wells around the *Ka'ba* have dried out, save for one — the well started by the Archangel. Thus, to this day, it is possible to obtain "*Zamzam*" water.

Following the seven-fold walk between the *Safa* and *Marwa* Mountains, male pilgrims must cut their hair to a shorter length, or shave their heads bald. The choice is theirs. Women must cut their hair, but a tiny cut, even removal of a strand or small lock, suffices. Typically, pilgrims conclude the 'Umrah by returning to the *Ka'ba* to pray.

### [F] Three Types of Hajj and Steps

As for the Hajj, it involves more practices than an 'Umrah. There are three types of "Hajj":

#### Type #1: *Timatto'*

This type of pilgrimage is intermediate, between *Qiran* and *Ifrad*, in terms of difficulty. With the *Timatto'*, a pilgrim intends to do the 'Umrah (outlined above), followed by the Hajj. Certainly, a pilgrim may perform 'Umrah as the Smaller Hajj at any time of the Muslim year (*Hijri* calendar). In contrast, when a pilgrim does 'Umrah as part of the *Timatto'*, he or she must pay close attention to the starting and ending dates.

Specifically, a pilgrim must commence the 'Umrah following the month of *Ramadan*, namely, starting on Day 1 of the 10th month (*Shawwal*), or on any day thereafter into the 11th month (*Dhu Al-Q'ada*) and the first 8 days of the 12th month (*Dhu Al-Hijja*). *Dhu Al-Hijja*, the third month after *Ramadan* and the final one in the Islamic calendar year, is the month prescribed for the Hajj. Moreover, the pilgrim must be finished with the 'Umrah by Day 8 of the 12th month (*Dhu Al-Hijja*). Thus, the pilgrim has some flexibility as to when to start the 'Umrah in connection with the *Timatto'*, but the limit is Day 8 of *Dhu Al-Hijja*.

Put differently, to perform the 'Umrah first, a pilgrim starts no earlier than on Day 1 of the 10th month in Mecca, but no later than Day 8 of the 12th month. What is the reason for this window of opportunity to perform the 'Umrah? The answer concerns events on Day 9 of the 12th month. On Day 9 of that month, the pilgrim must be in 'Arafat, a neighboring town of Mecca.

To commence the 'Umrah in connection with the *Timatto'*, a pilgrim declares an intent at the *Meqaat* to perform that *Timatto'*. The pilgrim then performs the



'*Umrah* (as outlined above), but male pilgrims only cut their hair, rather than shaving their heads. Upon completion of the '*Umrah*, the pilgrim changes clothes back to regular attire, and waits until Day 9 in Mecca. On Day 9, the pilgrim changes back into customary religious clothes ('*ihram*'), and goes to Mount 'Arafat. This spot is where the Prophet delivered his last sermon (*khuṭba*). There is a large mosque at Mount 'Arafat, as well as the town of 'Arafat, which is roughly 10-15 miles from Mecca. During the *Hajj* season, a new *khuṭba* is presented each year at the grand mosque in Arafat by an *imām*, who usually is the Grand Mufti of Saudi Arabia. Having listened to this sermon, the pilgrim stays at Mount Arafat until the sun sets, typically praying and asking for forgiveness for sins.

Once the sun sets, the pilgrim goes to Muzdalifah, which like 'Arafat is a small town around Mecca, close to Muzdalifah. The pilgrim overnights in Muzdalifah. Sunrise marks the beginning of the 10th day, which is "*Eid al-Adha*," or the Festival of Sacrifice for all Muslims not on *Hajj*. For pilgrims, Day 10 is *Yom Al-Nahr*, meaning "Day of Sacrifice." On Day 10, the pilgrim goes to Minā, which is the third of the three small towns along with Arafat and Muzdalifah around Mecca that are relevant to the *Hajj*.

At Minā, a pilgrim who performs four practices is free to remove his ritual garments ('*ihram*'), and sport his normal attire. The four practices are:

(1) Sacrifice of an Animal

As Day 10 is *Yom Al-Nahr* for a pilgrim, he or she must sacrifice an animal, typically a camel, cow, sheep. Each pilgrim, whether male or female, must do so. However, the pilgrim need not kill the animal with his or her own hand. Rather, they can go to a butcher shop, and need not watch the actual killing. Note that for non-pilgrims celebrating *Eid al-Adha*, the sacrifice is per family.

(2) *Jamrah Al 'Aqaba*, or *Jamrah Al Kubrā*:

"*Jamrah*" is a noun that means "coal," and "*kubrā*" is an adjective meaning "large." There are three large pillars, not technically made of coal. They look like large rectangular walls, and are off-white in color. Though *Jamrah Al Kubrā* refers to the "Large Pillar," the three pillars are of roughly equal size. They are differentiated by name, but the key point, is they represent the devil. It is *Jamrah Al Kubrā* that is to be stoned on Day 10. On that Day, a pilgrim throws seven stones at this pillar. This stoning keeps with the tradition of Abraham. Muslims appreciate that the devil tried to tempt Abraham away from sacrificing his son, Isaac, to God, and Abraham responded by throwing stones at the devil. Men and women are not segregated from one another while performing the stoning.

(3) Shortening or Shaving

Male pilgrims must shorten their hair, or preferably shave their heads. Female pilgrims may cut a small portion of their hair, as they would for an '*Umrah*.

(4) *Tawaf Al Hajj*

This practice is done in Mecca, of course, as it refers to walking around the *Ka'ba* seven times, as would be done in connection with '*Umrah*. Thus, a pilgrim must return from Minā to Mecca to satisfy this obligation.

A pilgrim who performs all four practices on Day 10 may resume wearing regular clothes, *i.e.*, is free from the '*ihram*. Male pilgrims also may resume shaving their faces, and to clip their nails, both of which they must abstain from doing from Day 1 through Day 10. However, the pilgrim must remain in Minā to participate in the stoning of the devil on Days 11, 12, and 13. The pilgrim throws seven stones at each of the three pillars. In addition to the *Jamrah Al Kubrā*, the other two pillars are named *Jamrah Al Woostā* (meaning the Medium Pillar), and *Jamrah Al Sughrā* (referring to the Small Pillar).

Why would a pilgrim choose not to perform all four of these practices, especially given the incentive to change back to his or her normal clothes? There is no single answer, but practical realities are important to keep in mind. In any given year, there are roughly 2-3 million people performing the *Hajj* (not counting pilgrims from Mecca). Engaging in all four practices on the same day is logistically difficult, not to mention tiring. Thus, many pilgrims perform these practices across 3-4 days, *i.e.*, Days 10-14. On Day 13, having cast the final stones at the symbolic devil, a pilgrim is free to return to Mecca. That is, the pilgrim could spend an extra day in Minā, at his or her discretion. Once in Mecca, the pilgrim performs the *tawaf al wadda'*, which refers to the last seven-fold circulation of the *Ka'ba*. The pilgrim need not perform this last step of the *Timatto'* on Day 13, but could do so a day or a few days thereafter.

Note that there are no hotels in Arafat, Muzdalifah, or Minā, and while in the latter two towns, pilgrims spend the night there. That means they sleep in tents, some of which are modernized to include air-conditioning, bathroom facilities, and other modern amenities (even internet, though televisions are discouraged, which could be a time-consuming distraction from religious affairs). There are no private tents, partly because in the past (up to the late 1990s) when there were such tents, there were accidents and casualties from campfires. The tents are built by the government, which rents them to travel agents, and the agents in turn sell *Hajj* travel packages to Saudi and non-Saudi pilgrims alike. Thus, the only time pilgrims stay overnight in Mecca is before Day 9, before going to Arafat, and after Day 13, when returning from Minā. Pilgrims going to Mecca to perform *Tawaf Al Hajj* do not spend the night in Mecca, but return to Minā.

Type #2: *Qiran*

The Prophet himself performed the *Qiran*, though declared if he lived another year, he would do the *Timatto'*. The *Qiran* form of the *Hajj* is quite similar to, but harder than, that of the *Timatto'*. The pilgrim performs both '*Umrah* and *Hajj*. Thus, for example, pilgrims performing *Qiran*, like pilgrims performing the *Timatto'*, are required to offer a sacrifice of an animal. However, the precise order of the practices done in connection with *Qiran* differ slightly from the order associated with *Timatto'*.

Also, among the differences is that a pilgrim is not allowed to change clothes, i.e., the pilgrim must wear ritual garments ('*ihram*') for the entire *Qirān* Hajj — both while awake and asleep. (In practice, a pilgrim takes two or three sets of identical '*ihram*', and washes and changes them as appropriate.) Here, then, is why the *Timatto*' is regarded as easier than the *Qiran*. With the *Timatto*', a pilgrim does the '*Umrah*' in customary clothes ('*ihram*'), changes to regular apparel until Day 8 of the 12th month (*Dhu Al-Hijja*), then changes back to the '*ihram*', and then does the Hajj. In other words, with *Timatto*', the pilgrim can select a starting date for the '*Umrah*' so as to enjoy some time in his or her normal clothes. For example, if the pilgrim starts and finishes the '*Umrah*' on Day 1 of the 12th month, then the pilgrim has 8 free days, until Day 9 when he or she has to be in 'Arafat, to rest in normal clothes. In contrast, this luxury is not possible with the *Qiran*.

#### Type #3: '*Ifrād*'

This form of the Hajj is the simplest of the three. No '*Umrah*' is performed, only the Hajj itself. Thus, pilgrims can start an '*ifrad*' as late as Day 9 of the 12th month (*Dhu Al-Hijja*). Further, a pilgrim on '*Ifrād*' is not required on Day 10, *Yom Al-Nahr*, to make a sacrifice of an animal. However, the pilgrim does sport religious garb ('*ihram*').

## Chapter 16

### FOUR SUNNITE SCHOOLS OF ISLAMIC LAW

... In the very outset, at the first meeting with them [Arabic speaking tribesmen and townsmen], was found a universal clearness or hardness of belief, almost mathematical in its limitation, and repellent in its unsympathetic form, Semites had no half-tones in their register of vision. They were a people of primary colours, or rather of black and white, who saw the world always in contour. They were a dogmatic people, despising doubt, our modern crown of thorns. They did not understand our metaphysical difficulties, our introspective questionings. They knew only truth and untruth, belief and unbelief, without our hesitating retinue of finer shades.

T.E. Lawrence (Lawrence of Arabia) (1888-1935)

SEVEN PILLARS OF WISDOM 38-39 (1926) (New York, New York: Doubleday, 1935)

#### SYNOPSIS

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## § 16.01 HISTORICAL BASIS FOR FOUR SCHOOLS

*Shari'a*, as properly understood within the different sects of Islam, defines the content of the law. Literally meaning the "way" or "path to the water source," it regulates more than conduct that impinges upon the rights of others. It concerns the personal religious duties of each Muslim. Determining the content of the *Shari'a* is more than mere law-making. It is interpreting correctly the Message of God (Allāh), as revealed through the Prophet Muhammad, to live in communion with God and prepare for Final Judgment. Methodologically, the content is determined by *fiqh*, or jurisprudence:

The aim of *fiqh* was to regulate all man's relations to God, to establish the right way to live according to the Islamic sources. *Fiqh*, then, is much more than law, it is a way of life. It gives regulations on religious duties such as prayer, fasting, almsgiving and pilgrimage. It also details criminal law and civil law. Every act that man performs is divided into what it permitted (*halal*) and what is forbidden (*haram*) with several gradations in between.<sup>1</sup>

*Sunnis*, who account for roughly 85 percent of all Muslims, have varying interpretations what is the appropriate *fiqh*.<sup>2</sup> The Four Schools all start from the same premise, so the differences among the Schools are not great. In fact, each School recognizes the validity of the other three, and any *Sunni* can choose to change Schools.

It is important to appreciate the historical context in which the Schools emerge, namely, a dispute about the primacy of *ray* (personal opinion) or *hadiths*. In the mid-8th century, scholars began to write down *hadith*, rather than relying on oral tradition.<sup>3</sup> Differences of interpretation grew as more *hadiths* were formalized and disseminated. At first, the sides in this conflict were determined more by geography than theological reasoning. Meccan and Median jurists emphasized "tradition as their standard for legal decisions,"<sup>4</sup> whereas the Ancient Schools in Basra and Kufa relied on *ray*.<sup>5</sup> Their rationale for *ray* grew over time, because the primary sources (Qur'an and *hadith*) did not account for all situations that Muslims encountered, to be a valid source of law allowing for changes in the environment. But, as *hadith* compilations were shown to be more authoritative and became increasingly accessible, many Muslims found the use of *ray* less compelling. Moreover, the argument Traditionists levied in trumpeting the primacy of *hadith* stressed that human reasoning could not be a source of law because of its fallibility.

Amidst this debate, the ruling Caliphates factored into the development of the Four Schools:

the practices of the *Umayyad* courts had failed properly to implement the spirit of the original laws of Islam propounded in the Qur'an. Pious scholars

began to give voice to their ideas of standards of conduct which would represent the fulfillment of the true Islamic religious ethic.<sup>6</sup>

As a result, these standards of conduct began to yield intellectual currents, a few developing into the major Schools. In brief, the failure of the *Umayyad* Caliphate to rule within Islamic precepts led to the development of the Schools outside the governing authority.<sup>7</sup>

As the *Umayyad* and *Abbasid* Caliphates rose and fell, the separation between political and religious authorities grew:

To allow one of these sultans — even a *Sunni* sultan — any determining role in the development of the law that was now being formulated would mean that the law was only valid within the area that this particular sultan controlled. That would mean splitting the law up along the borders of petty states that were ever changing and short-lived.

Thus the process of establishing an authority to legitimize the actual detailed law of Islam fell to the class of scholars, as a natural result of the political state of affairs in what we may call the Islamic Middle Ages, the "sultanic period" from the fall of the caliphate in the mid-tenth century to the rise of the Ottomans in the early sixteenth. . . . As political unity disappeared, ideological unity became paramount.<sup>8</sup>

Constructing a unified *Shari'a* applicable to all Muslims served as an important motivation to each of the founders of the Four *Sunni* Schools.

Table 16-1 summarizes basic information and teachings of the Four Schools. The Table is a simplified, and on some points simplistic, rendition of a complex reality. For example, it is misleading to suggest the *Shāfi'i* School accepts *ijma'* as a source of the *Shari'a* in the same manner as the *Hanafi* School.

Table 16-1:  
Key Comparisons of *Sunni* Schools

Name of School	Hanafi School	Māliki School	Shāfi'i School	Hanbali School
Founding Personality	Abū Hanīfa Al No'man	Mālik ibn An-nas Al Asbahi	Muhammad ibn Idris ibn Al Abbas ibn Uthman ibn Al Shāfi'i	Ahmed ibn Hanbal
Common Name ( <i>Imām</i> )	Abū Hanīfa	Mālik	Shāfi'i	Ibn Hanbal
Lifespan (A.D.)	699-787	710-795	768-820	780-855

<sup>1</sup> ROY JACKSON, FIFTY KEY FIGURES IN ISLAM 41 (2006). [Hereinafter, JACKSON.]

<sup>2</sup> THE OXFORD DICTIONARY OF ISLAM 306 (John L. Esposito et al. eds., 2003). [Hereinafter, OXFORD.]

<sup>3</sup> KNUT S. VIDER, BETWEEN GOD AND THE SULTAN: A HISTORY OF ISLAMIC LAW 91-92 (2005). [Hereinafter, VIDER.]

<sup>4</sup> MOHAMMAD HASHIM KAMALI, SHARI'AH LAW: AN INTRODUCTION 69 (2008). [Hereinafter, KAMALI.]

<sup>5</sup> See KAMALI, *supra*, at 69.

<sup>6</sup> N.J. COULSON, A HISTORY OF ISLAMIC LAW 36-37 (7th prtg. 1997) (1964). [Hereinafter, COULSON.]

<sup>7</sup> See VIDER, *supra*, at 110-11.

<sup>8</sup> See VIDER, *supra*, at 112.

Name of School	Hanafi School	Mālikī School	Shāfi'ī School	Hanbali School
Other Leading Figures within the School, and Their Respective Lifespans (A.D.)	Abū Yūsuf (died 798)  Shaybani (749/50-805)	Ibn Al Qasim (died circa 961)		Abū Bakr al-Khallal (died 923) Ibn Taymiyya (1263-1328) Muhammad ibn Abd Al Wahhāb (1703/1704-1792)
Important Concepts	<ul style="list-style-type: none"> <li>• Key proponent of <i>ra'y</i>, as opposed to <i>ḥadīth</i></li> <li>• Emphasizes <i>ijtihād</i> as a legitimate tool to adapt the <i>Sharī'a</i> to changing circumstances</li> </ul>	<ul style="list-style-type: none"> <li>• Develops theory of law occupying the middle ground of <i>ra'y-ḥadīth</i> debate</li> <li>• Utilizes sources of law not observed by other Schools</li> </ul>	<ul style="list-style-type: none"> <li>• Articulates the primacy of the Qur'ān vis-à-vis <i>ḥadīth</i> and <i>Sunnah</i> in a novel, authoritative manner</li> <li>• Restricts <i>ijma'</i> to the beliefs of all Muslims, not just the <i>ul-ema</i> of a certain school</li> <li>• Severely limits and de-emphasizes as subservient to the Qur'ān, <i>Sunnah</i>, and <i>ijma'</i>, the use of <i>ijtihād</i></li> </ul>	<ul style="list-style-type: none"> <li>• Revives the original Traditionist position emphasizing the Qur'ān and <i>Sunnah</i> almost exclusively</li> <li>• Delineates the primacy of weak <i>ḥadīth</i> over a <i>fatwā</i> of a Successor of Companion with a stronger <i>isnād</i></li> <li>• Reinterprets <i>ijtihād</i> as collective obligation of all followers of a School to ensure accuracy of Qur'ān and <i>Sunnah</i></li> </ul>
Recognized Sources of Law	(1) Qur'ān (2) <i>Sunnah</i> (3) <i>Ījma'</i> (4) <i>Qiyās</i> (5) <i>Istislāh</i> (6) <i>R'a'y</i>	(1) Qur'ān (2) <i>Ījma'</i> ahl al-Madinah (3) <i>Ḥadīth</i> (4) <i>Qiyās</i> (5) <i>Istislāh</i> (6) Sadd al-adhara'i	(1) Qur'ān (2) <i>Ḥadīth</i> (3) <i>Ījma'</i> (4) <i>Qiyās</i>	(1) Qur'ān (2) <i>Sunnah</i> (3) <i>Qiyās</i>
Current Countries or Regions Where School Predominates	Turkey Syria Jordan Lebanon Pakistan Afghanistan India	Morocco Algeria Tunisia South Egypt Sudan Bahrain Kuwait	North Egypt Southern Arabia East Africa Indonesia Malaysia Brunei	Saudi Arabia Qatar Palestine Syria Iraq

## § 16.02 FIVE COMPARATIVE POINTS

In studying the Four *Sunnite* Schools, five points are important to keep in mind. First, they are Schools of jurisprudence (*fiqh*). It is tempting, and sometimes fruitful, to draw analogies between them and denominations of other religions, such as Christianity. Technically, however, the stronger analogy is to schools of jurisprudence in the American legal system, such as law and economics, critical legal studies, and so forth. In other words, the Schools focus more on matters of law than faith, just as do jurisprudential movements in the United States. To round out the point, an apt comparison would be between different religious strands in Islam, namely *Sunnite* and *Shi'ite*, on the one hand, and different parts of the Christian world, such as Catholicism and Protestantism, on the other hand.

Second, all Four Schools agree on the core principles of Islam and the *Sharī'a*, such as the Five Pillars. In this respect, they are a testament to the unity within the diversity of Islam. That is also true of the different denomination within Christianity: all Christians, for example, accept Jesus as the Son of God and their personal savior.

Third, the Four Schools differ on a variety of matters that are of less than "mega" significance. That, too, is true of different Christian denominations. Thus, the Schools are a testament to the diversity within the unity of Islam, as are the denominations within Christianity.

Fourth, a Muslim is free to adopt the teachings of any one of the Four Schools, even if she happens to live in a jurisdiction in which that School is not predominant. She can study the precepts of each School, decide which she prefers, follow them, and as appropriate go to the nearest mosque associated with that School. Ideally, she should not select precepts in a cafeteria-plan like manner based on what is expedient for her. Rather, she should embrace the entirety of the teachings of a School as a result of a sincere belief in its precepts. However, on minor matters, she may depart from the teachings of her School, and follow the practice of an alternative School.

Fifth, there are Muslims who are unaffiliated with a School, just as there are non-denominational Christians. They choose precepts from different Schools, and develop their own practices through synthesis of these precepts. Such Muslims are not necessarily prominent, and indeed may seek a quiet, unassuming life — possibly, depending on their environment, for reasons of personal security.

## § 16.03 HANAFI SCHOOL

Following the Ancient Schools, the *Hanafi School* was the first official school, as distinct from a trend within Islam.<sup>9</sup> After the first four Caliphs, and in the wake of the hegemony of the *Umayyad* dynasty, a uniform *Sharī'a*, preserving fundamental Islamic beliefs, became necessary.<sup>10</sup> As a result, *Imām* Hanifa developed a theory of law, as a result of an incomplete and obscure collection of *ḥadīths* at the time,

<sup>9</sup> See VIRON, *supra*, at 97.

<sup>10</sup> See JACKSON, *supra*, at 26.



emphasizing "rational systems . . . as an independent basis for legal discussion."<sup>11</sup>

This focus on rationalism in the *uṣūl al-fiqh* (roots of jurisprudence) is still prevalent within this School. Due to its dominance in the *Abbasid* Caliphate and Ottoman Empire, the *Hanafi* School remains the leading legal authority in their successor states, claiming one-third of all Muslims.<sup>12</sup> As a result, *Hanafi* Muslims prevail in Turkey, Syria, Jordan, Lebanon, Pakistan, Afghanistan, and India.<sup>13</sup> Generally, the *Hanafi* School is the most liberal of the Four Schools,<sup>14</sup> because it grew out of the Ancient Schools of Basra and Kufa, located in the commercial cross-roads of Iraq.

### [A] Life of Abū Ḥanifa and Other Key Figures

Abū Ḥanifa, a Persian, was born in Kufa in 699 A.D.<sup>15</sup> Neither a lawyer nor judge (*qāḍī*), he was a silk manufacturer and merchant.<sup>16</sup> Ḥanifa rose to prominence as a scholar through his role as a teacher. As a scholar, Ḥanifa was less concerned with technical legal problems than with broader, deeper, theoretical issues.

The ideas of Ḥanifa about the *fiqh* competed with the *Khārijite* and *Murji'ite*. *Khārijites* were a fundamentalist group emphasizing a literal interpretation of the Qur'ān with a puritanical zeal.<sup>17</sup> In response, the *Murji'ites* advocated the rational, contemplative aspect of faith, encouraging faith over works.<sup>18</sup> Ḥanifa preferred the latter movement, and his teachings reacted against the rigidity of *Khārijite* fundamentalism.

As a result, Ḥanifa stressed the freedom of belief and the inability of fellow Muslims to judge the heart of their fellow Muslims. For instance, during his lifetime, the Muslim faith collectively struggled with whether humans could comprehend the manner in which Allāh is just.<sup>19</sup> The Caliph Ma'mun officially answered "no." But, Ḥanifa refused to take a single position: because neither the Qur'ān nor *Sunnah* were clear, other opinions should be respected.<sup>20</sup> This preference to individual liberty and intra-Muslim diversity of belief is evident in throughout his *fiqh*:

<sup>11</sup> See VIDOR, *supra*, at 96.

<sup>12</sup> See OXFORD, *supra*, at 107.

<sup>13</sup> See KAMALI, *supra*, at 73.

<sup>14</sup> See JACKSON, *supra*, at 30; KAMALI, *supra*, at 70; OXFORD, *supra*, at 107.

<sup>15</sup> See KAMALI, *supra*, at 70.

<sup>16</sup> See JACKSON, *supra*, at 27. The influence of Ḥanifa's vocation should not be lost when considering the formation of his ideas. For instance, the *Hanafi* School was the first to articulate comprehensive rules on contracts. See also OXFORD, *supra*, at 107.

<sup>17</sup> See JACKSON, *supra*, at 28.

<sup>18</sup> See JACKSON, *supra*, at 27.

<sup>19</sup> See VIDOR, *supra*, at 96.

<sup>20</sup> See VIDOR, *supra*, at 96.

[Ḥanifa] thus maintained the view that neither the community nor the government have the authority to interfere in the personal liberty of the individual so long as the latter has not violated the law.<sup>21</sup>

For example, Ḥanifa believed an adult female may conclude a marriage contract without a legal guardian present, a result different from the other Schools.<sup>22</sup>

Despite his influence, Ḥanifa is credited with only one work, *Al Fiqh Al Akbar* (*The Greater Understanding*).<sup>23</sup> Due to its brevity, the impact of the book was inconsequential, and the jurisprudential ideas of Ḥanifa were compiled by his students. Two students had the greatest impact on the *Hanafi* School: Abū Yūsuf and Shaybānī.<sup>24</sup> Indeed, they were more than students; along with Ḥanifa, they have an equal claim to be the founder of this School.<sup>25</sup>

Abū Yūsuf was a lawyer by trade. Because the *Abbasid* Caliphate favored the *Hanafi* School, Yūsuf was appointed as Chief Justice by Caliph Harūn Al Rashid.<sup>26</sup> His jurisprudential beliefs were eminently practical, and he also was aware of the reaction of the Caliphate to such beliefs.<sup>27</sup> This vocational approach may have influenced his criticism that the doctrines of Ḥanifa were insufficiently grounded in the *Sunnah* of the Prophet, articulated in the treatise Abū Yūsuf published at the request of Harūn Al Rashid.

Similarly, Shaybānī criticized a lack of emphasis he perceived by Ḥanifa on the Qur'ān and *Sunnah* to a greater extent than Abū Yūsuf. These criticisms, as well as the beliefs of Ḥanifa and Yūsuf, were chronicled by Shaybānī in voluminous detail.<sup>28</sup> The writings resulted in the "compilation of] the *corpus juris* of the *Hanafi* School."<sup>29</sup> In 787, Ḥanifa died while in a Baghdad prison,<sup>30</sup> perhaps there because he refused to accept an appointment as a *qāḍī*, or because he supported a moderate, rationalist *Shi'ite* revolt.<sup>31</sup>

### [B] Jurisprudential Foundations and Evolution

Ḥanifa wished to provide a rational basis for a unified *Shari'a* applicable to all believers. After all:

<sup>21</sup> See KAMALI, *supra*, at 71.

<sup>22</sup> See KAMALI, *supra*, at 71.

<sup>23</sup> See KAMALI, *supra*, at 70.

<sup>24</sup> See JACKSON, *supra*, at 27.

<sup>25</sup> See VIDOR, *supra*, at 96.

<sup>26</sup> See KAMALI, *supra*, at 70. At the request of Harūn Al Rashid, Abū Yūsuf published a treatise on fiscal and public law. *Id.*

<sup>27</sup> See COULSON, *supra*, at 51.

<sup>28</sup> See COULSON, *supra*, at 51.

<sup>29</sup> See KAMALI, *supra*, at 70.

<sup>30</sup> See JACKSON, *supra*, at 29.

<sup>31</sup> See JACKSON, *supra*, at 29.

if all Muslims were subject to God's law, then there should not be any difference in law between one Muslim and another, regardless of where they might reside.<sup>32</sup>

Interpreters should begin with examining the Qur'ān. If the Qur'ān speaks definitively to an issue, then its Divine revelation is final.<sup>33</sup> In the hierarchy of *Hanafi* law, the *Sunnah* ranks next, because the intention of the Prophet must be imputed as to his acts.

Flexibility in the law was important to Hanifa. To allow the *Shari'a* to adapt to changing social circumstances, he included the *ijtihad* (independent reasoning) of a judge, based on *uṣūl al-fiqh*, as a source of law.<sup>34</sup> Hanifa also allowed for the use of *qiyās* (analogical reasoning), *istihsān* (juristic preference), and *r'ay* (subjective opinion).<sup>35</sup> These principles gave judges considerable discretion which resulted in unpredictable results. After all, there were no rules for determining which form of *ijtihad* to prefer if they yielded conflicting conclusions.<sup>36</sup>

The emphasis Hanifa placed on *qiyās*, *istihsān*, and *r'ay* as sources of the *Shari'a* is not surprising in light of the fact that when he lived, there were few reliable compilations of *hadith*. He was a man of his times, working with the sources available to him. But, over time, following his death, more compilations of the non-Prophetic utterances of Muhammad were available. Thus, by the 10th century, the sources of law recognized by the *Hanafi* School were different from the ones championed by Hanifa. Thus, the School internalized the "post-Shāfi'i compromise."<sup>37</sup>

[T]he process of "Traditionalization" was at an end and it was generally accepted that rules that had earlier been based on practice must be grounded, as far as possible, in *hadith* and Koran.<sup>38</sup>

Thus, the School held the view that if the Qur'ān or *hadith* does not expressly address an issue, then reasoning by *qiyās* is preferable. But, a conclusion based on *qiyās* may be set aside by *istihsān* if it yields an undesirable result. Although *r'ay* is a valid source of law, it ranks as the least important. And, with the accretion of *Hanafi* School jurisprudence and deference owed to prior interpretations, instances in which a judge had the opportunity to use *r'ay* diminished.

### [C] Hierarchy within *Hanafi* School

The hierarchy of authority within the *Hanafi* School is not seriously disputed. Abū Hanifa holds the legitimate claim to be the founder of the School. Abū Yūsuf and Shaybānī were his leading students. They did not hold the same view as their

teacher on every controversy.<sup>39</sup> But, they resolutely adopted his methodology for resolving legal issues, and indeed developed that methodology.

How is a conflict among the views of these three great figures of the *Hanafi* School resolved? Some scholars suggest if all three considered an issue and two of them agreed, then the School should follow the majority, even if leaves out the views of Hanifa.<sup>40</sup> Others suggest a hierarchical preference, prioritizing Hanifa, Abū Yūsuf, and then Shaybānī.<sup>41</sup> In practice, it is up to an Islamic judge (*qāḍī*) in a particular case. In following the methodology of the *Hanafi* School, the *qāḍī* has discretion to reach an outcome different from that of the founder (or different from what the founder might have reached).

It is unlikely Hanifa believed he or his students should merit great esteem. Hanifa is attributed with saying:

No one may issue a *fatwā* on the basis of what we have said unless he ascertains the source of our statement.<sup>42</sup> Hanifa meant to support independent inquiry and *ijtihad* into the sources of law for a particular rule. The School did take his statement in that manner. Rather, the School held to the view that scholars should familiarize themselves with the sources of the *Shari'a* used by Hanifa to support a rule, but they should regard themselves as imitators of previously established rulings. They are not competent to inquire further into the evidence used by Hanifa, and indeed do not rank equally as scholars with Hanifa. In brief, the successors of Hanifa came to regard themselves as followers practicing *taqlid* (imitation), however hard Hanifa himself sought to downplay his importance and encourage independent thought.<sup>43</sup>

This prior-in-time deference was predictable. Hanifa once stated: "when you are faced with evidence, then speak for it and apply it."<sup>44</sup> Junior *qāḍīs* used this reasoning as an invitation to challenge their superiors, claiming the prior ruling did not have all of the evidence.<sup>45</sup> This limited independent inquiry was further restricted with the Closing of the Gate to *Ijtihad*.<sup>46</sup>

### § 16.04 MĀLIKĪ SCHOOL

Growing from the Ancient School of Medina, the *Mālikī* School was founded in the 8th century A.D. in Medina on the Arabian Peninsula.<sup>47</sup> In the *Mālikī* School, the traditional practices and *hadith* recorded in and around the city receive special

<sup>32</sup> See JACKSON, *supra*, at 26.

<sup>33</sup> See JACKSON, *supra*, at 28.

<sup>34</sup> See JACKSON, *supra*, at 28.

<sup>35</sup> See OXFORD, *supra*, at 107.

<sup>36</sup> See JACKSON, *supra*, at 29.

<sup>37</sup> See VIKOR, *supra*, at 97.

<sup>38</sup> See VIKOR, *supra*, at 97.

<sup>39</sup> See VIKOR, *supra*, at 96.

<sup>40</sup> See VIKOR, *supra*, at 96-97.

<sup>41</sup> See KAMALI, *supra*, at 72.

<sup>42</sup> See KAMALI, *supra*, at 72.

<sup>43</sup> See KAMALI, *supra*, at 72.

<sup>44</sup> See KAMALI, *supra*, at 71.

<sup>45</sup> See KAMALI, *supra*, at 71.

<sup>46</sup> See KAMALI, *supra*, at 72 and 77.

<sup>47</sup> See OXFORD, *supra*, at 190.



attention. Compared with *Hanafi* interpretation, the *Māliki* School dealt with the primary business of Medina, agriculture, rather than business and trade at large. Inspired by the Traditionists, Mālik wished to preserve the primacy of the Qur'ān and *Sunnah*, while allowing *ra'y* as a supplement when necessary:

Malik's legal reasoning is a synthesis of practical expediency and the infusion of Islamic religious and ethical principles, and he relied to a considerable extent on *Ijmaa* (the consensus of the *ulema*) and living tradition.<sup>48</sup>

Currently, there are significant followers of the *Māliki* School in Morocco, Algeria, Tunisia, Upper Egypt, the Sudan, Bahrain, and Kuwait.<sup>49</sup>

### [A] Life of Mālik ibn Anas Al Asbahi

A contemporary of Hanifa and a teacher of Al Shāfi'i,<sup>50</sup> Mālik may be the most influential of all scholars in the development of *Sunni* beliefs. His research, rooted in compilation of *ḥadīths*, likely followed the work of his father and grandfather, from whom he learned respect for their importance. Born in Medina in 710, Mālik lived in the midst of the rush to chronicle *ḥadīths* before they fade from the memories of their transmitters.<sup>51</sup>

Throughout his life, Mālik remained independent of any governing authority, never taking a position in the *Abbasid* administration or as a judge.<sup>52</sup> Mālik died in 795, living his last few years secluded for devotion to spiritual reflection.<sup>53</sup> As with all Schools, except the *Shāfi'i* School, the *Māliki* School was grounded by his pupils,<sup>54</sup> located primarily in Egypt.<sup>55</sup> Ibn Al Qasim had the greatest impact systematizing the foundations of the *Māliki* School.<sup>56</sup>

### [B] Transplantation of Māliki School

Mālik lived his entire life in Medina, and his School initially flourished in Egypt, but by 850 it atrophied in both places.<sup>57</sup> *Māliki* ideology was exported to the *Abbasid* provinces in the Maghreb (North Africa) and Spain, where it finally coalesced into a formal School.<sup>58</sup> To the east in Iraq, the movement lasted though

<sup>48</sup> JOSEPH SCHACHT, AN INTRODUCTION TO ISLAMIC LAW (PAGE NUMBERS) (3d prtg. 1982) (1965). [Hereinafter, SCHACHT.]

<sup>49</sup> See KAMALI, *supra*, at 73.

<sup>50</sup> See JACKSON, *supra*, at 33.

<sup>51</sup> See JACKSON, *supra*, at 31.

<sup>52</sup> See JACKSON, *supra*, at 33.

<sup>53</sup> See JACKSON, *supra*, at 34.

<sup>54</sup> See JACKSON, *supra*, at 34.

<sup>55</sup> See VIKOR, *supra*, at 98.

<sup>56</sup> See COULSON, *supra*, at 52.

<sup>57</sup> See VIKOR, *supra*, at 99.

<sup>58</sup> See VIKOR, *supra*, at 99.

the early 11th century, before dying out.<sup>59</sup> To the south, *Māliki* ideas flowed to Sub-Saharan Africa.

Crucial differences between Spain and the Maghreb influenced how the *Māliki* School developed in each locale. In Spain, the government left Muslims within its borders unfettered.<sup>60</sup> Combined with the isolation from Muslims of other Schools and sects, this autonomy allowed the School to develop doctrine without external influence.<sup>61</sup>

*Māliki* School development in the Maghreb, however, had a politically divisive nature, resulting in confrontation.<sup>62</sup> Writings of *Māliki* scholars from the Maghreb contrasted with those of the *Hanafi* School, which has the backing of governments in its formative years. *Māliki* scholars could not merely assert a proposition as authoritative. Rather, they had to be transparent about their methodology and logic.<sup>63</sup> As the Sevens *Shi'ite* *Fatimid* Empire took control of Tunisia in 909, *Māliki* scholars concentrated on withstanding government pressure.<sup>64</sup>

In Northern Nigeria, the British formally protected the *Fulanis* during the Colonial Era. The *Fulanis* asserted the exclusiveness of the *Shari'a* in theory and practice, and forbade accommodation with local customary law. *Fulani* *qādis* applying the law were *Māliki* jurists, and their exclusive approach led to fundamentalist interpretations and rulings.

### [C] Māliki School Sources of Law

The Qur'ān is the binding, starting point in determining the contours of the *Shari'a* as understood by the *Māliki* School.<sup>65</sup> After the Qur'ān, *ijma'* has the next highest level of priority.<sup>66</sup> To Mālik, this type of *ijma'* was not consensus of all Muslims or of *Māliki* scholars. Rather, he gave the *ijma' ahl al-Madinah*, a Median consensus, priority.<sup>67</sup>

[s]ince the Madinese followed each generation immediately preceding them, the process would have gone back to the generation that was in contact with the teachings and actions of the Prophet. In Malik's opinion, the practice of the Madinese thus constitutes basic legal evidence.<sup>68</sup>

*Imām* Mālik is not careless about quoting *ḥadīth*, but he presumes the *isnād* (chain of transmission back to the Prophet), is served by the prevailing beliefs in Medina. Thus, Professor Doi observes:

<sup>59</sup> See VIKOR, *supra*, at 99.

<sup>60</sup> See VIKOR, *supra*, at 99.

<sup>61</sup> See VIKOR, *supra*, at 99.

<sup>62</sup> See VIKOR, *supra*, at 99.

<sup>63</sup> See VIKOR, *supra*, at 99.

<sup>64</sup> See VIKOR, *supra*, at 100.

<sup>65</sup> See JACKSON, *supra*, at 34.

<sup>66</sup> See JACKSON, *supra*, at 34.

<sup>67</sup> See OXFORD, *supra*, at 109; COULSON, *supra*, at 46-47; KAMALI, *supra*, at 73.

<sup>68</sup> See KAMALI, *supra*, at 73.

The *Muwatta'* [the classic treatise of Mālik, discussed below] . . . shows that Imām Mālik always quotes a *ḥadīth* or a precedent of the *Khulafā' ar-Rāshidūn* . . . or very prominent Companions. Many Muslim scholars of the past have considered the *Muwatta'* as a book that has rendered a great service to the cause of collection of *ḥadīth* long before Imām al-Bukhārī and Imām Muslim and other scholars of *ḥadīth* began to produce their systematic compilations of *ḥadīth*. . . . [G]reat scholars like Imām ash-Shāfi'i [i.e., Imām Shāfi] have rated the *Muwatta'* as "the most authentic book after the Book of Allāh."

. . . [I]t is typical of the Mālikī School that the '*amal ahl al Madīnah*' (the practice of the People of Madīnah) is very much relied upon. The practice of the People of Madīnah . . . was based on the Sunnah of the Prophet . . . . It was the learned and right-acting Imām's view that Madīnah was the birthplace of Islam and the place to which the Prophet . . . emigrated; the nerve centre of the Ummah, the centre where important legal verdicts were given by the Prophet . . . and the *Khulafā' ar-Rāshidūn* . . . , the place where the Companions and their Followers lived and taught according to the Book of Allāh and the Sunnah of the Messenger of Allāh . . . . Hence, the practice of the people of Madīnah could not be contrary to the Sunnah of the Prophet . . . , especially during the early period in which Imām Mālik lived and taught.<sup>69</sup>

This pragmatic approach gives weight to local customs and conditions, prioritizing the practice of the Companions of Muhammad, and more specifically the '*amal ahl al Madīnah*' (the practice of the People of Medina) over *ḥadīth*.<sup>70</sup> But the Mālikī accords this priority only if, and to the extent, there is a true conflict between these two sources.<sup>71</sup> In theory, they should not conflict, but in practice, that is not always true.

For instance, under the doctrine of *khiyār al-majlis*, a *ḥadīth* allows for the option to cancel completed contracts as long as the parties have "not separated — nor left the meeting of the contract."<sup>72</sup> The prevailing Medinan practice regarding a contract is it is final upon agreement, whether or not the parties remained together or separated.<sup>73</sup> To some early scholars, there is a true conflict between practice and *ḥadīth*. If priority is given to practice, then the doctrine is invalid. Other early scholars point out there is no definition "separation," nor any set practice as to it.<sup>74</sup> Still other early scholars see no contradiction between the

<sup>69</sup> 'ABD AL-RAHMAN I. DOL SRARFAH: ISLAMIC LAW 561 (London, England: Ta-Ha Publishers Ltd., 2nd rev'd ed., 2008) (emphasis added). [Hereinafter, Dol.]

<sup>70</sup> See KAMALI, *supra*, at 73.

<sup>71</sup> See KAMALI, *supra*, at 74.

<sup>72</sup> See KAMALI, *supra*, at 74.

<sup>73</sup> See KAMALI, *supra*, at 74. Two other examples where a Madinese consensus prevailed as a preeminent source of law are as follows. First, the testimony of children in cases of injury amongst only children is acceptable when no one has left the scene of the incident. *Id.* at 75. Second, the wife of a missing person may seek judicial separation after completing a 4-year waiting period, and seek divorce on the ground of injurious treatment by her husband. *Id.* at 76.

<sup>74</sup> See DOL, *supra*, at 560-561.

doctrine and the practice of the people of Medina. The upshot is that some jurists (*fukahā'*) of the Mālikī School, and other Schools, question the validity of the doctrine, but overall, the doctrine is accepted.

The dictates of *ḥadīth* are third in priority. Mālik compiled the *Kitāb al-Muwatta'* (The Trodden Path), the first organized attempt to create a collection of *Shari'a* law<sup>75</sup> according to the topics of *fiqh*.<sup>76</sup> Generally, each *ḥadīth* must include:

the actual content of the *ḥadīth* (*matn*), and the list of its chain of transmitters (*isnad*) going back to the original source which, ideally, should be the Prophet himself and, if not, to the *Companions* (those who lived at the same time as Muhammad) or the *Successors* (the next generation after Muhammad's death).<sup>77</sup>

Historically, the *Muwatta'* is a window into the internal debate between *ḥadīth* and *r'ay* at the time of its writing. The *Muwatta'* reflects an uneasy compromise between the liberal, practical outlook of the earliest scholars and the inflexible approach of Traditionists.<sup>78</sup>

If none of these sources speak to an issue, then a *qādi* may use one of three types of *r'ay*.<sup>79</sup> First, and least controversially, *qiyās* may be used to analogize rules established within the first three sources to apply it to a new situation.<sup>80</sup> Second, a *qādi* may use *istiṣlāh* (consideration of public interest) as a valid source of law, when reasoning by *qiyās* produces a harsh result found to be objectionable. But Mālik himself issued *fatwās* solely on the ground of *istiṣlāh*, not simply as *istiḥsān* to disregard the conclusion of *qiyās*.<sup>81</sup> Third, the last source of *r'ay* is *sadd al-dhara'* (closing or blocking off the means that can lead to evil),<sup>82</sup> which involves categorizing actions that lead to *ḥarām* or *ḥalāl* consequences as forbidden or permitted.<sup>83</sup> Mālikī School scholars applied this distinctly consequential reasoning to prohibit the sale of grapes to a known wine-maker, and to bar contracts whose terms include *ribā*.<sup>84</sup>

Mālik himself did not propose a systematic theory of the *uṣūl al-fiqh*. Rather:

[his] chosen method of composing his treatise was first to report such precedents as were known, and then to consider them, interpret them, and accept them or otherwise in the light of his own reasoning and the legal tradition of Medina.<sup>85</sup>

<sup>75</sup> See JACKSON, *supra*, at 33.

<sup>76</sup> See KAMALI, *supra*, at 74.

<sup>77</sup> See JACKSON, *supra*, at 32.

<sup>78</sup> See COULSON, *supra*, at 44.

<sup>79</sup> See JACKSON, *supra*, at 34.

<sup>80</sup> See OXFORD, *supra*, at 109.

<sup>81</sup> See KAMALI, *supra*, at 75.

<sup>82</sup> See KAMALI, *supra*, at 75.

<sup>83</sup> See KAMALI, *supra*, at 76.

<sup>84</sup> See KAMALI, *supra*, at 76.

<sup>85</sup> See COULSON, *supra*, at 46.



However, through the *Muwatta'*, the hierarchy of *Mālikī* law could be inferred, as Shāfi'i later articulated.<sup>96</sup> Mālik, like the other founders, forbade his students from accepting his teachings *carte blanche*, saying:

I am only a human. May be [sic] I am wrong and may be [sic] I am right. So look into my opinions; if they are in agreement with the Qur'an and *Sunnah*, accept them, otherwise reject them.<sup>97</sup>

### § 16.05 SHĀFI'Ī SCHOOL

The *Shāfi'ī* School was the first "to crystallize around the personality of a great legal scholar," rather than rely on students for clear articulation of the ideology.<sup>98</sup>

Without doubt the single greatest Islamic legal scholar, his supreme contribution was to put Islamic law on a more solid and scientific footing, especially in his strict approach to the authentication of the sayings (*hadith*) of the Prophet Muhammad as a source for law. More than any other figure of his time he restored the unity to an Islamic community that was seemingly on the verge of breaking up.<sup>99</sup>

Shāfi'i spent much time traveling, so his geographic influence is wide. His teachings focus on *hadith* interpretation, with less attention to business associations and commercial matters.

#### [A] Life of Muhammad Al Shāfi'ī and Development of *Shāfi'ī* School

Born in Gaza in 768 A.D., Shāfi'ī was taken at an early age by his mother to Mecca for a better education.<sup>100</sup> Additionally, he also spent 10 years living with a Bedouin tribe, developing essential pure Arabic language skills, like Muhammad.<sup>101</sup> Reading Mālik's *Muwatta'*, and memorizing its over 2,000 *hadiths* was a turning point in his life. After studying with Mālik, he was arrested in Yemen for treason, but was spared execution because he was from the same tribe as the Prophet.<sup>102</sup> He wound up incarcerated in Baghdad, but there was able to study under Abū Hanīfa.<sup>103</sup> After Baghdad, he moved to Mecca, enjoying an academic life of teaching and writing for 9 years, where Ibn Hanbal was his student.<sup>104</sup> Returning to the intellectual richness of Baghdad, he wrote *Al Risalah (The Epistle)*, "which is regarded as the first scientific treatment of Islamic law, and this helped to spread

<sup>96</sup> See KAMALI, *supra*, at 74.

<sup>97</sup> Quoted in KAMALI, *supra*, at 77 (citing Al-Shawkānī, *Al-Qawl Al-Mufid* at 44).

<sup>98</sup> See SCHACHT, *supra*, at 58.

<sup>99</sup> See JACKSON, *supra*, at 39-40.

<sup>100</sup> See JACKSON, *supra*, at 40.

<sup>101</sup> See JACKSON, *supra*, at 40.

<sup>102</sup> See JACKSON, *supra*, at 40.

<sup>103</sup> See JACKSON, *supra*, at 40.

<sup>104</sup> See JACKSON, *supra*, at 40-41.

his scholarly reputation."<sup>95</sup>

In 815, Shāfi'ī relocated to Egypt, where he was designated as a *mukhtahid* (a well-qualified scholar or renewer of the faith).<sup>106</sup> While in Egypt, the dominant *Mālikī* current influenced him, though legend has it Shāfi'ī was murdered in 820 by a zealous bunch of *Mālikīs*.<sup>107</sup> Although intriguing, this tale lacks clear proof, and is orthogonal to common sense. Given the date of his death, it is unlikely the allegiances of the two Schools were so extreme.

Throughout his life, Shāfi'ī was a renegade scholar, as evinced by his many relocations. He did not accumulate a following of students who would promulgate his life work after his death.<sup>108</sup> Further, though Shāfi'ī spent a lifetime studying the *uṣāl al-fiqh*, he refused to ally himself within any of the extant Schools.<sup>109</sup> He considered himself a member of the Ancient School of Medina.

About 100 years after Shāfi'ī died, his thought began to influence a critical mass of scholars.<sup>100</sup> Centered in Iraq, these scholars formulated rules and requirements of the *Shari'a* under the *uṣāl al-fiqh* of Shāfi'ī.<sup>101</sup> *Shāfi'ī* jurisprudence was the official School of the *Ayyubid* Dynasty in Egypt (1171-1341), as well as being prominent in the ensuing *Mamluk* Sultanate (1250-1517), but was displaced by the *Hanafi* School when the Ottomans occupied Egypt in 1517.<sup>102</sup> The *Shāfi'ī* School prevailed in Iran through the Middle Ages, until displaced by Twelver *Shi'ism*. Today, it is prevalent in Lower Egypt, Southern Arabia, East Africa, Indonesia, Malaysia, Brunei, and has many followers in Palestine, Jordan, and Syria.<sup>103</sup>

#### [B] *Shāfi'ī* School Sources of Law

There are four recognized sources of law in the *Shāfi'ī* School: Qur'an, *Sunnah*, *ijma'*, and *qiyās*.<sup>104</sup> As Divine revelation, the Qur'an is the primary source of law.<sup>105</sup> The *Sunnah* is inferior to the Qur'an, only serving as an explanatory tool.<sup>106</sup> Theoretically, both must agree in all things. If there is a conflict between the Qur'an and *Sunnah*, then the discrepancy must be due to an error in transmission or a deviant act by a transmitter.

<sup>95</sup> See JACKSON, *supra*, at 41.

<sup>96</sup> See JACKSON, *supra*, at 41. The basis for this designation at this time is that a *hadith* states: "at the beginning of each century a great man will come to restore and revitalise the Muslim community, to renew (*tajdid*) Islam and return Muslims to the straight path." *Id.*

<sup>97</sup> See VIKOR, *supra*, at 98.

<sup>98</sup> See VIKOR, *supra*, at 100.

<sup>99</sup> See COULSON, *supra*, at 53.

<sup>100</sup> See VIKOR, *supra*, at 100.

<sup>101</sup> See VIKOR, *supra*, at 100-01.

<sup>102</sup> See OXFORD, *supra*, at 285.

<sup>103</sup> See KAMALI, *supra*, at 74.

<sup>104</sup> See JACKSON, *supra*, at 41-43; KAMALI, *supra*, at 78-82; COULSON, *supra*, at 55-61.

<sup>105</sup> See COULSON, *supra*, at 55.

<sup>106</sup> See KAMALI, *supra*, at 78-79.

The *Sunnah* is a vital tool of interpretation. To reject it would be to leave a gaping hole in the essential knowledge of Islam.<sup>107</sup> But, not all *Sunnah* deserve this exalted second-tier status. Shāfi'i differentiates between *Sunnah* based upon an act of the Prophet himself versus based upon a Companion or Successor. Shāfi'i criticized the Ancient Schools for relying on the latter categories. They wrongly assumed the Companions (*ṣaḥābah*) or Successors knew what the Prophet intended and had no view incongruous with the Prophet.<sup>108</sup> Additionally, allowing *ḥadīth* with such sources is a pretext to justify local customs that run afoul of Muslim beliefs.<sup>109</sup> In clarifying the centrality of the Prophet, Shāfi'i rejected the belief of Mālik that prioritized the acts of Companions and Successors through preferring Medinan custom over *ḥadīth*.<sup>110</sup>

*Ījma'* is third in priority, but Shāfi'i criticized the prior interpretation about whose consensus is required for *ijma* to be a valid source of law. Hanifa and Mālik believed *ijma'* was defined only by a consensus of scholars.<sup>111</sup> In contrast, Shāfi'i demanded consensus among the entire Muslim population (*ummah*) — lawyers and laity alike — for such belief to be a source of law.<sup>112</sup> *Ījma'* had been used to justify local or cultural norms, many of which existed before the advent of Islam.<sup>113</sup> Shāfi'i believed the consensus of all Muslims would ferret out these narrow, corruptible interpretations from the *Shari'a*. If all Muslims agree on a certain proposition, it is impossible, according to the Qur'an and *Sunnah*, for them to be in error because not all Muslims could be deceived in such an identical manner.<sup>114</sup> At the same time, Shāfi'i did not regard consensus as an important source of the *Shari'a*, finding its scope restricted largely to personal matters, such as performance of daily prayer. Moreover, as Islam spread far beyond the Hejaz, Shāfi'i appreciated that it was increasingly difficult to obtain a universal Islamic *ijma'*. Thus, Professor Coulson remarks that the doctrine of Shāfi'i on *ijma'* is "essentially negative," as it rejects the authority of a localized or limited consensus, and thus eliminates the diversity of rules in the *Shari'a* that results from these more modest consensuses.<sup>115</sup>

The final source of law acceptable within the Shāfi'i School is *qiyās*. If a sound analogy derives from a principle in the Qur'an, *Sunnah*, or *ijma'*, and the

<sup>107</sup> See KAMALI, *supra*, at 79.

<sup>108</sup> See SCHACHT, *supra*, at 47.

<sup>109</sup> See KAMALI, *supra*, at 77.

<sup>110</sup> See KAMALI, *supra*, at 79.

<sup>111</sup> See KAMALI, *supra*, at 78.

<sup>112</sup> See BERNARD G. WEISS, *THE SPIRIT OF ISLAMIC LAW* 123 (1998); Coulson, *supra*, at 59.

<sup>113</sup> See JACKSON, *supra*, at 42.

<sup>114</sup> See SCHACHT, *supra*, at 47. An interesting parallel to the idea consensus by the entire Muslim community cannot be in error is the work of Condorcet on voting systems. Generally, Condorcet said the choice between options by a greater number of people (assuming each chooser had adequate information to make a decision) is epistemically superior to the choice of the minority. Applied here, one could argue this strict requirement of *ijma'* ensures that choice reached by everyone is probabilistically guaranteed to be the correct choice. While "probabilistically guaranteed" is an odd phrase, if Condorcet's premises are accepted, then there might be a 100 percent chance the choice is correct.

<sup>115</sup> See COULSON, *supra*, at 59.

conclusion does not contradict another rule within those three sources, then it has a valid source in the *fiqh*.<sup>116</sup> Traditionists, who preferred a weak tradition to a strong analogy, criticized Shāfi'i for allowing the use of *qiyās*.<sup>117</sup> However, utilizing *ijtihād* in such a limited fashion allows the *Shari'a* to evolve to facts not encountered by the Prophet. In circumscribing the use of *ijtihād* to *qiyās*, Shāfi'i rejected all other types of forms of *ijtihād* and considered any opinion based on a form of *ijtihād* other than a valid *qiyās* "arbitrary and excessive."<sup>118</sup>

To be sure, the intricacies of the *fiqh* Shāfi'i originally proposed were modified over time. But, his belief in the supremacy of the Qur'an and *Sunnah* of the Prophet, followed by *qiyās*, never was seriously challenged.<sup>119</sup>

## § 16.06 HANBALI SCHOOL

The groundwork of the Hanbali School was laid at least 50 years after the other three Schools by those carrying the banner of the Ancient Traditionists.<sup>120</sup> The Hanbali School is the strictest on matters of faith, perhaps as a reaction to the rising currents of *Shi'ism* and *Sufism*, but more liberal on commercial matters because it originated in trade-wealthy Iraq. Currently, the Hanbali School is the official and only formally recognized school in Saudi Arabia, with many adherents also in Qatar, Palestine, Syria, and Iraq.<sup>121</sup>

### [A] Founders (Ibn Ḥanbal, Ibn Taymiyya, and Ibn Abd Al Wahhāb) and Development of Hanbali School

In 780 A.D., Ḥanbal was born in Baghdad into a family of nobility.<sup>122</sup> He accumulated knowledge of *fiqh* and the various Schools, studying under Shāfi'i, until the age of 40, when he began lecturing at a mosque in Baghdad.<sup>123</sup> In 832, a rationalist Chief *Qāḍī* (*Qāḍī Al Quḍhat*) was appointed by the Abbasid Caliph to the Baghdad court.<sup>124</sup> Refusing to adopt the beliefs of the *Qāḍī Al Quḍhat*, Ḥanbal was brought before a *mikna* (an inquisition-like trial), where he refused to reform his beliefs and was imprisoned.<sup>125</sup> Ḥanbal remained in prison for 10 years, until a more Traditionist Caliph came to power and ordered his release.<sup>126</sup> While in prison, his notoriety spread throughout the Muslim world due to his vast compilation of *ḥadīth*

<sup>116</sup> See COULSON, *supra*, at 60.

<sup>117</sup> See SCHACHT, *supra*, at 45–48.

<sup>118</sup> See KAMALI, *supra*, at 78.

<sup>119</sup> See COULSON, *supra*, at 61.

<sup>120</sup> See VIKOR, *supra*, at 101.

<sup>121</sup> See OXFORD, *supra*, at 107–08.

<sup>122</sup> See JACKSON, *supra*, at 44.

<sup>123</sup> See JACKSON, *supra*, at 44–45.

<sup>124</sup> See JACKSON, *supra*, at 45.

<sup>125</sup> See JACKSON, *supra*, at 45.

<sup>126</sup> See JACKSON, *supra*, at 45.



entitled "*Musnad*."<sup>127</sup> As such:

[Hanbal] was a rallying figure for the Traditionists, those who wanted to build only on *hadith* and who had become a religio-political party supported by the majority of the people of Baghdad and normally in opposition to the caliph.<sup>128</sup>

Eventually earning the popular title of the "*Imām* of Baghdad," Hanbal died in 855.<sup>129</sup>

The work of Abū Bakr Al Khallāl (who died in 923), compiling the *fiqh* of Hanbal through his teachings and the manner in which he compiled *hadith*, was crucial to the development of the *Hanbali* School.<sup>130</sup> Traditionists, however, were not uncritical. They did not support the claim of Abū Bakr that Hanbal used Shāfi'i-inspired *ijtihād* to supplement lacunae within *hadith*.<sup>131</sup> The Traditionists prevailed, precluding the valid use of reasoning that is not analogically derived from within the Qur'ān or *Sunnah*.<sup>132</sup> Accordingly, although Abū Bakr concluded the seminal groundwork shortly after the life of Hanbal, it was not until the end of the 11th century that the views of Hanbal coalesced into a School.<sup>133</sup>

The *Hanbali* School had many followers until the 14th century, when it lost almost all of its adherents.<sup>134</sup> Despite the dim following, the *fiqh* of the *Hanbali* School progressed due to the work of Ibn Taymiyya (1263-1328), who lived and worked in Damascus. Along with the Qur'ān and *Sunnah*, Ibn Taymiyya accepted the use of *qiyās* as a valid, but inferior, source of law. One focus of his work was to improve the quality of reasoning within a *qiyās*. Additionally, for the same reasons as Shāfi'i, he rejected *ijma'* as the consensus of the *ulema* as a source of law. In rejecting *taklid* (knowledge of previous scholars within the School), he advanced a similar argument as against *ijma'*. That is, the acknowledged doctrines of a School are not above reproach, because the consensus necessary for that acknowledged status lacks a validating effect.

Until the 18th century, the *Hanbali* School failed to gain any prominence vis-à-vis other Schools or via official recognition by a governing authority. However, Muhammad ibn Abd Al Wahhāb soon led a revival of the *Hanbali* School, as interpreted by Ibn Taymiyya.<sup>135</sup> While Al Wahhāb was born into a family of

<sup>127</sup> See Vikor, *supra*, at 101; Coulson, *supra*, at 71. Although all agree the amount of *hadiths* within the *Musnad* is vast, there is disagreement as to how vast. Vikor places the figure at 30,000, while Coulson states it is 80,000.

<sup>128</sup> See Vikor, *supra*, at 102.

<sup>129</sup> See Jackson, *supra*, at 44.

<sup>130</sup> See Vikor, *supra*, at 102.

<sup>131</sup> See Vikor, *supra*, at 102.

<sup>132</sup> See Vikor, *supra*, at 102.

<sup>133</sup> See Vikor, *supra*, at 103.

<sup>134</sup> See Kamali, *supra*, at 84.

<sup>135</sup> See Kamali, *supra*, at 84.

distinguished *Hanbali* jurists,<sup>136</sup> the recovery of this School has its roots in a greater renewal of Islam. Generally, there had been a large-scale decline of piety in the Muslim world.<sup>137</sup> Seemingly a result of colonialism, many Muslims began to recognize the Western dichotomy between their public and private lives. Al Wahhāb soundly rejected this secularist division as an affront to *tawhid* (absolute monotheism), wishing to place God at the center of politics and the governing structure.<sup>138</sup>

As a result, Al Wahhāb ushered in an era of renewed attention to the Qur'ān and *Sunnah*.<sup>139</sup>

He rejected imitation of the past (*taklid*) in favor of fresh and direct interpretation (*ijtihād*) of the scriptures and Islamic law by contextualizing them and studying their content.<sup>140</sup>

This revival took a more official form within Saudi Arabia, as King Ibn Saud officially adopted the *Hanbali* School with the insights of Al Wahhāb, in 1927 as the official School of the Kingdom. This adoption was part of a bargain: support from clerics for the political authority of the House of Saud, in exchange for support from that House for the religious authority of the *Wahhābi* clerics. Consequently, Saudi Arabia typically is characterized as a "*Wahhābi*" nation.

That is true, and it is an alliance that served the Saudi Royal Family and *Wahhābi* clerics well for many decades. But, their interests no longer are exactly aligned, if they ever were. Some Royal Family members would like to see the Kingdom modernize, in the sense of westernize. They are opposed not only by other members of the House of Saud, but also by many clerics, who seek to keep the Kingdom as Islamicized as possible. The King himself (whoever it is) sometimes must walk a fine line between the two sides, regardless of his own policy preferences. Notably, on 14 February 2009, the reformist-minded King Abdullah announced changes in government regarding the primacy of the *Hanbali* School.<sup>141</sup> The King allowed scholars on his 21-man advisory council to include *Sunnites* from non-*Hanbali* Schools.<sup>142</sup> Although these reforms do not come close to a denunciation of *Hanbalism* or *Wahhābism* as the official School, collectively they have yielded a more tolerant view of Muslims who are not partisan to the same beliefs or predilections of some members of the House of Saud (i.e., the Saudi royal family).

After the terrorist attacks of 11 September 2001, the official endorsement by Saudi Arabia of the *Hanbali* School was portrayed by mainstream Western media outlets as an extremist, violent sect of Islam. They characterized the perpetrators of the attacks, and other terrorists, as *Wahhābis*, and implicitly assumed all *Hanbali*

<sup>136</sup> NATANA J. DeLONG-BAS, WAHHABI ISLAM: FROM REVIVAL AND REFORM TO GLOBAL JIHAD 17 (2004). [Hereinafter, DeLong-Bas.]

<sup>137</sup> See DeLong-Bas, *supra*, at 8.

<sup>138</sup> See DeLong-Bas, *supra*, at 8-9.

<sup>139</sup> See DeLong-Bas, *supra*, at 13.

<sup>140</sup> See DeLong-Bas, *supra*, at 13.

<sup>141</sup> *Tiptoeing Towards Reform*, THE ECONOMIST, 21 February 2009, at 48. [Hereinafter, *Tiptoeing*.]

<sup>142</sup> *Tiptoeing*, *supra*, at 48.

adherents were *Wahhābis*. There are problems with this journalism.

Al Wahhāb was a prominent figure in the history and rejuvenation of the *Hanbali* School, and the life of the 18th century Persian Gulf. But, it is incorrect to characterize *Hanbalis* generally as followers of Al Wahhāb. It is no more accurate to characterize an American Protestant Christian as a follower of the early Puritan Jonathan Edwards because the faith of that person could be historically explained by the Great Awakening than it is to say the faith of a *Hanbali* *Sunnite* may be explained by reference to Al Wahhāb:

The reality is that *Wahhabism* has become such a blanket term for any Islamic movement that has an apparent tendency toward misogyny, militantism, extremism, or strict and literal interpretation of the Qur'an and *hadith* that the designation of a regime or movements as Wahhabi or Wahhabi-like tells us little about its actual nature.<sup>143</sup>

All *Hanbalis* can be linked historically to Al Wahhāb, as American Protestants can be to Jonathan Edwards. But, there are extremist groups that label themselves as "*Wahhābis*," with which the vast majority of *Hanbalis*, and indeed all Muslims, want nothing to do. These groups trumpet the argument of Al Wahhāb harkening back to Traditionists and their emphasis on the Qur'an and *hadith* as justification for violence. But neither the Prophet nor Al Wahhāb held such beliefs. Al Wahhāb strongly denounced the use of *jihād*, except in strict, limited circumstances,<sup>144</sup> and promoted evangelism through *da'wah*, or an educational process.<sup>145</sup>

Furthermore, there is diversity of belief within the *Hanbali* School, as evidenced by the manner in which it and the other Schools developed. At the outset, the appropriate *fiqh* was determined, and then the *Shari'a* was extrapolated within those parameters. Differences, some greater than others, are inevitable, when only fundamental principles are articulated upon which individual rules are to be based. Differences in law and social expectations within the *Hanbali* School between Saudi Arabia and Qatar are a case in point. Women can drive in Qatar, but not (yet) in Saudi Arabia. Additionally, alcohol may be served in hotels in Qatar, but its importation is banned in Saudi Arabia, which in its 2005 terms of accession to join the World Trade Organization (WTO) invoked Article XX(a) of the General Agreement on Tariffs and Trade (GATT). This provision allows a WTO Member to ban importation of merchandise, if that ban is necessary to protect public morality (and also satisfies the legal criteria in the *chapeau* to Article XX). Hence, it is both inaccurate and improper to associate *Hanbali* *Sunnites* with monolithic extremist movements that purport to pay lip service to the School.

## [B] *Hanbali* Sources of Law

Generally considered the most traditional of the four Schools, the *Hanbali* School places primary emphasis on the Qur'an and *Sunnah*. As with all other Schools, the Qur'an, as the Divinely revealed will of God (Allāh), is paramount. The

*Sunnah* is second in priority, but the *Hanbali* School delineates between a weak *hadith* traced back to the Prophet versus a *fatwa* issued by a Companion (*Ṣahābah*) or Successor.<sup>146</sup> Although the *Māliki* line of reasoning influenced the *Hanbali* School on this point, the argument that carried the day reflected historical context. At the time of founding of the three previous Schools, extensive and credible compilations of *hadith* were not readily available, hence the science and art of applying the sayings and doings of the Prophet was in its early stages.<sup>147</sup> By the time of the *Hanbali* School, such compilations were widely available, and that science and art began to flourish. Interestingly, today some Saudi scholars debate as to whether the *Sunnah* of the Peoples of the Book (*ahl al kitāb*) before Islam, i.e., of Jews and Christians, might be a source of the *Shari'a*.

Suppose a situation arises that the Qur'an and *Sunnah* does not address. Then, a *qādi* may use a properly derived *qiyās* to fashion a rule. However, a *hadith* whose transmission is weak is strongly preferred to a logically rigorous *qiyās*.<sup>148</sup>

The *Hanbali* School strictly forbids the use of *ijtihād* as a source of law, though there are instances when Hanbal himself used it to issue a *fatwa*.<sup>149</sup> But, the School promotes *ijtihād* as a collective obligation of all *Hanbalis* to examine continually the Qur'an and *Sunnah* as a check on prevailing thought within the School.<sup>150</sup> Hanbal stated the point best: "Do not imitate me, nor Mālik, nor Thawri, nor Awza'i, but take from where we have taken."<sup>151</sup>

*Hanbali* School *fiqh* has led to a widespread characterization that it is the most conservative of the *Sunnite* Schools. What is forgotten is it is the most liberal regarding commercial matters.<sup>152</sup> For instance, the School takes the position that any sort of contract is permitted unless expressly prohibited by the *Shari'a*.<sup>153</sup> Hanbal himself seems to have had the opposite view, as he is rumored to have never eaten watermelon, because he was unable to locate a Prophetic precedent expressly allowing it.<sup>154</sup> Relatedly, *Hanbali* doctrine allows (*ibahah*) a person to obligate herself unilaterally in a manner not contrary to the *Shari'a*.<sup>155</sup> For instance, a husband could add a personal commitment to his wife not to marry another wife, and this pledge would be binding because polygamy is a permissive, not obligatory, right.<sup>156</sup> As another example, Saudi Arabia boasts a dual banking system, with both Islamic and non-Islamic financial products and institutions.

<sup>146</sup> See KAMALI, *supra*, at 84.

<sup>147</sup> See KAMALI, *supra*, at 84.

<sup>148</sup> See JACKSON, *supra*, at 46-47.

<sup>149</sup> See KAMALI, *supra*, at 84.

<sup>150</sup> See KAMALI, *supra*, at 84.

<sup>151</sup> See KAMALI, *supra*, at 84.

<sup>152</sup> See OXFORD, *supra*, at 108.

<sup>153</sup> See KAMALI, *supra*, at 85.

<sup>154</sup> See COULSON, *supra*, at 71.

<sup>155</sup> See KAMALI, *supra*, at 86.

<sup>156</sup> See KAMALI, *supra*, at 86. Along the same lines, the *Hanbali* School allows contracts where the price is determined after formation because it is a customary practice and not prohibited in authoritative text or by sound *qiyās*. *Id.*

<sup>143</sup> See DeLONG-BAS, *supra*, at 123-24.

<sup>144</sup> See DeLONG-BAS, *supra*, at 201-20.

<sup>145</sup> See DeLONG-BAS, *supra*, at 198.





## Chapter 17

### ISLAM AND CAPITALIST ECONOMIC GROWTH

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. . . In 1950, Bangladesh, Egypt, Indonesia, Nigeria, Pakistan, and Turkey had a combined population of 242 million. By 2009, those six countries were the world's most populous Muslim-majority countries and had a combined population of 886 million. Their populations are continuing to grow and indeed are expected to increase by 475 million between now and 2050 — during which time, by comparison, the six most populous developed countries are projected to gain only 44 million inhabitants. Worldwide, of the 48 fastest-growing countries today — those with annual population growth of two percent or more — 28 are majority Muslim or have Muslim minorities of 33 percent or more.

It is therefore imperative to improve relations between Muslim and Western societies. *This will be difficult given that many Muslims live in poor communities vulnerable to radical appeals and many see the West as antagonistic and militaristic.*

Jack A. Goldstone, *The New Population Bomb — The Four Megatrends That Will Change the World*, 89 FOREIGN AFFAIRS 31, 37 (January/February 2010) (emphasis added)

#### SYNOPSIS

##### § 17.01 STEREOTYPES

##### § 17.02 CONVENTIONAL ECONOMIC INDICATORS

##### § 17.03 HUMAN DEVELOPMENT AND FREEDOM

##### § 17.04 WHY THE POOR PERFORMANCE?

##### § 17.01 STEREOTYPES

One of the stereotypes about Islam and its legal system is that they are incompatible with, or at least not supportive of, modern capitalist economic growth. Indeed, just 15 days after the 9/11 terrorist attacks, Martin Wolf, a prominent *Financial Times* journalist and former World Bank economist, wrote in a provocatively titled article that:

western ideas of democracy, liberalism . . . and a law-governed state conflict with *Islam's* traditional practice.<sup>1</sup>

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<sup>1</sup> Martin Wolf, *The Economic Failure of Islam*, FINANCIAL TIMES (London), 26 September 2001, at 17 (emphasis added).



The title of his article bespeaks the stereotype he perpetuates: "The Economic Failure of Islam."

According to the stereotype, Islam is to blame for the poverty of Muslims. Put crassly, if Muslim countries are poor, then it is because they are Muslim. By inference, the more devout a Muslim individual, community, or society is, then the greater the economic backwardness suffered. The remedy — again, following the stereotype — is secularism, *i.e.*, the abandonment of religious belief, in this instance because it retards material progress.

Conforming to this stereotype is the thesis put forth by Turkish-American economist Timur Kuran in his 2011 book, *The Long Divergence — How Islamic Law Held Back the Middle East*. The Economist summarizes the argument thusly:

... Angus Maddison [a British economic historian who lived from 1926-2010 and authored *Contours of the World Economy, 1-2030 A.D. — Essays in Macroeconomic History* (Oxford, England: Oxford University Press, 2007), *Growth and Interaction in the World Economy* (Washington, D.C.: The AEI Press, 2005), and *The World Economy: A Millennial Perspective/Historical Statistics* (Paris, France: OECD, 2007)] has calculated that in the year 1000, the Middle East's share of the world's gross domestic product was larger than Europe's — 10% compared with 9%. By 1700 the Middle East's share had fallen to just 2% and Europe's had risen to 22%.

The standard explanations for this decline are all unsatisfactory. One is that the spirit of Islam is hostile to commerce. But if anything, Islamic scripture is more pro-business than Christian texts. Muhammad was a merchant, and the Koran is full of praise for commerce. A second explanation is that Islam bans usury. But so do the Torah and Bible. A third — popular in the Islamic world — is that Muslims were victims of Western imperialism. But why did a once-mighty civilization succumb to the West?

In *The Long Divergence*, Mr. Kuran advances a more plausible reason. *The Middle East fell behind the West because it failed to produce commercial institutions — most notably joint-stock companies — that were capable of mobilizing large quantities of productive resources and enduring over time.*

Europeans inherited the idea of the corporation from Roman law. Using it as a base, they also experimented with ever more complicated partnerships. By 1470, the House of the Medicis had a permanent staff of 57 spread across eight European cities. *The Islamic world failed to produce similar innovations. Under the prevailing "law of partnerships," businesses could be dissolved at the whim of a single partner. The combination of generous inheritance laws and the practice of polygamy meant that wealth was dispersed among claimants.*

None of this mattered when business was simple. But the West's advantage grew as it became more complicated. Whereas business institutions in the Islamic world remained atomized, the West developed ever more resilient corporations — limited-liability became widely available in

the mid-19th century — as well as a penumbra of technologies such as double-entry book-keeping.

... Today the Islamic world boasts muscular companies and hectic stock markets. . .

Yet, the "long divergence" continues to shape the region's business climate. Most obviously, the Middle East has a lot of catching up to do. Income per head is still only 28% of the European and American average.<sup>2</sup>

The *Shari'a* is an easy target, but blaming it misses the mark. In truth, Islamic Business Associations Law contains an array of partnership structures with diverse conditions for termination. Limited liability is possible. Islamic Inheritance Law helps ensure many family relatives of a decedent are not entirely disinherited and thereby potentially impoverished. Polygamy can be criticized on many grounds, but retarding Islamic economic performance is not one of them. Simply put, while misinterpretation or misapplication of Islamic legal doctrine may be causal factors, the doctrine itself should not be scapegoated, nor should its salubrious influences be ignored. For instance, the doctrine condemns improper moral or ethical conduct in business, as well as greed, and looks askance at aristocracies and plutocracies — all scourges of capitalism in the non-Muslim West.

Complementing the stereotype is the perception the incompatibility of the Islamic faith with modern economic growth fuels frustration — particularly among restive, poor, young under- or un-employed people yearning to put their education, skills, and talents to work. Their frustration renders them susceptible to extremist Islamic ideas, which are manifest in the violence of war and terrorism. Conversely, if Islam and the *Shari'a* provide the framework for growth, and indeed for broad, sustainable development, then extremism is a relatively less attractive path than working within the status quo to a brighter future. Consider the doctrine of "securing development" propounded by (*inter alia*) World Bank President Robert Zoellick:

The most fundamental prerequisite for sustainable development is an effective rule of law, including respect for property rights. Yet, the international security and development communities have let the task of building justice and law enforcement systems fall between the cracks.

...

Only by securing development can we put down roots deep enough to break the cycle of fragility and violence. . . . Soldiers and aid workers need to cooperate to help the people in these countries shift from being victims to becoming the principal agents of recovery. Without this cooperation, efforts to save fragile states are likely to fail and we will all pay the consequences.<sup>2</sup>

<sup>2</sup> *The Crescent and the Company*, THE ECONOMIST, 29 January 2011, at 67 (reviewing Timur Kuran, *The Long Divergence* (Princeton, New Jersey: Princeton University Press, 2011)) (emphasis added).

<sup>2</sup> Robert B Zoellick, Speech to International Institute for Strategic Studies, Geneva, Switzerland, quoted in Daniel Dombey, *World Bank Chief Calls for Rethink Over Fragile States*, FINANCIAL TIMES, 12 September 2008, at 3 (emphasis added).

To be sure, the World Bank President does not confine this doctrine to the Muslim World. The link between a legal system and growth or development, and the consequences for national security, is important for all countries. So, too, is the emphasis on the integral role property rights and their protection play in this linkage. But, what about the stereotype itself — is it true?

In short, the answer is “no.” Islam and the *Shari’a* are not only compatible with growth, but even more impressively, they contain — long before the development of the Common Law in England and the United States — the rule of law elements, including property rights, needed to support that growth. Indeed, the stereotype referenced above is manifestly flawed. Much of the accompanying Chapters explain and probe those elements in property law, contracts, business associations, and banking. Taken together, the thrust of these Chapters is clear: the stereotype is wrong, and insofar as Muslim countries have performed poorly in the economic league tables in comparison with non-Muslim nations, the reason is not Islam or the *Shari’a*.

## § 17.02 CONVENTIONAL ECONOMIC INDICATORS

The conventional economic measure of growth is a sustained increase in Gross Domestic Product (GDP), and better yet, *per capita* GDP. On the measure of *per capita* GDP — both absolute values and growth rates — many Islamic countries, particularly in the Arab Middle East, fare poorly. That is particularly true for Arab countries that are not members of the Organization of Petroleum Exporting Countries (OPEC). Their lackluster performance following the Second World War pales in comparison to East Asia, particularly the Tigers, Hong Kong, Korea, Singapore, and Taiwan. With the exceptions of Indonesia and Malaysia, East Asia is populated not by Muslims, but largely Buddhists, Christians (both Catholic and Protestant), Hindus, and Sikhs. Thus, goes the stereotype, surely religion, and the culture associated with it, must have something to do with differential performance between the Arab Muslim World and East Asia.

After reviewing Table 17-1, a few questions and observations may come to mind. First, how is it possible that three oil-rich Arab League countries — Iraq, Kuwait, and Qatar — have had a negative growth rate in *per capita* GDP over the past 56 years? Given overall growth trends in the world economy, it is astonishing that citizens of those countries are actually poorer today than they were in 1950. Second, what happened between 1990 and 2006 in East Asia that did not happen in Arab countries? While East Asian countries innovated, took advantage of global changes, and consequently experienced unprecedented growth during the 1990s and early 2000s, five Arab League countries actually saw a decrease in their *per capita* GDP. Finally, note the drastic difference in aggregate average growth from 1950-2006 of the Arab League countries (278 percent) and the East Asian countries (1,588 percent). While certain factors (*e.g.*, geography) may impose unavoidable economic effects, surely there should not be a 1,310 percentage difference between the growth rates of these two regions. What, then, explains the enormous divide?

## § 17.03 HUMAN DEVELOPMENT AND FREEDOM

A more inclusive measure of economic growth than GDP or *per capita* GDP emphasizes human development and freedom. At least three broad categories are relevant: Education, Health, and Gender Equality. In each category, several variables are measured. Variables like education (literacy rates, along with primary, secondary, tertiary, and adult level enrollment rates) and health (infant mortality, life expectancy, number of health care professionals) are studied to provide a comparative picture of the relative economic performance of countries. On several of these variables, such as enrollment rates, the existence and extent of differences between males and females must be scrutinized.

On these broader measures, too, many Islamic countries — especially in the Arab Middle East — fare poorly. The comparison with the Tigers specifically, and East Asia generally, is striking. Furthermore, the contrast is remarkable on gender issues. School enrollment rates for girls versus boys are dreadfully disparate in some Muslim countries, but wonderfully equal in non-Muslim East Asia. Thus, the stereotype seems reinforced: is Islam itself retarding development and the progress of women?

Table 17-1:  
Income Comparisons (Geary-Khamis dollars) — Middle East versus Far East<sup>3</sup>

Coun- try (al- pha- beti- cally, OPEC Mem- bers de- noted by as- terisk )	1950 Per Capita GDP	1960 Per Capita GDP	1970 Per Capita GDP	1980 Per Capita GDP	1990 Per Capita GDP	2000 Per Capita GDP	2006 Per Capita GDP	Per- cent- age Rate of Growth of Per Capita GDP be- tween 1950 and 2006
Arab League								
Alge- ria*	1,365	2,088	2,249	3,143	2,918	2,792	3,456	253%
Bahr- ain	2,104	2,843	3,788	4,388	4,104	5,065	6,635	315%

<sup>3</sup> All data are obtained from ANGUS MADISON, *THE WORLD ECONOMY: HISTORICAL STATISTICS* (Organisation for Economic Co-operation and Development (OECD)) (2007). Note: The figures are measured in 1990 Geary-Khamis dollars. The Geary-Khamis dollar, also known as the “international dollar,” is a hypothetical unit of currency with the same purchasing power the U.S. dollar had at a given point in time. For comparisons through a historical time period, the year 1990 is often used as a benchmark. The estimation is based on aggregation of data on (1) international average prices of commodities and (2) purchasing power parities (PPP) of various country currencies. The benefit of the Geary-Khamis system is that it provides a reliable overall measure of the real value of output produced by an economy relative to other economies.



Country (alphabetically, OPEC Members denoted by asterisk *)	1950 Per Capita GDP	1960 Per Capita GDP	1970 Per Capita GDP	1980 Per Capita GDP	1990 Per Capita GDP	2000 Per Capita GDP	2006 Per Capita GDP	Percentage Rate of Growth of Per Capita GDP between 1950 and 2006
Egypt	910	991	1,254	2,069	2,522	2,920	3,361	369%
Iraq*	1,364	2,735	3,473	6,377	2,458	1,221	943	-69%
Jordan	1,663	2,330	2,395	4,480	3,792	4,059	4,900	294%
Kuwait*	28,878	28,813	30,965	13,271	6,121	10,210	13,232	-45%
Lebanon	2,429	2,393	2,917	3,526	1,938	3,409	3,834	157%
Libya*	857	1,830	9,115	7,272	3,087	2,322	2,687	313%
Oman	623	935	3,799	4,072	6,479	6,893	7,720	1,239%
Palestine	949	1,378	1,980	2,744	3,806	5,124	2,314	243%
Qatar*	30,387	33,104	33,160	29,552	6,804	8,042	11,524	-38%
Saudi Arabia*	2,231	3,719	7,624	13,824	9,115	8,002	8,274	370%
Syria	2,409	3,023	3,540	6,508	5,701	7,481	7,832	325%
United Arab Emirates (UAE)*	15,798	22,433	24,552	25,894	13,070	16,560	24,246	153%
Yemen	911	964	1,230	2,290	2,272	2,588	2,701	296%
Non-Arab Middle East								
Iran*	1,720	2,154	4,177	3,961	3,472	4,742	5,959	346%
Israel	2,817	4,663	8,101	10,984	12,968	16,159	18,374	652%
Turkey	1,623	2,247	3,078	4,015	5,445	6,597	8,080	497%
East Asia								
China	439	673	783	1,067	1,858	3,425	6,048	1,377%
Hong Kong	2,218	3,134	5,695	10,503	17,541	21,499	29,481	1,329%
Japan	1,921	3,986	9,714	13,428	18,789	21,069	22,471	1,169%
Korea	770	1,105	1,954	4,114	8,704	14,343	18,084	2,348%
Singapore	2,219	2,310	4,439	9,058	14,365	22,207	26,162	1,178%

Country (alphabetically, OPEC Members denoted by asterisk *)	1950 Per Capita GDP	1960 Per Capita GDP	1970 Per Capita GDP	1980 Per Capita GDP	1990 Per Capita GDP	2000 Per Capita GDP	2006 Per Capita GDP	Percentage Rate of Growth of Per Capita GDP between 1950 and 2006
Taiwan	924	1,492	2,980	5,869	9,886	16,642	19,641	2,125%

Note the importance of tertiary education in the global economy. Educated people are efficient at tasks, and are innovative (that is, creative) in developing and implementing new ideas. To paraphrase the French Rationalist philosopher René Descartes (1596-1650), it is not enough to have a good mind; the key is to use it well. The training of a good mind, and learning to use it well, comes from higher education, which in turn is built on the bedrock of sound primary and secondary school training. So, enrollment rates in colleges and universities, for men and women, are critical. Yet, even robust enrollment rates are not enough. What goes on in the classroom, the curriculum taught and tested, is a key factor not captured by the statistics.

While it is encouraging to see illiteracy rates have fallen significantly in all of the countries listed above, a few questions merit attention. First, why were illiteracy rates in Islamic countries so high to begin with? Conventional wisdom says the educational system of a country correlates closely and positively with its economic conditions. Table 17-1 reveals *per capita* GDP in Islamic countries was roughly comparable to that of East Asian countries back in 1950.

Thus, two questions come into focus. First, what other explanation would Islamic countries offer for their high illiteracy rates? Second, what does an average illiteracy rate of 23 percent among Arab League countries foreshadow about the future of those countries in a world that not only is increasingly globalized, but also demanding of human capital for success?

Table 17-2:  
Education Comparisons (Illiteracy) — Middle East versus Far East\*

Country (alphabetically, OPEC Members denoted by asterisk *)	1975 Illit-eracy Rate	1980 Illit-eracy Rate	1985 Illit-eracy Rate	1990 Illit-eracy Rate	1995 Illit-eracy Rate	2000 Illit-eracy Rate	2005 Illit-eracy Rate
<b>Arab League</b>							
Algeria*	71.6%	63.4%	55.1%	47.1%	39.7%	33.3%	27.9%
Bahrain	37.1%	28.8%	23.3%	17.9%	14.8%	12.5%	10.0%
Egypt	64.6%	60.7%	56.8%	52.9%	48.9%	44.7%	40.8%
Iraq*	70.5%	68.4%	66.3%	64.3%	62.5%	60.7%	58.9%
Jordan	37.7%	30.8%	24.4%	18.5%	13.5%	10.2%	7.6%
Kuwait*	38.2%	32.2%	27.9%	23.3%	21.0%	18.1%	15.6%
Lebanon	31.4%	27.6%	23.7%	19.7%	16.7%	14.0%	11.7%
Libya*	55.4%	47.3%	39.2%	31.9%	25.5%	20.1%	15.9%
Oman	72.4%	63.8%	54.5%	45.3%	36.3%	28.3%	21.7%
Palestine	NA	NA	NA	NA	NA	NA	10%
Qatar*	36.6%	30.2%	25.6%	23.0%	20.8%	18.8%	16.5%
Saudi Arabia*	58.3%	49.2%	40.8%	33.8%	28.7%	23.8%	19.6%
Syria	52.3%	46.7%	40.6%	35.2%	30.1%	25.6%	21.6%
UAE*	40.4%	34.6%	31.2%	29.0%	26.6%	23.8	21.2%
Yemen	85.1%	80.0%	74.1%	67.3%	59.9%	53.6%	47.0%
<b>Non-Arab Middle East</b>							
Iran*	58.0%	50.3%	44.1%	36.8%	30.0%	24.0%	19.0%
Israel	17.1%	13.9%	11.2%	8.6%	6.7%	5.2%	3.9%
Turkey	37.0%	31.6%	26.1%	22.1%	18.2%	15.0%	12.5%
<b>Far East</b>							
China	40.1%	32.9%	26.6%	21.7%	18.1%	14.8%	11.8%
Hong Kong	18.0%	14.6%	12.4%	10.3%	8.5%	6.7%	5.4%
Japan	NA	NA	NA	NA	NA	NA	1%
Korea	9.8%	7.1%	5.5%	4.1%	3.1%	2.2%	1.6%
Singapore	21.6%	17.4%	14.4%	11.2%	9.3%	7.7%	6.2%
Taiwan	NA	NA	NA	NA	NA	NA	NA

Table 17-3:  
Education Comparisons (School Enrollment) — Middle East versus Far East\*

\* Illiteracy figures are from the United Nations Educational, Scientific, and Cultural Organization (UNESCO), Institute for Statistics, posted at [www.uis.unesco.org/cv.php?ID=2867\\_2014&ID2=DO\\_TOPIC](http://www.uis.unesco.org/cv.php?ID=2867_2014&ID2=DO_TOPIC). These figures reflect adult illiteracy rates for the population aged 15 years and above.

Country (alphabetically, OPEC Members denoted by asterisk *)	1999: Primary (P), Secondary (S), and Tertiary (T) Enrollment Rate	2001: Primary (P), Secondary (S), and Tertiary (T) Enrollment Rate	2003: Primary (P), Secondary (S), and Tertiary (T) Enrollment Rate	2005: Primary (P), Secondary (S), and Tertiary (T) Enrollment Rate	2007: Primary (P), Secondary (S), and Tertiary (T) Enrollment Rate
<b>Arab League</b>					
Algeria*	P: 91% S: NA T: 14%	P: 94% S: NA T: 16%	P: 96% S: NA T: 19%	P: 97% S: 65% T: 21%	P: 95% S: NA T: 24%
Bahrain	P: 96% S: 85% T: 22%	P: 97% S: 88% T: NA	P: 98% S: 91% T: 34%	P: 98% S: 92% T: 32%	P: NA S: 93% T: 32%
Egypt	P: 94% S: NA T: 37%	P: 94% S: 80% T: NA	P: 95% S: 80% T: 29%	P: 96% S: 82% T: 35%	P: 96% S: NA T: NA
Iraq*	P: 85% S: 30% T: 11%	P: 83% S: 34% T: 13%	P: 89% S: 38% T: 13%	P: 89% S: 38% T: 16%	P: NA S: NA T: 16%
Jordan	P: 91% S: 80% T: NA	P: NA S: NA T: 29%	P: 94% S: 83% T: 37%	P: 91% S: 79% T: 40%	P: NA S: 82% T: 39%
Kuwait*	P: 87% S: 89% T: 23%	P: 82% S: 81% T: 22%	P: 85% S: 79% T: 20%	P: 87% S: 77% T: 19%	P: NA S: NA T: 18%
Lebanon	P: 86% S: NA T: 33%	P: 87% S: NA T: 39%	P: 84% S: NA T: 41%	P: 83% S: 73% T: 46%	P: 83% S: 73% T: 52%
Libya*	P: NA S: NA T: 50%	P: NA S: NA T: 50%	P: NA S: NA T: 56%	P: NA S: NA T: NA	P: NA S: NA T: NA
Oman	P: 81% S: 65% T: NA	P: 82% S: 70% T: NA	P: 80% S: 74% T: 14%	P: 76% S: 76% T: 18%	P: 73% S: 79% T: 25%
Palestine	P: 97% S: 77% T: 25%	P: 95% S: 79% T: 28%	P: 91% S: 85% T: 34%	P: 78% S: 77% T: 41%	P: 73% S: 79% T: 46%

\* Primary and Secondary Enrollment figures are from United Nations Educational, Scientific, and Cultural Organization (UNESCO), Institute for Statistics, posted at <http://stats.uis.unesco.org/unesco/TableViewer/tableView.aspx?ReportId=182>. Tertiary enrollment figures also are from UNESCO, posted at <http://stats.uis.unesco.org/unesco/TableViewer/tableView.aspx?ReportId=167>.

Primary Enrollment figures are percentage of school-aged children enrolled in an officially recognized school. Secondary figures are percentage of students continuing beyond Primary education. Tertiary figures are percentage of students continuing beyond Secondary education.



Country (alphabetically, OPEC Members denoted by asterisk *)	1999: Primary (P), Secondary (S), and Tertiary (T) Enrollment Rate	2001: Primary (P), Secondary (S), and Tertiary (T) Enrollment Rate	2003: Primary (P), Secondary (S), and Tertiary (T) Enrollment Rate	2005: Primary (P), Secondary (S), and Tertiary (T) Enrollment Rate	2007: Primary (P), Secondary (S), and Tertiary (T) Enrollment Rate
Qatar*	P: 92% S: 74% T: 16%	P: 90% S: 73% T: 15%	P: 93% S: 78% T: 13%	P: 96% S: 87% T: 15%	P: 94% S: 93% T: 16%
Saudi Arabia*	P: NA S: NA T: 20%	P: NA S: NA T: 22%	P: NA S: NA T: 26%	P: NA S: NA T: 29%	P: NA S: NA T: 30%
Syria	P: 92% S: 36% T: NA	P: 94% S: 38% T: NA	P: NA S: 54% T: NA	P: NA S: 62% T: NA	P: NA S: 66% T: NA
UAE*	P: 79% S: 69% T: 18%	P: 79% S: 68% T: 23%	P: 82% S: 71% T: 23%	P: 86% S: 77% T: NA	P: 91% S: 79% T: 23%
Yemen	P: 56% S: 32% T: 10%	P: 66% S: NA T: NA	P: 71% S: 36% T: NA	P: 75% S: 37% T: 9%	P: NA S: NA T: 9%
Non-Arab Middle East					
Iran*	P: 82% S: NA T: 19%	P: 80% S: NA T: 20%	P: 87% S: 77% T: 20%	P: 95% S: 77% T: 24%	P: NA S: 77% T: 41%
Israel	P: 98% S: 86% T: 48%	P: 98% S: 88% T: 52%	P: 98% S: 89% T: 57%	P: 97% S: 89% T: 58%	P: 97% S: 90% T: 58%
Turkey	P: NA S: NA T: 22%	P: NA S: NA T: 23%	P: 89% S: NA T: 28%	P: 90% S: 66% T: 31%	P: NA S: 70% T: 35%
Far East					
China	P: NA S: NA T: 6%	P: NA S: NA T: 10%	P: NA S: NA T: 16%	P: NA S: NA T: NA	P: NA S: NA T: 22%
Hong Kong	P: NA S: NA T: NA	P: 93% S: 74% T: NA	P: 93% S: 75% T: 31%	P: 91% S: 77% T: 32%	P: NA S: 79% T: 34%
Japan	P: 100% S: 99% T: 45%	P: 100% S: 100% T: 49%	P: 100% S: 100% T: 52%	P: 100% S: 100% T: 55%	P: 100% S: 99% T: 57%
Korea	P: 97% S: 94% T: 73%	P: 97% S: 89% T: 83%	P: 97% S: 88% T: 89%	P: 98% S: 94% T: 91%	P: 98% S: 96% T: 93%

Country (alphabetically, OPEC Members denoted by asterisk *)	1999: Primary (P), Secondary (S), and Tertiary (T) Enrollment Rate	2001: Primary (P), Secondary (S), and Tertiary (T) Enrollment Rate	2003: Primary (P), Secondary (S), and Tertiary (T) Enrollment Rate	2005: Primary (P), Secondary (S), and Tertiary (T) Enrollment Rate	2007: Primary (P), Secondary (S), and Tertiary (T) Enrollment Rate
Singapore	P: NA S: NA T: NA	P: NA S: NA T: NA	P: NA S: NA T: NA	P: NA S: NA T: NA	P: NA S: NA T: NA
Taiwan	P: NA S: NA T: NA	P: NA S: NA T: NA	P: NA S: NA T: NA	P: NA S: NA T: NA	P: NA S: NA T: NA

Perhaps the most troublesome data are the 2007 primary enrollment rates for Arab League countries. Many are under 90 percent, and some well below 80 percent. To be sure, extreme poverty and a paucity of schools may account, in part, for the numbers. Still, are these enrollment rates unacceptable in the modern age? Additionally, note the enormous drop-off from primary to secondary to tertiary rates. How can Islamic countries compete in the global economy if so few of the bright young minds in them have the chance to study at a university?

Table 17-4:  
Health Comparisons (Infant Mortality and Life Expectancy) —  
Middle East versus Far East\*

Country (alphabetically, OPEC Members denoted by asterisk *)	1960 Infant Mortality (IM) and Life Expectancy (LE)	1970 Infant Mortality (IM) and Life Expectancy (LE)	1980 Infant Mortality (IM) and Life Expectancy (LE)	1990 Infant Mortality (IM) and Life Expectancy (LE)	2000 Infant Mortality (IM) and Life Expectancy (LE)	2006 Infant Mortality (IM) and Life Expectancy (LE)
Arab League						
Algeria*	IM: 26% LE: 47	IM: 22% LE: 53	IM: 13.4% LE: 60	IM: 6.9% LE: 67	IM: 4.4% LE: 70	IM: 3.8% LE: 72
Bahrain	IM: 15% LE: 56	IM: 8.2% LE: 62	IM: 3.0% LE: 68	IM: 1.9% LE: 72	IM: 1.2% LE: 75	IM: 1.0% LE: 76
Egypt	IM: 27.8% LE: 46	IM: 23.5% LE: 50	IM: 17.6% LE: 55	IM: 9.1% LE: 62	IM: 5.1% LE: 69	IM: 3.5% LE: 71

\* All figures are from the WORLD BANK GROUP, WORLD DEVELOPMENT INDICATORS, posted at <http://go.worldbank.org/U0F5M7AQ40>. [Hereinafter, WORLD DEVELOPMENT INDICATORS.] Infant Mortality figures reflect the percentage of children dying before the age of 5. Life Expectancy figures are measured in years.

Country (alphabetically, OPEC Members denoted by asterisk *)	1960 Infant Mortality (IM) and Life Expectancy (LE)	1970 Infant Mortality (IM) and Life Expectancy (LE)	1980 Infant Mortality (IM) and Life Expectancy (LE)	1990 Infant Mortality (IM) and Life Expectancy (LE)	2000 Infant Mortality (IM) and Life Expectancy (LE)	2006 Infant Mortality (IM) and Life Expectancy (LE)
Iraq*	IM: 15.8% LE: 50	IM: 12.5% LE: 56	IM: 8.0% LE: 61	IM: 5.3% LE: 62	IM: NA LE: NA	IM: NA LE: NA
Jordan	IM: 13.9% LE: 47	IM: 10.7% LE: 54	IM: 6.5% LE: 63	IM: 4.0% LE: 68	IM: 3.0% LE: 71	IM: 2.5% LE: 72
Kuwait*	IM: NA LE: 60	IM: NA LE: 66	IM: NA LE: 71	IM: NA LE: 75	IM: NA LE: 77	IM: NA LE: 78
Lebanon	IM: 8.5% LE: 61	IM: 5.4% LE: 65	IM: 4.4% LE: 67	IM: 3.7% LE: 69	IM: 3.2% LE: 71	IM: 3.0% LE: 72
Libya*	IM: 27% LE: 47	IM: 16% LE: 52	IM: 7.0% LE: 60	IM: 4.1% LE: 68	IM: 2.2% LE: 73	IM: 1.8% LE: 74
Oman	IM: 28% LE: 42	IM: 20% LE: 50	IM: 9.5% LE: 61	IM: 3.2% LE: 71	IM: 1.4% LE: 74	IM: 1.2% LE: 76
Palestine	IM: NA LE: NA	IM: NA LE: NA	IM: 6.5% LE: NA	IM: 4.0% LE: 67	IM: 2.7% LE: 72	IM: 2.2% LE: 73
Qatar*	IM: 14% LE: 53	IM: 6.5% LE: 61	IM: 3.2% LE: 67	IM: 2.6% LE: 70	IM: 2.2% LE: 74	IM: 2.1% LE: 75
Saudi Arabia*	IM: 25% LE: 45	IM: 18.5% LE: 52	IM: 8.5% LE: 61	IM: 4.4% LE: 68	IM: 2.9% LE: 71	IM: 2.5% LE: 73
Syria	IM: 20% LE: 50	IM: 12.8% LE: 56	IM: 7.4% LE: 63	IM: 3.8% LE: 68	IM: 2.0% LE: 72	IM: 1.4% LE: 74
UAE*	IM: 22.2% LE: 53	IM: 8.4% LE: NA	IM: 3.3% LE: 68	IM: 1.5% LE: 73	IM: 1.0% LE: 78	IM: 0.8% LE: 79
Yemen	IM: 34% LE: 35	IM: 30.3% LE: 39	IM: 20.5% LE: 47	IM: 13.9% LE: 54	IM: 11% LE: 59	IM: 10% LE: 62
<b>Non-Arab Middle East</b>						
Iran*	IM: 28.1% LE: 48	IM: 19.1% LE: 54	IM: 13% LE: 59	IM: 7.2% LE: 65	IM: 4.4% LE: 69	IM: 3.4% LE: 71
Israel	IM: 3.9% LE: 71	IM: 2.7% LE: 71	IM: 1.9% LE: 74	IM: 1.2% LE: 77	IM: 0.7% LE: 79	IM: 0.5% LE: 80
Turkey	IM: 21.9% LE: 50	IM: 20.1% LE: 57	IM: 13.3% LE: 61	IM: 8.2% LE: 66	IM: 4.4% LE: 70	IM: 2.6% LE: 71

Country (alphabetically, OPEC Members denoted by asterisk *)	1960 Infant Mortality (IM) and Life Expectancy (LE)	1970 Infant Mortality (IM) and Life Expectancy (LE)	1980 Infant Mortality (IM) and Life Expectancy (LE)	1990 Infant Mortality (IM) and Life Expectancy (LE)	2000 Infant Mortality (IM) and Life Expectancy (LE)	2006 Infant Mortality (IM) and Life Expectancy (LE)
<b>Far East</b>						
China	IM: NA LE: 36	IM: 11.8% LE: 62	IM: 6.0% LE: 67	IM: 4.5% LE: 69	IM: 3.7% LE: 70	IM: 2.4% LE: 72
Hong Kong	IM: NA LE: NA	IM: NA LE: 71	IM: NA LE: 75	IM: NA LE: 77	IM: NA LE: 81	IM: 0.3% LE: 82
Japan	IM: 4.0% LE: 68	IM: 1.8% LE: 72	IM: 1.0% LE: 76	IM: 0.6% LE: 79	IM: 0.4% LE: 81	IM: 0.4% LE: 82
Korea	IM: 12.7% LE: 54	IM: 5.4% LE: 61	IM: 1.8% LE: 66	IM: 0.9% LE: 71	IM: 0.5% LE: 76	dIM: 0.5% LE: 78
Singapore	IM: 4.0% LE: 64	IM: 2.7% LE: 68	IM: 1.3% LE: 71	IM: 0.8% LE: 74	IM: 0.4% LE: 78	IM: 0.3% LE: 80
Taiwan	IM: NA LE: NA	IM: NA LE: NA	IM: NA LE: NA	IM: NA LE: NA	IM: NA LE: NA	IM: NA LE: NA

As with the illiteracy data, trends in Islamic countries are encouraging. Infant mortality has steadily declined while life expectancy has steadily increased. However, is there a good reason why life expectancy is 68.4 years in Arab League countries, and 78.8 years in East Asia?

An interesting observation involves the starting points for the above countries. In contrast to the economic and education data, showing Muslim and non-Muslim countries mostly on the same playing field in the 1960s and 1970s, here the divide seems to have begun further back in time. For example, the average age at first marriage for females in Arab League countries from 1973-1982 was 20.5, whereas the same figure for East Asian countries was 24.2.

Thus, it was not strictly the economic success of East Asia that triggered a gradual increase in average marriage age. Marriage rates in East Asia were already higher than in Muslim countries. Note also that, with the exception of Qatar, the only Arab countries that have seen a significant increase in female marriage ages are Algeria and Libya — two North African countries. Removing those two countries and Israel, the average age of female marriage in the Middle East is 22.8. That figure is well below the worldwide average of about 26.2. Why are Muslim women getting married at such a relatively young age?

Fertility rates in Muslim countries gradually have fallen, but not to the same degree as in other parts of the world. Again, as with the average female age of marriage, Muslim and East Asian countries have long had different fertility rates. While the average Middle Eastern woman had 7 children in the 1960s, the average East Asian woman had 4. Today, the majority of females in East Asia have one child,



but the typical Middle Eastern woman has 3. Fertility rates in some Muslim countries are more akin to those in African developing countries than to the advanced economies of East Asia and Western Europe. To what extent do high fertility rates create a drag on economic growth, and what are the causal linkages between the two variables?

Compared with statistics in Tables 17-1 through 17-6, the data in Table 17-7 suggest the Gender Parity Index (GPI) in Muslim countries do not fare as badly against those of East Asia as anticipated. Indeed, 6 Arab League countries actually had GPIs over 1.0 in 2006, meaning there were more girls than boys enrolled in primary and secondary school in those countries. Such figures are encouraging. Yet, this pattern is not uniform in the Muslim World. Gulf Arab countries, and some countries in the Levant, stand out unfavorably. Significant concern ought to be given to Oman, Qatar, Saudi Arabia, Syria, and Yemen, where there remains a substantial gap in enrollment rates between genders. What accounts for the gender divide in these countries?

Table 17-5:  
Gender Equality Comparisons: Age at First Marriage (Female, Years) —  
Middle East versus Far East<sup>a</sup>

Country (alphabetically, OPEC Members denoted by asterisk *)	Average Age at First Marriage (Female), 1973-1982	Average Age at First Marriage (Female), 1987-1996	Average Age at First Marriage (Female), 2000-2004
<b>Arab League</b>			
Algeria*	21.0	25.2	27.5
Bahrain	NA	24.2	NA
Egypt	21.2	23.6	22.3
Iraq*	20.3	22.0	NA
Jordan	20.7	23.0	24.2
Kuwait*	19.3	22.2	25.2
Lebanon	22.8	NA	NA
Libya*	18.7	NA	29.2
Oman	NA	21.3	21.7
Palestine	21.6	21.4	21.7
Qatar*	21.1	26.0	26.3
Saudi Arabia*	NA	21.4	21.7
Syria	20.4	NA	NA
UAE*	18.0	22.8	23.1
Yemen	NA	20.4	20.7
<b>Non-Arab Middle East</b>			

<sup>a</sup> Figures obtained from two sources: World Development Indicators, *supra*; United Nations, Department of Economic and Social Affairs, World Fertility Report 2003, posted at [www.un.org/esa/population/publications/worldfertility/World\\_Fertility\\_Report.htm](http://www.un.org/esa/population/publications/worldfertility/World_Fertility_Report.htm).

Country (alphabetically, OPEC Members denoted by asterisk *)	Average Age at First Marriage (Female), 1973-1982	Average Age at First Marriage (Female), 1987-1996	Average Age at First Marriage (Female), 2000-2004
Iran*	19.4	21.9	22.1
Israel	22.2	23.9	25.0
Turkey	19.9	22.0	22.0
<b>Far East</b>			
China	NA	22.0	23.1
Hong Kong	24.8	26.7	28.6
Japan	24.5	26.7	28.6
Korea	22.8	26.0	26.1
Singapore	24.6	26.0	26.5
Taiwan	NA	NA	26.8

Table 17-6:  
Gender Equality Comparisons: Total Fertility Rate —  
Middle East versus Far East<sup>a</sup>

Country (alphabetically, OPEC Members denoted by asterisk*)	1960 Average Births per Woman	1970 Average Births per Woman	1980 Average Births per Woman	1990 Average Births per Woman	2000 Average Births per Woman	2009 (estimate) Average Births per Woman
<b>Arab League</b>						
Algeria*	7	7	7	5	3	1.79
Bahrain	7	6	5	4	3	2.5
Egypt	7	6	5	4	3	2.66
Iraq*	7	7	7	6	NA	3.86
Jordan	8	8	7	5	4	2.39
Kuwait*	7	7	5	3	2	2.76
Lebanon	6	5	4	3	2	1.85
Libya*	7	8	7	5	3	3.08
Oman	7	7	7	6	4	5.53
Palestine	NA	NA	NA	NA	5	3.22
Qatar*	7	7	6	4	3	2.45

<sup>a</sup> The "Total Fertility Rate" ("TFR") is defined as the average number of children that would be born to a woman if she were to survive from birth to the end of her reproductive life. TFR includes only live births, not stillbirths. All figures from 1960-2000 are from World Development Indicators, *supra*.

<sup>b</sup> See Central Intelligence Agency, World Factbook, posted at [www.cia.gov/library/publications/the-world-factbook/geos/mu.html#People](http://www.cia.gov/library/publications/the-world-factbook/geos/mu.html#People) (for 2009 estimate data). [Hereinafter, CIA.]

Country (alphabetically, OPEC Members denoted by asterisk*)	1960 Average Births per Woman	1970 Average Births per Woman	1980 Average Births per Woman	1990 Average Births per Woman	2000 Average Births per Woman	2009 (estimate) <sup>10</sup> Average Births per Woman
Saudi Arabia*	7	7	7	6	4	3.83
Syria	8	8	7	5	4	3.12
UAE*	7	7	5	4	3	2.42
Yemen	8	9	9	8	6	6.32
<b>Non-Arab Middle East</b>						
Iran*	7	7	7	5	2	1.71
Israel	4	4	3	3	3	2.75
Turkey	6	5	4	3	3	2.21
<b>Far East</b>						
China	3	6	3	2	2	1.79
Hong Kong	5	4	2	1	1	1.02
Japan	2	2	2	2	1	1.21
Korea	6	5	3	2	1	1.21
Singapore	5	3	2	2	1	1.09
Taiwan	5	5	3	2	2	1.14

Table 17-7:  
Gender Equality Comparisons (Gender Parity Index (GPI) for Gross Enrollment Ratio — Middle East versus Far East<sup>10</sup>)

Country (alphabetically, OPEC Members denoted by asterisk *)	1991 GPI, Primary & Secondary Combined	2002 GPI, Primary & Secondary Combined	2004 GPI, Primary & Secondary Combined	2006 GPI, Primary & Secondary Combined
<b>Arab League</b>				
Algeria*	0.83	NA	0.98	0.99
Bahrain	1.01	1.04	1.05	1.03
Egypt	0.81	0.91	0.93	NA
Iraq*	0.78	0.77	0.80	0.78

<sup>10</sup> The Gender Parity Index (GPI) for gross enrollment ratio reflects the level of access to education of females compared to that of males. A GPI of less than 1 indicates there are fewer females than males in the formal education system.

The above figures are from two sources: WORLD DEVELOPMENT INDICATORS, *supra*; United Nations Educational, Scientific, and Cultural Organization (UNESCO), Institute for Statistics, posted at <http://stats.uis.unesco.org/unesco/TableViewer/tableView.aspx?ReportId=182>.

Country (alphabetically, OPEC Members denoted by asterisk *)	1991 GPI, Primary & Secondary Combined	1999 GPI, Primary & Secondary Combined	2002 GPI, Primary & Secondary Combined	2004 GPI, Primary & Secondary Combined	2006 GPI, Primary & Secondary Combined
Jordan	1.01	1.01	1.01	1.01	1.02
Kuwait*	0.97	1.01	1.03	1.04	1.02
Lebanon	NA	1.02	1.01	1.02	1.03
Libya*	NA	NA	1.03	NA	1.05
Oman	0.89	0.98	0.98	0.98	0.98
Palestine	NA	1.03	1.04	1.03	1.04
Qatar*	0.98	1.02	1.01	0.99	0.98
Saudi Arabia*	0.84	NA	NA	NA	0.94
Syria	0.85	0.92	0.92	0.94	0.95
UAE*	1.04	1.01	1.0	1.0	1.01
Yemen	NA	0.50	0.58	0.63	0.66
<b>Non-Arab Middle East</b>					
Iran*	0.85	0.94	0.96	1.0	1.0
Israel	1.05	0.99	0.99	1.0	1.01
Turkey	0.81	NA	0.86	0.86	0.90
<b>Far East</b>					
China	0.87	0.92	0.99	0.99	1.0
Hong Kong	1.03	NA	0.96	0.98	0.99
Japan	1.01	1.01	1.0	1.0	1.0
Korea	0.99	0.98	0.96	0.96	0.96
Singapore	NA	NA	NA	NA	NA
Taiwan	NA	NA	NA	NA	NA

## § 17.04 WHY THE POOR PERFORMANCE?

As a theoretical matter, the stereotype referenced at the outset of this Chapter confuses correlation with causation. The irrefutable fact that Islamic countries are outperformed on so many variables by non-Muslim countries does not mean Islam is the cause, or the only cause, of the gap. There are many causes of economic growth in a narrow sense, and of development in a broad sense. (The topic obviously is beyond the present scope.) Hence, the temptation to “blame” religion as a negative causal factor must be avoided.

As a practical matter, there are plenty of candidates to explain the poor economic performance of Arab Muslim countries. Four leading causes are war, poor governance, corruption, and discrimination against women.

War is a costly drag on economic growth. Sri Lanka is a case in point. Its conflict cost the country about 1 percentage point annually on its GDP growth rate. Between 1976 and 2009, there was an on-and-off civil war between the government



and the Liberation Tigers of Tamil Eelam (known as the "Tamil Tigers"). It is estimated (as of 2004) 400,000 were killed, and there were more than 200,000 internally displaced persons (IDPs) in the country.<sup>11</sup> Since the birth of Israel in 1948 via United Nations agreement, most Arab countries have been obsessed with its destruction. Arab nations warred with Israel in 1948, 1956, 1967, and 1973, launching the attacks in June 1967, on *Yom Kippur* (the Day of Atonement), 1973, and (arguably) 1948. They lost each one. Yet, many continue to devote large percentages of their government budgets or GDP on defense, justifying those expenditures by a perceived continued threat from Israel.<sup>12</sup>

Not until 1976 did an Arab country, Egypt, break ranks and sign the Camp David Peace Accords, brokered by President Jimmy Carter.<sup>13</sup> In contrast, for most of the 1950s through 1970s, East Asia eschewed war. True, some countries put down Communist insurgencies, as in the Malayan Federation during the 1948-1960 Emergency. Some countries fought low-grade border wars, notably, Malaysia and Indonesia from 1962 to 1966. And, in Indochina, after independence from French colonialism, Cambodia, Laos, and Vietnam fell to Communism. But, for much of the post-Second World War era, East Asian countries were obsessed with their economies, a fixation true in Indochina since roughly the early 1990s. By contrast, while Jordan made peace with Israel in 1993, the rest of the Arab League dwelled on the tiny Jewish state, as their own populations grew larger and more restive in a quest for a better life.

As for poor governance, many leaders in the Arab Middle East made foolish economic choices in the post-Second World War era. Some of them, in Egypt, Libya, and Syria, aligned with the Communist bloc led by the former Soviet Union. They nationalized industries, thereby building up a bloated, inefficient public sector, and thwarting private sector entrepreneurship. They expropriated foreign assets, thus discouraging foreign investment and international trade.

Corruption made the effects of bad decisions worse. Transparency International (TI), a credible source ranking countries on the extent to which their regimes are corrupt, consistently gives Islamic countries low marks for clean governance. In TI's 2008 *Corruption Perceptions Index (CPI)*, which ranks countries from 1 to 180 on their perceived levels of corruption, only 5 Islamic countries ranked in the top 50.<sup>14</sup> Over half of Arab League countries ranked in the bottom 50 percent, placing

<sup>11</sup> Sirimal Abeyaratne, *Economic Roots of Political Conflict: The Case of Sri Lanka*, 27:8 THE WORLD ECONOMY 1295-1314 (2004).

<sup>12</sup> The following Arab countries spend the following amounts of their GDP on defense: Saudi Arabia, 10 percent; Iraq and Jordan, 8.6 percent; Syria, 6 percent; Lebanon, 3.1 percent. Iran allegedly spends 2.5 percent of its GDP on defense, though that data may be unreliable and inaccurate. See CIA, *supra*.

<sup>13</sup> The Camp David Accords, signed at the famous retreat of the President of the United States on 17 September 1978, included two agreements: *A Framework for Peace in the Middle East* and *A Framework for the Conclusion of a Peace Treaty between Egypt and Israel*. The latter led toward the *Israel-Egypt Peace Treaty*, signed on 26 March 1979, which established mutual recognition of each country by the other, cessation of the state of war which had existed since the 1948 Arab-Israeli War, the complete withdrawal by Israel of its armed forces from the Sinai Peninsula, and provided for the free passage of Israeli ships through the Suez Canal.

<sup>14</sup> These were Qatar at No. 28, United Arab Emirates (UAE) at No. 35, Oman at No. 41, Bahrain at No. 43, and Jordan at No. 47.

them alongside notoriously corrupt regimes in Sub-Saharan Africa. Eight Islamic countries (Indonesia, Libya, Comoros, Pakistan, Iran, Yemen, Syria, and Iraq) ranked near the bottom, next to countries with the most despotic regimes of the world.<sup>15</sup>

Monstrous as corruption and its effects are, again, Islam is not to blame. Nothing in the *Shari'a* commands, or even suggests, that leaders plunder their people. To the contrary, they are to rule with justice and compassion. The Qur'an has passages instructing all Muslims, especially political leaders, to act with integrity and empathy. For example, *surah* 4, *ayah* 58 provides:

God commands you [people] to return things entrusted to you to their rightful owners, and, if you judge between people, to do so with justice. . . .<sup>16</sup>

*Surah* 4, *ayah* 135 instructs followers:

You who believe, uphold justice and bear witness to God, even if it is against yourselves, your parents, or your close relatives. Whether the person is rich or poor, God can best take care of both. Refrain from following your own desire, so that you can act justly — if you distort or neglect justice, God is fully aware of what you do.<sup>17</sup>

*Surah* 16, *ayah* 90 teaches:

God commands justice, doing good, and generosity towards relatives and He forbids what is shameful, blameworthy, and oppressive.<sup>18</sup>

The corrupt behavior of a leader is anything but "Islamic," in the same way corrupt actions of an American politician hardly would be considered "Christian."

Finally, concerning women and discrimination in many Islamic countries against them, the data speak loudly. Too many women are married off too early, which means they bear a large number of children (well above the replacement rate of 2.1), because they go through several fertility cycles during their marriage, and they do not enter the labor force until later in life, if at all. Too few women are given even a decent education, much less encouraged to go to college or graduate. This sorry state is a sharp contrast with the treatment of women in East Asia. No country has modernized by systematically leaving its women in a degraded state. Japan comes closest in East Asia to being the exception, but even Arab countries that perform "best" on women's issues are a rather distant cry from Japan's record on those issues. The logic is simple: women are half the population of any country, and if the country invests in their human capital, then they can contribute significantly to GDP, and to broader measures of development.

<sup>15</sup> These countries were ranked No. 126 (tie), 134 (tie), 141 (tie), 147, and 178, respectively.

<sup>16</sup> THE QUR'AN — A New Translation by M.A.S. Abdel Haleem 4:58, at 56 (Oxford, England: Oxford University Press, 2004). [Hereinafter, QUR'AN.]

<sup>17</sup> QUR'AN, *supra*, 4:135, at 63.

<sup>18</sup> QUR'AN, *supra*, 16:90 at 172.

Here again, Islam is not to blame. The *Shari'a* does not mandate discrimination against women. As Muslim women often say, it may be that interpretations of Islamic Law rendered by men centuries ago, and clung to by some men today, counsel for unequal treatment. But, an understanding of the *Shari'a* that is authentic, open-minded, and open-hearted does not support systematic discrimination. Besides, as Muslims, Christians, and Jews, as well as Buddhists, Hindus, and Sikhs, know, the soul of a human being has no sex, and all human beings are created in the image and likeness of God.<sup>19</sup> As incapable of understanding the true nature of God as we are, and as imperfect as our language is to describe God (often using "He," "Him," and "His"), we all share a common understanding that God does not have a gender.

Thus, underlying these theoretical and practical observations is the critical point that blaming Islam for the economic woes of the Muslim World, or the Arab Middle East, is misguided. Islamic countries are identified as such by having a population that is more than 50 percent Muslim. The adherence to Islam of over half the population does not mean the legal system governing the people is the *Shari'a*. While that certainly is so in Saudi Arabia, the role of Islamic law is greater or lesser depending on the country in question. Egypt, Iraq (under Saddam Hussein), Morocco, Syria, and Tunisia are examples of Arab Muslim countries the leaders of which scrupulously try to avoid imposition of the *Shari'a*, at least in a traditional sense. Indeed, many such leaders have felt threatened by Islamic political parties, and look in horror at the experience of Algeria.<sup>20</sup> In that country, the military regime surprised many by introducing a series of democratic reforms, the most notable of which was a new constitution in 1989 that granted the right to form political associations. Soon thereafter, multiparty local and parliamentary elections took place for the first time in Algeria's history, and the *Front Islamique du Salut (FIS)* won a majority in both. This prompted the army to impose martial law and imprison *FIS* leadership, and later stage a *coup d'état* to "save the country" from Islamic rule. From there, Algeria gradually descended into chaos and a six-year (1992-1998) "Dirty War."

Likewise, the style of Islamic law varies. Indonesia, operating under "*Pancasila*," has a relatively secularized version. In that country — the most populous Muslim-majority state of the world — there is no specific reference to Islam in the constitution. Rather, Indonesia functions according to the philosophical foundations of *Pancasila*, which promotes five core principles:

- (1) Belief in the one and only God;
- (2) Just and civilized humanity;
- (3) The unity of Indonesia;
- (4) Democracy; and

<sup>19</sup> This comment elides the point that Tibetan Buddhists do not believe in a "soul," but rather in "mind."

<sup>20</sup> See generally Laura Scully, Note, *Neither Justice, Nor Oases: Algeria's Amnesty Law*, 33 BROOKLYN JOURNAL OF INTERNATIONAL LAW 975-1035 (2008) (discussing amnesty laws in post-civil war Algeria in light of the customary obligation — in public international law as well as international human rights law — to prosecute perpetrators of war crimes and crimes against humanity).

- (5) Social justice for the whole of the people of Indonesia.

(The word "*Pancasila*" consists of two Sanskrit words: "*panca*," meaning five, and "*sila*," meaning principles.) *Pancasila* originally was promulgated by Indonesia's first President, Sukarno (1901-1970), in 1945, partly to resolve conflict between Muslims, nationalists, and Christians. The philosophy was solidified in Indonesian political culture by Suharto (1921-2008), who served as President for over 30 years (1967-1998).<sup>21</sup>

The logical question is whether Islamic Law contains rights and obligations to support modern capitalist economic growth and development. Those rights and obligations involve property, contracts, business associations, and banking. The renowned Peruvian economist, Hernando De Soto (1941-), explains respect for private property is essential for growth and development.<sup>22</sup> De Soto articulately argues one of the critical components of capitalism is functioning state protection of property rights where ownership and transactions are clearly recorded. De Soto points to the economic success of the United States and Japan, noting how each country benefited from a transparent system of property rights, created during the "frontier" period in America and after the post-Second World War in Japan. In countries lacking a transparent system of property rights, poor citizens cannot leverage their informal ownerships into capital (as collateral for credit), thereby inhibiting entrepreneurship and individual social mobility. Consequently, overall economic growth and development stagnates.

Writing before De Soto was economist John R. Commons (1862-1945) of the University of Wisconsin. In his 1924 classic, *The Legal Foundations of Capitalism*, Commons argued markets are a function of the institutions and power structures that form and operate through them.<sup>23</sup> As such, economic growth and development depends not just on market forces, but also on the legal system imposed by the state. Collective decisions — ultimately those of the courts — must be made as to what constitutes a "good" economy, and those decisions must be used to create practical working rules that govern economic activity. Does the *Shari'a* contain the essential ingredients that scholars like De Soto and Commons find indispensable?

If the answer is "no," then there might be a kernel of truth to the stereotype "something in the religion is a drag on growth." But, the answer is "yes." The next several Chapters cover Islamic Law on Property, Contracts, Business Associations (Partnership), and Banking. Their goal is to set out the foundational *Shari'a* concepts in each field. The theme unifying them is the *Shari'a* indeed does contain the essential ingredients. Put simply, if Islamic countries perform poorly economically, then the reason is not the *Shari'a* lacks respect for contracts, property, business associations, and finance. Islamic Law contains the doctrines to support

<sup>21</sup> See generally BENJAMIN FLEMING INTAN, "PUBLIC RELIGION AND THE PANCASILA-BASED STATE OF INDONESIA: AN ETHICAL AND SOCIOLOGICAL ANALYSIS" (2006). See also DOUGLAS E. RAMAGE, *POLITICS IN INDONESIA: DEMOCRACY, ISLAM, AND THE IDEOLOGY OF TOLERANCE* (1997).

<sup>22</sup> See HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* (2000). See also HERNANDO DE SOTO, *THE OTHER PATH: THE INVISIBLE REVOLUTION IN THE THIRD WORLD* (1989).

<sup>23</sup> See JOHN R. COMMONS, *THE LEGAL FOUNDATIONS OF CAPITALISM* (1924) (Madison, Wisconsin: University of Wisconsin Press, 1957).



transactions indispensable to a vibrant capitalist economy.

## Chapter 18

### PROPERTY LAW: OWNERSHIP AND PROPERTY

The Buddha's life story provides further clues about the Middle Path. First he discovered that "too much" wasn't satisfactory; then he discovered that "too little" was equally problematic. . . . According to Buddhist psychology, humans have a deeply ingrained habitual pattern never to be satisfied and to always grasp for more. That is the nature of *samsara* [literally, "wandering on," i.e., the Wheel of Suffering, or Wheel of Reincarnation — the eternal cycle of birth, suffering, death, and re-birth], the ultimately unsatisfying way of dealing with life, which the path of Buddhist practice seeks to remedy.

Rita M. Gross, *Form and Elegance with Just Enough*, in *HOOKED! BUDDHIST WRITINGS ON GREED, DESIRE, AND THE URGE TO CONSUME* 152, 158 (Boston, Massachusetts: Shambhala Publications, Stephanie Kaza, ed., 2005)

#### SYNOPSIS

##### § 18.01 GOD AND WEALTH

- [A] Regency and Vice-Regency
- [B] Freedom and Right to Private Ownership
- [C] Proper Attitude to Private Wealth

##### § 18.02 PROPERTY

- [A] What is "Property"?
- [B] Certain Rights as Property
- [C] Validity: Void (Bātil) versus Voidable (Fāsid)
- [D] Objects of Commerce (Māl)

##### § 18.03 OWNERSHIP

- [A] What is "Ownership"?
- [B] Is Ownership Possible?
- [C] Complete versus Deficient Ownership
- [D] Ownership by Women

##### § 18.01 GOD AND WEALTH

###### [A] Regency and Vice-Regency

Property ownership and wealth accumulation by men and women is a topic that transcends technical *Shari'a* rules. It rises to the level of the creative power of God (Allāh), and the relationship of the Almighty to people in respect of real and

personal assets. Simply put, it is Allāh who is the Most High Creator that made everything in the universe, including property. Hence, He is the true owner of all property.

Private ownership of property rightfully acquitted by men and women is supported and protected by the rules of the *Shari'a*. But, this ownership, by which an individual or jointly-acting persons control an asset, occurs in the widest of all possible contexts — namely, recognition that God (Allāh) built the edifice in which there is property to own and people to own it. A man or woman is a trustee (i.e., custodian) appointed by God, a Vice-Regent where God is the Regent, in respect of property. The large, indeed cosmological, point about ownership is expressed as the Vice-Regency Theory. This Theory emerges from no less than five different passages of the Qur'an:

- [Prophet], when your Lord told the angels, "I am putting a successor on earth," they said "How can You put someone there who will cause damage and bloodshed when we celebrate Your praise and proclaim Your holiness?" but He said, "I know things you do not."<sup>1</sup>

In the Arabic version of this passage, *surah* 2, *ayah* 30, the term "*khalifa*" is used. This word means "Vice-Regent," or "Deputy," or at bottom, a successor in the sense of some one to whom (or group to which) a responsibility is given, as in a trustee.<sup>2</sup>

- . . . Control of the heavens and earth and all that is between them belongs to God: He creates whatever He will and has power of everything.<sup>3</sup>

This passage, a portion of *surah* 5, *ayah* 17, makes explicit the identity of the Regent.

- God has control of the heavens and the earth; He creates whatever He will . . .<sup>4</sup>

This passage, from *surah* 42, *ayah* 49, echoes *surah* 5, *ayah* 17, both of which state unambiguously that control over real or personal property exercised by an individual is second to the control of the Creator Himself.

- Say, "To whom belongs all that is in the heavens and earth?" Say, "To God. He has taken it upon Himself to be merciful." . . .<sup>5</sup>

Here, in *surah* 6, *ayah* 12, it is again made clear that God is the ultimate owner of everything, both what is seen on earth and what is unseen in heaven.

- <sup>71</sup>Can they [the disbelievers] not see how, among the things made by Our hands, We have created livestock they control, <sup>72</sup>and made them obedient, so that some can be used for riding, some for food, <sup>73</sup>some

<sup>1</sup> THE QUR'AN — A New Translation by M.A.S. Abdel Haleem (Oxford, England: Oxford University Press, 2004), 2:30 at 7. [Hereinafter, QUR'AN.]

<sup>2</sup> See QUR'AN, *supra*, 2:30, fn. a at 7.

<sup>3</sup> QUR'AN, *supra*, 5:17 at 69.

<sup>4</sup> QUR'AN, *supra*, 42:49 at 314.

<sup>5</sup> QUR'AN, *supra*, 6:12, at 81.

for other benefits, and some for drink? Will they not give thanks?  
<sup>74</sup>Yet they have taken other gods beside God to help them, <sup>75</sup>though these could not do so even if they called a whole army of them together!<sup>76</sup>

This passage, from *surah* 36, of course, applies to more than merely agricultural property.

The point is clear enough: men and women are not absolute owners of real or personal property. Theirs is a trusteeship (known in Arabic as "*istikhlāf*"). It is a contingent ownership, with two contingencies. First, they must exercise their control with the realization that God is the original and true owner. Second, they must be competent stewards of their property, that is, they must manage their property in accordance with the will of God as revealed in the Qur'an. This point applies not only to private individual or joint ownership, but also to community property over which the government exercises ownership and control. In sum, an owner — whether a person or governmental authority — is nothing more or less than a Vice-Regent of God.

It is important to appreciate the Vice-Regency Theory does not weaken the basic, resolute support of the *Shari'a* for private property ownership. Professor Kamali rebuts the notion that Vice-Regency negates private ownership:

. . . since it could be taken to imply that the community as a whole had the right to overrule private ownership [on the ground that the Regency of God is a respectful metaphor, but in practice real authority lies with the government over its territory], which would be manifestly erroneous. The absolute sovereignty of God is an article of the Muslim faith on which there is no disagreement . . . Man is therefore both an owner of property and also the bearer of a trust, and there is no inherent conflict between the two.<sup>7</sup>

In brief, the in respect of property ownership, as in all other aspects of life, God is supreme, and not in just a symbolic way. People are called to discern and submit to God's will, including in the manner and extent to which they accumulate private property, and the way in which they exercise their ownership of it.

Finally, it is important to remark that there is an inter-temporal implication of the Vice-Regency Theory. The status of an individual as a trustee in respect of his or her property obviously raises an obvious question: who are the beneficiaries of that trust? The obvious answer is the property owner, for in utilizing his or her property in accordance with the will of God, the owner is pleasing God, mindful of the Day of Final Judgment when the owner will be called to account for all of his or her actions. Beyond that owner, however, there are other beneficiaries — children, grandchildren, and anyone who might inherit the property, or anyone who might

<sup>6</sup> QUR'AN, *supra*, 36:71-75 at 284.

<sup>7</sup> MOHAMMAD HASHIM KAMALI, THE RIGHT TO LIFE, SECURITY, PRIVACY AND OWNERSHIP IN ISLAM 257-258 (Cambridge, England: Islamic Texts Society, 2008). [Hereinafter, KAMALI.]

Dr. Kamali, Dean of the International Institute of Islamic thought and Civilization (ISTAC), and Professor of Law at the International Islamic University in Kuala Lumpur, Malaysia since 1985, is a renowned scholar of the *Shari'a* who has published many fine works in English.



later purchase the property, and heirs of the purchaser. In other words, the trusteeship is on behalf of future generations. This implication of the Vice-Regency Theory suggests a congruity between that Theory and the modern economic and environmental concept of "sustainable development." In both approaches, property ought to be used so that it may be handed down to future generations in the same, or preferably enhanced, condition so that they may enjoy it, too.

### [B] Freedom and Right to Private Ownership

There is no doubt Islam, both in a purely religious sense, and in the sense of the rules of the *Shari'a*, unequivocally recognizes, approves, and even cherishes the right to own property.<sup>8</sup> That is plain enough from the Vice-Regency doctrine (explained above). It also is evident from an array of scholarship, including that produced in 1964 by the Academy of Islamic Research, which is based in Cairo, Egypt.<sup>9</sup> Moreover, not only is ownership a right (*haqq*) of each person, but also a freedom (*hurriyyah*) that each person may enjoy. The freedom to own logically precedes the right to ownership, in that each person is at liberty to acquire ownership of property. This freedom is found not only in Islam and the *Shari'a*, but also in the Constitutions of most Muslim countries.

The principle sources of Islamic Law — the Qur'an and *Sunnah* of the Prophet — provide the essential bulwark for private ownership. For example, at least two *hadiths* recorded in the *Sahih Muslim* compilation are relevant:

- Your lives and your properties are forbidden to one another until you meet your Lord.<sup>10</sup>
- All that belongs to a Muslim is forbidden to his fellow Muslim, his life, his property and his honour.<sup>11</sup>

A further *hadith*, also recorded in both *Sahih Muslim*, expressly implicates protection of the private property interests of a woman, as Professor Kamali explains and quotes:

- [A] dispute is reported to have arisen in which a woman, Arwah bint

<sup>8</sup> See, e.g., JOSEPH SCHACHT, AN INTRODUCTION TO ISLAMIC LAW 136 (Oxford, England: Oxford University Press (Clarendon Paperbacks) 1982). [Hereinafter, SCHACHT.]

<sup>9</sup> The work of the Academy is noted in KAMALI, *supra*, at 258.

<sup>10</sup> Quoted in KAMALI, *supra*, at (citing Muslim, *Mukhtasar Sahih Muslim*, 186, *hadith* no. 707). See also SAHIH MUSLIM — BEING TRADITIONS OF THE SAYINGS AND DOINGS OF THE PROPHET MUHAMMAD AS NARRATED BY HIS COMPANIONS AND COMPILED UNDER THE TITLE AL-JAM' US-SAHIH BY IMAM MUSLIM, RENDERED INTO ENGLISH BY ABDEL HAMID SIDDIQI, WITH EXPLANATORY NOTES AND BRIEF BIOGRAPHICAL SKETCHES OF MAJOR NARRATORS, CORRECTED AND REVISED BY DR. HASSAN (Lahore, Pakistan: Sh. Muhammad Ashraf Booksellers and Exporters, 1990). [Hereinafter, MUSLIM.]

This *hadith* also is recorded by Imam Bukhari, albeit with slightly modified wording. See THE TRANSLATION OF THE MEANINGS OF SAHIH AL-BUKHARI, ARABIC-ENGLISH BY DR. MUHAMMAD MUHSIN KHAN VOL. II, book XXVI (The Book of *Hajj*), p. 460, *hadith* no. 795, and p. 461, *hadith* no. 797 (Islamic University, Medina, Kingdom of Saudi Arabia: Dar Ahya Us-Sunnah, Al Nabawiya, March 1978). [Hereinafter, BUKHARI.]

<sup>11</sup> Quoted in KAMALI, *supra*, at 250 (citing *Mukhtasar Sahih Muslim*, 473, *hadith* no. 1775). See also MUSLIM, *supra*.

Uways, told the Umayyad ruler, Marwan b. al-Hakam, that one Sa'id b. Zayd had usurped some of her land. Sa'id was summoned and in defending his case he said: "How could I take her land after hearing what I heard from the Prophet, peace be on him?" Marwan asked: "What did you hear?" and Sa'id replied: The Prophet, peace be on him, said "Whoever takes (even) one span of land unjustly from another, it will become a yoke over his neck to the extent of seven earths." Marwan responded by saying "I shall not ask you to bring evidence after this."<sup>12</sup>

Two additional *hadiths*, from other compilations, state:

- It is unlawful to take the property of a Muslim without his consent.<sup>13</sup>
- Every person is entitled to his own property more than his father, his son, and the whole of mankind.<sup>14</sup>

Read carefully, all five *hadiths* actually go further than simply upholding the private property as an institutional or legal matter. Private ownership is a matter of sanctity, that is, it is a sacrosanct principle. Respect for this principle is a manifestation of good relationships among Muslims, male and female.

Acquisition of private ownership is an exercise of the liberty to own, and may occur by one of three principal means: purchase, inheritance, or gift. Once acquisition occurs, the abstract freedom is manifest in a practical right over the property, such as an immovable object (e.g., a plot of land), a movable object (e.g., a car), or even an intangible object (e.g., intellectual property, such as a patent, trademark, or copyright). Exclusiveness is a (perhaps the) key attribute of private ownership, and the right of ownership in Islam and the *Shari'a* indeed is exclusive to the owner. That is, the owner enjoys the right to exclude all others from the use or disposition of the acquired property.

At the same time, the right is not unqualified. The *Shari'a* subjects the right of private ownership to five categories of conditions:

- Public interest, known in Arabic as "*maslahah*."
- The rights of others affected by the manner and extent of use of private property, and in terms of access and water flow.
- Taxes levied on private property to support the public interest.

<sup>12</sup> KAMALI, *supra*, at 250. See also BUKHARI, *supra*, vol. III, book XLII (The Book of *Luqata* (A Well-Tied Pouch or Purse or Lost Things Picked Up By Somebody)), p. 379, *hadith* no.632. In the subsequent *hadith* recounted by Al Bukhari, the wife of Mohammed, 'Aisha, foretells the dreadful fate on the Day of Judgment of anyone who takes wrongly the private property of another:

Abu Salama narrated that there was a dispute between him and some people (about a piece of land). When he told 'Aisha . . . about it, she said, "O Abu Salama! Avoid taking the land unjustly, for the Prophet . . . said, 'Whoever usurps even one span of the land of somebody, his neck will be encircled with it down the seven earths.'"

*Id.*, vol. III, p. 379, *hadith* no.633.

<sup>13</sup> Compiled in AL-SHAWKANI, NAYL AL-AWTAR, vol. V, p. 355, and quoted in KAMALI, *supra*, at 250.

<sup>14</sup> Compiled in AL-BAYHAQI, AL-SUNAN AL-KUBRA, KITAB AL-NAFQAAT, BAB NAFQAAT AL-ABAWAYN; MAJMA-SANI, ARKAN, p. 207, quoted in KAMALI, *supra*, at 243-244.

- Charitable donations from the wealth associated with private property.
- Inheritance of private property.

Under the public interest (*maṣlahah*), a governmental authority may expropriate property for purposes of an infrastructure project (e.g., to build a fire station, police station, port, power station, road, or school), hospital, or even a mosque. The latter illustration — expropriation of private property to build a mosque — is inconceivable in the American context, where First Amendment separation of church and state would bar the government from acquiring land to build a place of worship. But, that authority must pay fair compensation to the owner of the expropriated property.

The condition that private ownership stops where the rights of others start is a precept of European Utilitarian Philosophy as the “Harm Principle.” It is expressed by John Stuart Mill in *On Liberty* (1859), and earlier by John Locke in *Second Treatise of Government* (1689). Mill writes famously:

The object of this Essay is to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means used be physical force in the form of legal penalties, or the moral coercion of public opinion. That principle is, that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinion of others, to do so would be wise, or even right . . . The only part of the conduct of anyone, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.<sup>15</sup>

In brief, an owner is free to enjoy his or her property as he or she pleases, unless that enjoyment harms another person, such as an adjacent property owner.

Taxes are a restriction on private ownership in every society and legal system. The final two limitations, charitable donations and inheritance, are not relevant in each case of private ownership. They are implicated when property is that of a charitable foundation (*waqf*), or acquired by inheritance. The legal instrument donating the property to charity, or creating the bequest, may specify restrictions on the use of the property.

Is it correct to speak of freedom to own as a “right” in the same vein as a “right” to acquire ownership? “Yes,” says Professor Kamali, but they are theoretically distinct:

<sup>15</sup> JOHN STUART MILL, *ON LIBERTY IN ON LIBERTY AND OTHER ESSAYS* 21–22 (1859, New York: Oxford University Press, 2008 ed.) (John Gray, ed.).

. . . [T]he liberty to acquire ownership is also a right, a type of right which is known in Arabic as *al-haqq al-mubāh*, or a permissive right, which is different from a personal right (*al-haqq al-shakhsī*). A personal right is stronger than a permissive right in that it is exclusive and can be the subject of sale and inheritance, whereas a permissive right, although protected by law, is not an exclusive right, and can neither be sold nor inherited. This may also be said to be one of the main differences between a freedom and a right generally in that the former is a permissive right and everyone is entitled to utilise it and benefit by it, but no one is entitled to lay an exclusive claim to it. In this way, freedom to own property resembles other civil liberties such as freedom of speech and freedom of movement, yet these can also be referred to as rights, in the sense of permissive rights. They may all be said to be liberties, which are however, like ownership, i.e., all capable of being converted to rights. To write a book is an exercise of one's freedom of expression, but then once it is written the author owns it and also has an exclusive right (copyright) over it [depending, of course, on the terms of the publication contract!]. Similarly, to travel to a certain destination is an exercise of one's freedom of movement, but when one acquires a visa and buys a plane ticket to go there, that freedom has been exercised as a right.<sup>16</sup>

In brief, the liberty to own is a permissive right that all persons enjoy in a non-exclusive manner, but which any one of the may or may not choose to exercise. Acquisition of ownership is a “personal” right, which yields exclusive control over a property.

### [C] Proper Attitude to Private Wealth

Nothing in Islam as a religion or legal system discourages the acquisition of wealth, nor places a restriction — a quantitative limit — on the amount of wealth that may be acquired through lawful means. That is, proscribing only unlawful acquisition, the *Shari'a* does not regulate how much property an individual may accumulate. It leaves to the free will of the individual — the sphere of “*mubāh*,” an adjective that literally means “permissible” — the response to “How much is enough?” That is true for any kind of property, whether real or movable, and for intellectual property.

Indeed, at a number of points (e.g., *surah* 9, *ayah* 75, *surah* 24, *ayah* 22, and *surah* 62, *ayah* 10), the Qur'an refers in Arabic to wealth, or property, as “*fadl Allāh*,” which means the bounty or favor of God. It also calls wealth “*khayar*,” that is, a benefit or blessing, in contexts such as (in *surah* 2, *ayah* 180) assets of a decedent inherited by the family of the decedent. In such passages, Muslims are encouraged to gain wealth. Self-exertion to earn income and acquire assets lawfully so one can support oneself and one's family is a form of service to God, called “*ibādah*,” a noun meaning “worship.”

Moreover, wealth is distinctly preferable to poverty. Professor Hussain explains:

<sup>16</sup> KAMALI, *supra*, at 243–244.



There are many verses in the Qur'an which encourage trade and commerce. . . .

Not surprisingly, the attitude of Islam is that there is no impediment to honest and legitimate trade and business, so that people may earn a living, support their families, and give charity to those less fortunate. *Islam does not expect believers to give away all their possessions and live the life of ascetics.*<sup>17</sup>

At one level, the expectation in italics also is true of Catholic Christians. Excessive generosity that turns one's family into paupers is to turn a virtue into a vice.

Yet, at a deeper level perhaps, the reverse expectation is suggested in New Testament passages. Consider the Beatitudes, which Jesus Christ delivers in the Sermon on the Mount. Poverty is preferable to wealth, in the sense that wealth can be a grave encumbrance to entry into the Kingdom of Heaven. The poignant metaphor of trying to fit a camel through the eye of a needle illustrates the expectation to disavow attractions of the world. Further, Christ, when asked by a man of means what was necessary to be a disciple and find God, responded with clear counsel to give away or sell all possessions.

In contrast, a statement of the Prophet found in all six compilations of the *hadith*, including *Imām* Bukhari, and recounted by as Professor Kamali, is noteworthy. The statement is a response to a question from Sa'd Ibn Abi Waqās, a Companion of the Prophet whom the Prophet visited in Mecca, during the Farewell (i.e., last and only) Pilgrimage of the Prophet, when this Companion was ill, perturbed that he had remained in Mecca after the *Hijra*, and worried about whether to leave two-thirds or one-half of his entire estate to charity for fear his family might fall into poverty:

No, one third [of your money and all your other assets], and one third is more than enough [to bequeath to charity]. For *it is better you leave your heirs in easy conditions rather than penniless, for that might prompt them to beg others for help.*<sup>18</sup>

Put in generic terms, wealth is not an end in itself, but rather a means to ensure a person or family does not become dependent for sustenance on the community.

Additionally, the Prophet prayed for Anas bin Mālik, and other Companions, as follows:

<sup>17</sup> JAMILA HUSSAIN, *ISLAMIC LAW AND SOCIETY — AN INTRODUCTION* 158-159 (Annandale, New South Wales, Australia: The Federation Press, 1999) (emphasis added). [Hereinafter, HUSSAIN.]

Professor Hussain is a Lecturer in Law at the University of Technology Sydney (UTS) in Sydney, Australia.

<sup>18</sup> Quoted in KAMALI, *supra*, at 245 (emphasis added). See also BUKHARI, *supra*, vol. VIII, book LXXX (The Book of *Furūd* (1) (The Laws of Inheritance)), pp. 477-478, *hadith* no. 725 (quoting the same *hadith*).

This *hadith* later would become the official rule in the *Umayyad* Caliphate, namely, a limit on legacies as directed by a decedent of one-third of the entire estate of the decedent, with two-thirds of the estate automatically flowing to the family and distributed among the family members in accordance with prescribed shares (*farā'id*).

O My Lord, increase his wealth and his offspring.<sup>19</sup>

The Prophet also prayed that he himself would not be poor:

O My Lord, grant me guidance (*hudā*), piety (*taqwā*), purity (*'iffah*) and affluence.<sup>20</sup>

Certainly, nowhere in the New Testament does Christ pray for his own material wealth, and nothing in His life or ministry remotely suggests he either had or pursued affluence.

At the same time, a common denominator in both faiths is self-reliance, at least to the extent possible, coupled with an appreciation that wealth ultimately is a gift from God. Saint Paul writes in *The Second Letter to the Thessalonians* that there is a closely related element of not taking this gift for granted, of not being indolent or officious, but rather of earning one's keep:

<sup>10</sup>. . . [W]e instructed you that if anyone was unwilling to work, neither should that one eat. <sup>11</sup>We hear that some are conducting themselves among you in a disorderly way, by not keeping busy but minding the business of others. <sup>12</sup>Such people we instruct and urge in the Lord Jesus Christ to work quietly and to eat their own food. <sup>13</sup>But you, brothers, do not be remiss in doing good.<sup>21</sup>

In sum, put in secular terms, neither Islam nor Catholic Christianity equate with Marxism or other non-religious philosophies that aim at an equality of economic result.

Despite the strong religious basis for the freedom and right to ownership, and prayerful exhortations to acquire wealth, neither Islam generally, nor particular rules in the *Shari'a*, condone greed or gluttony. Quite the opposite is true. Unbridled wealth accumulation, and its attendants — selfishness, extravagance, wastefulness, ingratitude, and corruption — are evil. The Qur'an (in *surah* 17, *ayah* 27) dubs whoever wealth on sensual pleasures "brothers of Satan," and warns (in *surah* 7, *ayah* 31) that "God does not like wasteful people" (called in Arabic "*musrifin*").

The proper understanding of wealth begins with an appreciation that all of it comes from God with a purpose. His purpose in bestowing wealth is to create a testing ground for righteous conduct, as *surah* 18, *ayah* 7-8 articulate:

We have adorned the earth with attractive things so that We may test people to find out which of them do best, but We shall reduce all this to barren dust.

In other words, wealth is a Divine testing methodology, an opportunity to reject the temptation to materialistic excess and practice the virtue of restraint. Like the majestic and intricate Buddhist Mandala, which monks deliberately blow or sweep away to symbolize impermanence and recall the importance of detachment, wealth

<sup>19</sup> Quoted in KAMALI, *supra*, at 246 (emphasis added).

<sup>20</sup> Quoted in KAMALI, *supra*, at 245 (emphasis added).

<sup>21</sup> *The Second Letter to the Thessalonians*, 3:10-13, in THE CATHOLIC STUDY BIBLE 332 (New York, New York: Oxford University Press, 1990, New American Bible trans.). [Hereinafter, BIBLE.]

calls upon each Muslim to remember it has no enduring or intrinsic value. Each Muslim is to ask how he or she may best use the wealth from Allāh in service of His will.

That service is neither miserly nor spendthrift behavior. Thus, in a poignant metaphor, the Qur'an, in *surah* 17, *ayah* 29, calls for avoidance of the extremes:

And do not tie your hand to your neck, nor stretch it forth to its utmost reach, so that you are then left with destitution and regret.<sup>22</sup>

Less the metaphor be ambiguous, *surah* 25, *ayah* 63-67 spells out the precept:

<sup>63</sup>The servants of the Lord of Mercy are those who walk humbly on the earth, and who, when the foolish address them, reply, "Peace"; <sup>64</sup>those who spend the night bowed down or standing, worshipping their Lord, <sup>65</sup>who plead "Our Lord, turn away from us the suffering of Hell, for it is a dreadful torment to suffer — <sup>66</sup>it is an evil home, a foul resting place." <sup>67</sup>They are those who are neither wasteful nor niggardly when they spend, but keep to a just balance. . . .<sup>23</sup>

On this point — moderation — the similarity with Catholic Christianity is clear.

In Catholic theology, moderation is one of the Four Cardinal Virtues (along with prudence, justice, and courage). Conversely, greed and gluttony are two of the Seven Deadly Sins. (The list may be remembered by the acronym "PLACES + G" — Pride, Lust, Anger, Covetousness (which essentially is gluttony), Envy (i.e., jealousy), Sloth, and Greed.) Thus, for example, in a September 2008 homily with 260,000 gathered for Mass in Paris at the Esplanade des Invalides, Pope Benedict XVI:

condemned unbridled "pagan" passion for power, possessions and money as a modern-day plague. . . .

. . .

"Has not our modern world created its own idols?" Benedict said in his homily, and wondered aloud whether people have "imitated, perhaps inadvertently, the pagans of antiquity.

This is a question that all people, if they are honest with themselves, cannot help but ask," the pontiff said.

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Paraphrasing from the New Testament, Benedict decried "insatiable greed" and said "the love of money is the root of all evil."

Have not money, the thirst for possessions, for power, and even knowledge, diverted man from his true destiny?" the pope asked.

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QUR'AN, *supra*, 17:29 at 177.

<sup>23</sup> QUR'AN, *supra*, 25:63-67 at 230 (emphasis added).

The pope urged the faithful to "shun the worship of idols. Do not tire of doing good!"<sup>24</sup>

In sum, as in Catholicism, in Islam and the *Shari'a*, nothing justifies relentless accumulation of wealth through property acquisition. All counsel is for balance.

From a legal position, excessive, self-indulgent materialism, indolence, and use of property in an oppressive way are, according to the Qur'an, lawless behaviors. From a moral view, they are sins (in Arabic, "*ithm wa baghy*") and indecencies (*al fawāhish*). *Surah* 7, *ayah* 33 teaches such behaviors must be avoided, not just in a perfunctory way when others are watching, but also out of a heart-felt belief they are truly wrong:

Say [Prophet], "My Lord only forbids disgraceful deeds — *whether they be open or hidden* — and sin and unjustified aggression, and that you, without His sanction, associate things with Him, and that you say things about Him without knowledge."<sup>25</sup>

Specific examples of the lawless, sinful use of property are hoarding and a lack of generosity. *Surah* 9, *ayah* 24 of the Qur'an admonishes:

Those who hoard gold and silver and refuse to spend them in the way of God [i.e., in a worthy cause], warn them of a painful punishment.<sup>26</sup>

This statement, while comparatively more severe in tone, is redolent of a Biblical passage from *The First Letter of John*:

<sup>17</sup>If someone who has worldly means sees a brother in need and refuses him compassion, how can the love of God remain in him? <sup>18</sup>Children, let us love not in word or speech but in deed and truth.<sup>27</sup>

Sadly, what is preached in both the Muslim and Catholic Christian worlds is not always practiced.

Many in Muslim and Catholic communities live in poor — sometimes desperately impoverished — conditions, while materialistic excesses of a small minority persist. The juxtaposition in major urban areas — Cairo and Chicago, for example — is stark. As Muslim and Catholic countries increasingly intersect and are intertwined in the global capitalist economy, the inequities in wealth distribution seem ever-more serious. Numerous statistics on income inequality, including Gini coefficients, bear out this reality.<sup>28</sup> Is the *Shari'a* a Third Way, a middle ground between American-style laissez-fair capitalism and oppressive, inhumane communism?

<sup>24</sup> Jenny Barchfield, *Pope in Paris Condemns Love of Money, Power*, *SIoux CITY JOURNAL*, 13 September 2008, posted at [www.siouxcityjournal.com](http://www.siouxcityjournal.com) (quoting Pope Benedict XVI).

<sup>25</sup> QUR'AN, *supra*, 7:33 at 96 (emphasis added).

<sup>26</sup> QUR'AN, *supra*, 9:24 at 118.

<sup>27</sup> *The First Letter of John*, 3:17-18, in *BIBLE*, *supra*, at 390.

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Professor Kamali argues in the affirmative, viewing Islamic Law, particularly its rules on property ownership, as eschewing the excesses of the two systems.<sup>29</sup> He finds the rules of the *Shari'ā* affirm private property, but sensitize wealthy property owners to the needs of the poor. That is true enough. But, it also is true of American Property Law and the Catholic Christian tradition. The starting premise for both systems — Islamic and American — is distinctly capitalist, namely, freedom of ownership of private property. Both systems contain rules to reign in abusive, oppressive, or unconscionable practices by property owners. Both systems admit the importance of the public interest, that property owners have social responsibilities. Both systems seek to obviate harms to neighbors without toppling entirely the meaning of freedom of ownership.

Distressingly, neither system vigorously enforces all of its property law rules to help the poor or vulnerable. Perhaps the American regime learned to balance individual and communal interests in part from the *Shari'ā*, in which case Islamic Property Law is not a Third Way. Rather, the relationship between Islamic and American Property Law is that of a parent to child, with the child bearing semblances to the parent, yet having its own distinct features, some of which arise from the environment in which it develops.

## § 18.02 PROPERTY

### [A] What is "Property"?

"Ownership" in Arabic is "*milk*." The term connotes (as discussed below) a right to complete, exclusive disposal of a thing. In Arabic, the word for a "thing" is "*ayn*."<sup>30</sup> Just as is connoted by the English word "thing," the Arabic word "*ayn*" has a broad meaning, covering both movable property and immovable (*i.e.*, real) property (land), and tangible as well as intangible objects. Of course, of relevance to Property Law, be it Islamic or American, is a thing that is property, *i.e.*, a thing capable of being owned.

The Arabic term for "property" is "*māl*." Obviously, "*māl*" is the subject matter of "*milk*." The owner is called "*mālik*" or "*rabb*." In the parlance of American Property Law, the terms "*milk*" (ownership) and "*mālik*" (owner) are used in the *Shari'ā* in the context of *in rem* property rights. Notably, the terms "*milk*" and "*mālik*" are used in the *Shari'ā* not only in the context of real and personal property, and usufruct (discussed below), but also in the context of the right to sexual intercourse in marriage.

But, what is "*māl*"? That is, what is the Islamic legal conception of "property"? Without a practical answer to this question, discussion of ownership is quixotic. There is no one definition of "property" used across all Four *Sunni* Schools, and among *Shi'ites*. That said, the majority of Islamic legal scholars (*fukahā*) would

agree with Professor Kamali that "property" is:

anything that has a saleable value, and destroying which could entail compensation, even if a small amount, yet not so small that people would not consider it to be of any value [*i.e.*, of no value], such as a grain of wheat or a handful of grass.<sup>31</sup>

This definition, which emphasizes the value of a thing, accords with the views of *Imām Shāfi'i*. However, the *Hanafi* School focuses on enjoyment, defining "*māl*" as:

anything that people naturally like to own and which can be stored for future use.<sup>32</sup>

What is the difference between the majority, and *Shāfi'i* School, definition, on the one hand, and the *Hanafi* School definition, on the other hand?

The short answer is "usufruct" (in Arabic, "*manfa'a*"), which as the *New Shorter Oxford English Dictionary* explains, is a noun meaning

1 . . . The right of enjoying the use of and income from another's property without destroying, damaging, or diminishing the property. . . . 2 . . . Use, enjoyment, or profitable possession . . .<sup>33</sup>

Examples of "usufruct" are (1) rent derived but not yet collected from real property, (2) profits anticipated but not yet realized from the use of, or extractions of resources from, real property, and (3) certain abstract rights, possibly including a yet-to-be-conferred intellectual property right. Simply put, "usufruct" is the right to use another's property, and enjoy that use, short of wasting or destroying the property.

The majority approach, and the *Shāfi'i* School, includes not only usufruct, but also intangible assets, in the category of things that can be owned, *i.e.*, of "*māl*," and says all of them may be inherited. In contrast, the *Hanafi* School definition excludes usufruct, because it "cannot be stored for future use,"<sup>34</sup> and thus would not consider it to be inheritable. However, the *Hanafi* School rationale seems parlous.

Even a rudimentary understanding of business and accounting is enough background to appreciate that rents and sales revenues not yet collected may be booked on a balance sheet under a category such as "Accounts Receivable." This account is an asset with value that can be pledged as collateral in further transactions. In other words, what is to be collected — rents or sales revenues — is stored in this account, and available for future use. Perhaps the accurate, and stronger, defense of the *Hanafi* School position lies in the definition of "usufruct" from the *New Shorter Oxford English Dictionary*. The first definition speaks of one person enjoying use and income from property of another person. The second definition envisions profitable possession of property of another. For the *Hanafi*

<sup>29</sup> Kamali, *supra*, at 259.

<sup>30</sup> Kamali, *supra*, at 259.

<sup>31</sup> *NEW SHORTER OXFORD ENGLISH DICTIONARY* vol. 2 at 3533 (Oxford, England: Oxford University Press, 1993).

<sup>32</sup> Kamali, *supra*, at 259.

<sup>29</sup> See Kamali, *supra*, at 295-96.

<sup>30</sup> Sometimes, a "thing" is called "*nakaba*," which means "substance." See generally JOHN MAKDISI, *ISLAMIC PROPERTY LAW* ch. 11.A (Durham, North Carolina: Carolina Academic Press, 2005) (concerning the nature of property).



School, the question is whether a thing can be the subject matter of ownership, if another person owns that same thing. The question contains the answer: aside from joint or common ownership, a thing possessed by one person and owned by another person cannot be owned by the first person. Ownership is exclusive.

## [B] Certain Rights as Property

Under the *Shari'a*, the concept of "*māl*" includes rights as well as property. Certain rights may be owned, akin to real and personal property. For example:<sup>35</sup>

- Credit Claims:

Consider the distinction between two Arabic terms: (1) "*ayn*" (a "thing," such as movable property or immovable property (land), and (2) a debt, or a claim arising from a credit loan, called a "*dayn*." This term can apply to money or fungible things, and the debt or claim may have matured, or may be due at some future date. It is possible under the *Shari'a* to own a right, namely, a *dayn*. A lender is the owner of a right to claim repayment from a borrower. This right is associated with the status of an individual as a creditor.

- Further Rights Associated with Legal Status:

There are additional rights an individual may acquire and own by virtue of his or her status. One illustration is the right to maintenance (*nafaka*). A woman enjoys this right because of her status as a wife, and her husband owes the correlative obligation. Another illustration is the right of a worker to be paid for work he or she performs. The right is associated with the status of being a worker.

Interestingly, three of the Four *Sunni* Schools — the *Māliki*, *Shāfi'i*, and *Hanbali* Schools — agree these status-based rights are *māl*, and may be the object of complete ownership. *Hanafi* School *fukahā'* take a different approach. These jurists argue that rights associated with status are putative rights susceptible to deficient, but not complete, ownership. (The distinction between complete and deficient ownership is discussed below. In brief, "complete" ownership covers both a thing and its possession; "deficient" ownership occurs where an individual owns the thing but does not possess it, or does not own the thing, but owns the usufruct associated with that thing, i.e., the right to possess and enjoy the thing.) A "putative" right, called in Arabic "*māl hukmi*," is a supposed right, a right that is reputed or to be believed. From the *Hanafi* perspective, it is not certain that the right-holder actually will possess and use the right. A creditor might not demand full repayment, a wife might be self-sufficient and not need maintenance from her husband, or a worker might provide some goods or services gratis. Consequently, their ownership of the status-based rights is best characterized as deficient.

- Rights Associated Based on Possession or Use:

It is possible for an ownership interest to exist in an ancillary right associated with real property, such as an easement, right of abode in a rented property, or right of transport (e.g., of animals or machines). These rights are over a thing, based on actual possession or use of that thing.

However, there are three major categories of rights that do not qualify as *māl*. Thus, such rights are not valid objects of ownership.

- Rights With No Financial Value

Rights of custody, guardianship (by one person of another), paternity, or visitation — all of which arise in the context of Islamic Family Law — may not be owned. While they have high emotional value to the holder, they carry no intrinsic financial value, nor can they be bought or sold in a marketplace. Thus, they are not considered as *māl*. That also is true of the right to inflict a just retaliation (*qisās*), which arises under Islamic Criminal Law. This right does have a financial value, because it can be converted into a payment of blood money (*diyyah*). But, the right cannot be sold or exchanged by its holder.

- Liberties

Under the *Shari'a*, all persons hold what are called "permissible rights," or "*ibāhāt*." In effect, they are liberties. Examples are the right to use public recreation facilities and road, to buy real or personal property, and to conclude contracts. To be sure, they are attached to *māl*. Yet, they are deemed not to be *māl*. That is because they may not be the target of exclusive possession by a single person, nor may one person exchange them for value.

- Rights Contingent on Another Person:

Some rights may not be exercised unless another person assents. That is, their enjoyment by the right-holder depends on the will of the obligor. An Example is a right of a seller to receive the unpaid price of an object made from gold, where the seller of the object delivered it to the buyer before procuring full payment. The right of the seller depends on the will of the buyer to make the seller whole. Thus, while the *Māliki* School *fukahā'* classify the seller's right as a form of *māl*, the other *Sunni* Schools — *Hanafi*, *Shāfi'i*, and *Hanbali* — do not. Their rationale is the uncertainty surrounding the performance of the buyer (i.e., whether he or she actually will pay the balance due in the future) means the right of the seller contingent on the will of the buyer. However, all Four Schools agree that if there is a third-party guarantee backing the duty of the buyer to pay, then the right of the seller qualifies as *māl*.

From the vantage point of contemporary finance, it could be argued *Māliki* School has the correct view. Financial markets regularly price uncertainty. If there is doubt as to payment of (for example) dividends on stock of United Airlines, bonds issued by Argentina, mortgage loans extended to sub-prime borrowers, or asset-backed securities where the underlying pool of assets consists of sub-prime mortgages, then markets discount the price

<sup>35</sup> See KAMALI, *supra*, at 259.

of those financial instruments. The price drops, possibly precipitously, until an investor believes the uncertainty of obtaining any gain (payment) is justified by the discounted price. At all times, save for insolvency of the entity issuing the instrument, that instrument has value, and is tradeable. Thus, as the *Māliki* School urges, the right of the holder of United Airline stock, Argentine debt, mortgage loan, or mortgage-backed security, has value and is *māl*. Likewise, a seller who delivers gold without full payment holds an asset — an account receivable — which he or she may sell, at a reduced price from the face value of the obligation if necessary, to incorporate uncertainty that the buyer of the gold might not pay at all, or in a timely fashion.

By way of summary, two remarks are worth making.

First, the discourse about what ought or ought not to be considered property, and thus a valid object of ownership, occurs among Islamic legal scholars many centuries, indeed, roughly a thousand years, ago, and continues to the present. That is a long and distinguished history that easily antedates American Property Law. Second, the general disposition of the *Sharī'a* is to include a right as kind of property that may be owned and freely alienated. That disposition is consistent with modern global capitalism, and supports free enterprise. Third, the exceptions to that tendency are justifiable from a moral perspective. It would be an inhumane religious law that condoned buying and selling of (for example) custody rights, or rights to use public facilities.

### [C] Validity: Void (*Bātil*) versus Voidable (*Fāsid*)

A key concern in the *Sharī'a* is validity. In Islamic Property Law, an issue is whether a property transaction is valid. The *Sharī'a* has two alternatives to answer this question, which have exact analogs in American jurisprudence — void, and voidable.

A transaction may be null and void, in Arabic, "*bātil*." Such a transaction is invalid. It never has legal effect, as from inception it is flawed. In contrast, a transaction may be voidable, in Arabic, "*fāsid*." This transaction also is defective, but the defect is not so serious to vitiate from inception the deal. Neither the Qur'ān nor *Sunnah* resolves the issue of validity for every imaginable transaction in real or personal property. Thus, the legal effect often must be decided by an Islamic judge (*qāḍī*), or other means. The concepts of *bātil* and *fāsid* are applied to purchases and sales of various items.

### [D] Objects of Commerce (*Māl*)

Not every corporeal object or thing (*ayn*) is a legitimate object of commerce. This point holds true under both Islamic Property Law and Contract Law. To be a legitimate object of commerce, or *māl*, and thus to be susceptible to ownership, it must be permissible (*halāl*) to own the object. The *Sharī'a* concept of "*māl*" is akin to the Roman Law concept of "*res in commercio*." Both refer to an object of a lawful transaction.

The following objects are considered forbidden (*harām*) under the *Sharī'a*, and thus cannot be the object of commerce or become owned:

- A free person (*i.e.*, a person who is not a slave).
- Blood.
- An animal that has been slaughtered, but not in accordance with the proper religious ritual.
- Dead carcasses.
- Alcohol.
- Pork (swine) or pork products.

These items cannot be bought or sold. They are excluded from legal transactions. That is, any effort to transact in them would be *bātil* (null and void).

Distinct from forbidden (*harām*) things (*ayn*) is a second category of objects that are regulated. That is, they may be the subject of a valid transaction, but their use in commerce is regulated in some way. Leading examples are:

- A thing with no market value. The sale of such a thing is *fāsid*.
- A thing that is not in the actual possession of its purported owner, and which is unlikely to be possessed, namely, a thing that has been lost, usurped, or confiscated. The sale of such a thing also is *fāsid*.
- A holy thing, like the soil of Mecca. The sale of a holy thing is considered reprehensible (*makrāh*), hence a transaction in it would be *fāsid*.

Not surprisingly, given the desert climate of much of the Middle East, water is another object whose use is regulated.

Only a small water course is considered private property, and then, too, of the individuals whose property that adjoins the water course. Large waterways are public property. The only instance in which water is wholly-owned by one person is when it is in a container. Otherwise, water has some co-ownership or public ownership dimension to it. Consider a stream or canal.<sup>36</sup> Even the owners of the adjoining land exercise joint ownership of the water course, and these owners have duties to the public. They must maintain the stream or canal by dredging it. As they draw water from it, they cannot make unilateral changes to the stream or canal. They cannot exclude anyone from drinking from the stream or canal, or from performing the ritual ablutions in connection with Muslim prayers. (On the latter point, note the interaction of the sacred and profane.) To be sure, except in a case of necessity (*ḍarūrāh*), the public does not have a right to trespass on the land of the owners to get to the stream or canal. An outsider must get the permission of the landowners.<sup>37</sup> (Note the important related topics of public interest (*maṣlahah*), necessity, and regulation of items like water.)

<sup>36</sup> See SCHACHT, *supra*, at 143.

<sup>37</sup> See MARDISI, *supra*, ch. II.G-H (concerning license and trespass).



Additionally, there are some things that are legitimate objects of commerce, but which an individual may not own. Hence, the *Shari'a* prohibition on private ownership of them is unsurprising:

- Natural goods, such as air and large bodies of water.
- Community property, i.e., assets for the benefit of the common good, such as bridges, mosques, and roads.
- Property that is not known, or not in actual possession, such as certain kinds of natural wildlife, like birds.
- Property dedicated to a charitable foundation (*waqf*).

These items are what American trained lawyers would call "public goods." No single individual can exclusively own or dispose of them. All persons may use them, as long as their use does not adversely affect the use of them by others. However, the fourth category, property in a *waqf*, is less easily characterized as a public good than the first three categories. Some *ulema* justify the prohibition against private ownership of property in a *waqf* by arguing property does not belong to any individual, but to God (Allāh).

A final and important prerequisite for a thing to be a legitimate object of commerce and capable of being owned is a kind of *de minimis* rule. An object is not *māl* if it has no value. The *Shari'a* sets a minimum value of such objects (*nāl*): 1 dirham. That is, only a valuable asset is a legitimate object of commerce, with the *de minimis* threshold being very low indeed.

Assuming a thing (*'ayn*) is an object of a legal transaction, then it may be classified further. That is, there are different categories of *māl*:

- Immovable objects, which in Arabic are called "*akār*" An example would be land.
- Movable objects, which are referred to as "*māl mankūl*" (or, synonymously, "*māl nakl*"). An example would be a car.
- Fungible (homogeneous) objects, which are dubbed "*mithli*," such as bulk cargo, or the same species of apples or of oranges.
- Non-fungible (heterogeneous) objects, known as "*kimī*," such as artwork.

For most objects, placement into one of the above categories is based on custom, which in turn is based on the nature of the object. The above categories are not entirely mutually exclusive. For example, certain objects can be movable and fungible (such as commodities like rice), or even immovable and fungible (such as identical tracts of adjacent land). Certain objects could be movable and non-fungible (such as custom-made apparel or jewelry), or immovable and non-fungible (such as the Taj Mahal).

The categorization of certain things is based on the *Sunnah*. Specifically, following the *Sunnah*, fungible objects are further divided into the these sub-categories:

- Fungible objects that can be measured, called "*makīl*" (or, synonymously, *kaylī*), such as barley, dates, salt, and wheat.
- Fungible objects that can be weighed, known as "*maẓnūn*" (or, synonymously, *waẓnī*), such as gold and silver.
- Fungible objects that can be counted, referred to as "*ma'dūd mutakārib*" (or, synonymously, "*dadī*").

Illustrations of countable items include camels, cows, and horses, though the extent to which they are fungible is debatable and may depend on the context. These sub-categories are especially relevant in Banking Law, to rules prohibiting *ribā* (loosely translated as "interest"). These sub-categories are found in specific *ḥadīths* that elaborate on the basic prohibition of interest in debtor-creditor relationships. The examples of items in the each sub-category are based on *ḥadīths*, but are not exclusive. Overall, the sub-categories facilitate the understanding and application of the prohibition on *ribā*.

## § 18.03 OWNERSHIP

### [A] What is "Ownership"?

"Ownership" ("*milk*") is defined by the great 13<sup>th</sup> century A.D. *Māliki* School legal scholar Al Qarāfi as follows:

A ruling of *Shari'ah* (*ḥukm sharī*), or a juridical attribute (*ḥaṣṣ sharī*), which is specified in a real object (*'ayn*) or usufruct (*manfa'a*), and enables a person to control, dispose, or exchange it in any manner he wishes provided that there is no legal impediment against it.<sup>38</sup>

The definition bears much in common with the conception of "ownership" in American Property Law. The second clause emphasizes control and free alienability, subject only to certain legal provisos, which in turn are based on moral principles concerning the common good, or the defect of the owner (such as minority or insanity). The first clause indicates that "ownership" is made possible because of a legal regime that protects it.

To this definition, Professor Kamali adds four corollary points about ownership under the *Shari'a*:

- First, a private owner has exclusive control and rights of use and disposition over his or her property. No other person may lawfully sell or otherwise

<sup>38</sup> AL-QARĀFI, AL-FURUQ, *fayr* no. 180, vol. 3, p. 208, quoted in KAMALI, *supra*, at 259.

Al Qarāfi's full name is "Shihāb al-Dīn al Qarāfi." He was born in 1228 A.D., in Upper Egypt (the Bahnasa district), lived in Egypt during largely during the reign of the Mamluks, and died there in 1285 A.D. (684 A.H.). He was a *Māliki* School *fukahā* (jurist). He wrote about the public interest and the common good (*maslahah*), and his famous books are: *Al Dhakirah* (The Stored Treasure), *Al Furuq* (The Differences), *Nafais al Uyal* (Gems of Legal Theory), and *Kitab al Iḥkam fī Tamyiz al Fatāwa* on al Ḥkam wa Tasarrufat al Qadī wa'l-imam (Book of Perfecting the Distinction Between Legal Opinions, Judicial Decisions, and the Discretionary Actions of Judges and Caliphs).

alienate the property, or interfere with the right of the owner to enjoy the property.

- Second, nothing in this definition (and other definitions of “ownership” by various *Shari’a* scholars) restricts *māl* to tangible real or personal property. That is, as Professor Schacht also points out, under the *Shari’a*, there is no definition of “property” strictly limiting the term to a tangible thing — a “*res*.”<sup>39</sup> Rather, there are several distinctions made, *i.e.*, to a tangible thing (in Latin, “*res*”). Intellectual property — patents, trademarks, and copyrights — are legitimate subjects of ownership.
- Third, property that is common, or that is a public amenity, has no tradable value for the individual. A public highway or park has no monetary value to a particular individual that he or she can offer in exchange for a good or service. Hence, he or she cannot own that highway or park.
- Fourth, certain rights are off limits to trade, by operation of law, which again is based on ethical precepts. The custody of a child or guardianship of a dependent, are not *māl* that can be owned, bought, or sold. The underlying precept here would seem to be human dignity. The inherent dignity of the human person is compromised if a market exists for his or her rights. That also is true, of course, of human beings themselves, notwithstanding the numerous references in the Qur’ān itself to slaves.

In sum, “ownership” is a special relationship between a person and an acceptable object of commerce — property, tangible or not — that has an exchangeable value to a private party, and that confers on the owner exclusive control and rights.

## [B] Is Ownership Possible?

Islamic Law distinguishes a thing (*‘ayn*) owned separately by an individual from a thing in which separate ownership is not possible, or which does not yet exist. Consider bulk cargo (*i.e.*, a large volume of a fungible commodity), like a shipment of cacao beans. This cargo — the individual beans — are not and cannot be specifically appropriated to owners. The *Shari’a* treats the cargo as a thing in which separate ownership is not possible. Consider milk inside a cow. The milk is a thing not yet materialized. Islamic Law considers separate ownership impossible, at least until the cow is milked.

What property law rules apply to a thing that is not yet, or cannot ever be, separately owned? The *Shari’a* response is straightforward: apply the same rules as to the principal object to which the thing is attached. For example, the property law rules governing bulk cargo would apply to the cacao beans. Likewise, the rules governing ownership of the cow would apply to her milk.

## [C] Complete versus Deficient Ownership

There are several categories of ownership, and distinctions among them, under the *Shari’a*.<sup>40</sup> Perhaps the most fundamental distinction is between a “thing” and a “debt.”

A basic distinction is between “complete” and “deficient” ownership.<sup>41</sup> Of the two varieties, complete ownership is the most common. Complete ownership is ownership of both a corporeal object — a thing (“*‘ayn*”), which may be real property, such as agricultural land, or personal property, such as a car, horse, or money — and its usufruct. The ownership is “complete,” because exclusive, full capacity to control the property, and possess and enjoy it, lies in the owner. It also is “complete” in the sense of permanence. Time passage neither enervates nor exhausts the ownership. The complete owner may pass ownership through inheritance to a designated beneficiary.

“Deficient” ownership exists when there is ownership of an object, or its usufruct, but not both. The ownership is “deficient” in the sense that control and possessory enjoyment are separate for at least a brief period. Deficient ownership can be, and typically is, subject to limits, namely, limits on the duration, place, and conditions of possession and enjoyment of property. An obvious condition, or duty, concerns care. The deficient owner of the usufruct, *i.e.*, the individual in temporary possession of the object in question, is responsible for its safe keeping. The responsibility is to the owner of the object, and the potential liability for breach of the duty is compensation to that owner. These contingencies, usually imposed by or negotiated with the owner of the thing that is the subject of the usufruct, clearly connote the deficient nature of ownership. There would be no need for them if the object and its usufruct were not being separated.

A common example of the distinction between “complete” and “deficient” ownership are certain nominate contracts, such as a lease contract. “Nominate contract” is a Civil Law term referring to a contract with a particular name.<sup>42</sup> Merely by using that name, some of the rules of the contract are established, thereby setting the rights and duties of the parties without the need for explicit or special terms. Examples of nominate contracts are sale contracts, insurance contracts, and lease contracts. In Arabic, a lease contract is known as an “*ijāra*” agreement. In such an accord, there is a party with complete ownership, both over the thing, or *‘ayn*, such as real or personal property, and in possession of it, and another party seeking to borrow that thing. The owner-lessor transfers usufruct (the possession and enjoyment right) of that thing to the borrower-lessee, as per the terms of the *ijāra* contract. During the operation of the contract, the borrower-lessee has deficient ownership: he or she owns the usufruct, but not the object itself. Likewise, but inversely, the owner-lessor has deficient ownership, namely, over the object but not the usufruct. The same situation occurs with respect to another kind of nominate contract, a loan agreement, or contract of lending (known

<sup>40</sup> See SCHACHT, *supra*, at 134-135, 144-145.

<sup>41</sup> See KAMALI, *supra*, at 260-261.

<sup>42</sup> See BRYAN A. GARNER, ED., BLACK’S LAW DICTIONARY 371 (St. Paul, Minnesota: West, 9th ed. 2009) (entry for “contract” — “nominate contract”).

<sup>39</sup> See SCHACHT, *supra*, at 134-135, 144-145.



in Arabic as “*i‘ārah*” or “*‘āriya*”). The owner of funds transfers usufruct but not ownership of the funds to a borrower, who enjoys possession and use of the funds during the tenor of the loan.

Table 18-1 sets out yet another hypothetical example. Suppose the property in question is a house owned by Khadyja, who as testator (*i.e.*, the legator, who is bequeathing her legacy) elects to make a bequest (*i.e.*, give by will) of it to Abdullah, the legatee (*i.e.*, the person named in the will to receive the bequest), for 10 years. Under the terms of the will, Amal, the daughter of Khadyja, inherits the house. For as long as Khadyja is alive, she remains the owner of the house. Assuming she lives in the house until her passing, she enjoys complete ownership. To be sure, Abdullah has a contingent interest in the usufruct, but the contingency — Khadyja’s death — has not yet occurred. After Khadyja dies, and for the first decade after her death, Abdullah enjoys possession and enjoyment of the house. If Amal were in the house, then she would have no legal right to exclude Abdullah from it, and indeed would be obliged to make the property available to him, which may mean vacating it herself. Nevertheless, when Khadyja dies, ownership of the house shifts directly from Khadyja to Amal. This ownership — Amal’s during the first decade — is deficient. That is because for the 10-year period, Amal owns the property, but not the usufruct. It is Abdullah, who for a decade, has the right to use and enjoy the house owned by another person, namely, Amal. Then, after the 10-year period, Abdullah must vacate the house, and possession and enjoyment of it goes to Amal. At that point, Amal has complete ownership of the house, both the property and usufruct. Abdullah has no right to the house, nor to inherit it (unless Amal, upon her writing a will, decides to bequeath it to him).

Table 18-1:  
Hypothetical Will of Khadyja

Period → Person and Ownership Interest ↓	Before Khadyja Dies	First 10 Years After the Death of Khadyja	After the First Decade following the Death of Khadyja (Years 11 and following)
Khadyja (testator, legator)	Complete ownership	No right or interest	No right or interest
Amal (heir)	Contingent deficient and contingent complete ownership interest	Deficient ownership covering only property, not usufruct	Complete ownership over both property and usufruct
Abdullah (legatee)	Contingent usufruct interest	Deficient ownership, covering only usufruct, not property	No right or interest

This kind of arrangement might be suitable where Abdullah is a senior citizen, and Amal a teenager or young adult bound for college. Khadyja seeks to provide for Abdullah in his old age, and preserve the property for Amal when she becomes a mature woman.

More generally, this case illustrates why the *Hanafi* School draws two conclusions about complete versus deficient ownership. First, ownership of an object (*‘ayn*) leads, sooner or later, to complete ownership. For Amal, owning the house via a bequest from her mother resulted in complete ownership 10 years after her mother died. Second, ownership of a usufruct is temporary. Abdullah held the usufruct for a decade, and thereafter that possessory right shifted to Amal via the will of Khadyja.

Note one variation (of many possible) on the above hypothetical. Suppose Khadyja as testator chooses to bequeath the house to her daughter, Amal, but retain ownership of the usufruct, for as long as Khadyja is alive. Khadyja might do so in order that she can live in the property for her remaining years, but have her daughter take on the benefits and burdens of ownership of the property. In this instance, Khadyja would have deficient ownership — she would hold the usufruct, but not the object (*‘ayn*). Likewise, albeit conversely, Amal would have deficient ownership — she would not hold the usufruct, but would hold the object (*‘ayn*). When Khadyja dies, the complete ownership she had before making the bequest passes to Amal. This kind of arrangement is common when a property owner with complete ownership seeks to dedicate property to a charitable foundation (*waqf*), but the dedicator (*waqif*) also seeks to enjoy possession and use of the property for as long as the owner is alive. When the dedicator passes, complete ownership shifts to the foundation. In turn, the foundation may well elect to retain ownership over the property, but confer ownership over the usufruct to one or more less fortunate persons, such as widows or orphans, who are the beneficiaries of properties held in trust by the foundation.

Interestingly, observe “deficient” ownership transcends the distinction between a personal right (*in personam*) and a right attached to a thing (*in rem*). In some cases, the transfer of usufruct from an owner to another party is a transfer of an *in personam* right. That occurs with respect to a right to use and enjoy real property given to an individual, like Abdullah in the above hypothetical. In other cases, such as a right of passage or a right of flow, the usufruct involves an *in rem* right, *i.e.*, it is attached to the property, not to any specific person. Yet, the distinction between *in personam* and *in rem* is relevant to the question of whether deficient ownership is inheritable.

The *Hanafi* School, which is the minority approach on the topic, says deficient ownership cannot be inherited. That is because ownership of a usufruct ends when the deficient owner dies. This rationale presumes the deficient ownership is an *in personam* right. The *Hanafi* School recognizes some rights, such as easements and flow rights, are a usufruct involving an *in rem* right. In these cases where the usufruct attaches to property, not to a person, the *Hanafi* School agrees the right may be inherited. In practice, that means that if the owner of the property dies, and the property passes to a new owner such as an heir of the decedent, *in rem* rights continue. Neighbors and strangers still enjoy the easement or flow right, as they did before the death of the previous owner.

The other three *Sunni* Schools take a more generous approach to the question of inheritability of deficient ownership than does the *Hanafi* School. The *Māliki*, *Shāfi‘i*, and *Hanbali* School all agree that deficient ownership may be inherited. This

majority rule holds true regardless of whether the usufruct in question involves an *in personam* or *in rem* right. If the right is *in rem*, then it follows the object through successive generations of owners, as it does for the *Hanafi* School. If the right is *in personam*, then the legal heirs of the deficient owner are entitled to possess and enjoy the object for the remaining duration of the deficient ownership. For instance, heirs of a tenant may stay on the real property that is the subject of a tenancy agreement after the tenant dies, and until the agreement expires. Likewise, heirs of a loan contract (*i'āra*) or lease agreement (*ijāra*) continue to enjoy the benefit of the loaned funds, or leased goods or services, respectively, after the death of the original deficient owner-contractor, and until the contract expires. Observe this rule applies even to a lease agreement for employment services, for instance, where the decedent contracted for housekeeping or nanny services.

#### [D] Ownership by Women

The *Shari'a* supports ownership by an individual, to or more individuals acting jointly, or the community. That is, both private and public ownership are permitted, as are individual and joint private ownership. Notably, this right of ownership, and the protection of the right, extends to women equally with men.

Emphatically, women are entitled to own property via purchase or inheritance, to keep what they earn from that property, and to have their property rights enforced in a substantively meaningful way. There is no better example of the practical manifestation of this right by a woman than the wife of the Prophet Muhammad, Khadyja. A wealthy and successful businesswoman, she acquired, used, loaned, and sold various assets.

To be sure, in contemporary times, this theory is practiced unevenly, and sometimes not at all, depending on the Muslim country or part thereof in which a woman happens to reside. (Moreover, Qur'anic inheritance shares are not always equal as between women and men.) Still, practiced or not, the Islamic legal precept is clear enough: female or male property owners enjoy the freedom — the permissive right — to use and enjoy their property, and to alienate it via sale, gift, or bequest.

## Chapter 19

### PROPERTY LAW: PUBLIC PROPERTY, PRIVATE PROPERTY, AND POSSESSION

In short, human history has been propelled in great part by the pursuit of three basic desires: the desire to possess, the desire to know, and the desire for thrill and sustained pleasure. Each of these plays a significant role in today's runaway consumeristic culture.

Ruben L.F. Habito, *The Inner Pursuit of Happiness, in* HOOKED! BUDDHIST WRITINGS ON GREED, DESIRE, AND THE URGE TO CONSUME 34-35 (Boston, Massachusetts: Shambhala Publications, Stephanie Kaza, ed., 2005)

#### SYNOPSIS

##### § 19.01 PUBLIC (COMMUNITY) PROPERTY

- [A] Principle of Original Permissibility (*Ibāḥa*)
- [B] Public Ownership and Nature
- [C] Four Categories of Publicly Owned Property
- [D] Governmental Assignment (*Iqtā'*) of Public Property and Oil Concession Contracts

##### § 19.02 PRIVATE PROPERTY

- [A] Lawful versus Unlawful Acquisition
- [B] Lawful Acquisition of Un-Owned Land
- [C] Lawful Acquisition of Un-Owned Land
- [D] Finding Treasure (*Luqta*)
- [E] Individual versus Joint Ownership
- [F] Termination of Ownership

##### §19.03 POSSESSION

- [A] Right to Possess
- [B] Legitimate versus Illegitimate Possession
- [C] Adverse Possession
- [D] Deposits (*Amāna*), Pledges (*Rahn*), and Liens (*Habs*)



## § 19.01 PUBLIC (COMMUNITY) PROPERTY

[A] Principle of Original Permissibility (*Ibāḥa*)

Almost all kinds of property are susceptible to private ownership — unimproved or improved land, livestock, vehicles, consumer durable goods (sometimes called “white” goods like microwave ovens, dishwashers, refrigerators, washer/dryers, etc.), consumer non-durable goods (*i.e.*, goods with a short- or medium-term lifespan, such as food), and intellectual property (*i.e.*, patents, trademarks, and copyrights).<sup>1</sup> That also is true for items from the natural world, such as minerals and forests. But, in respect of some items — particularly those provided by Mother Nature, as it were — there is a community interest in ownership. The original state of the world, as created by God (Allāh), was one in which all persons owned all things, as Qur’anic passages indicate. *Surah* 2, *ayah* 29 says:

It was He [Allāh] who created all that is on the earth for you; . . .<sup>2</sup>

*Surah* 45, *ayah* 13 reads:

He has subjected all that is in the heavens and the earth for your benefit,  
as a gift from Him. . . .<sup>3</sup>

The first passage uses the second person pronoun (“you”), and the second passage uses the second person possessive (“your”), and both refer to “all” things on earth. The use of the second person is not restricted to any one ethnicity, gender, race, or religion. God puts all things are put on earth for the benefit of all people.

This precept is known in Islamic Law as the Principle Original Permissibility, or *ibāḥa*. It means, as Professor Kamali writes:

all things were originally permissible (*mubāḥ*) to all people, and this was the natural state of things until the emergence of private ownership.<sup>4</sup>

Thus, while the *Shari’a* easily supports private ownership and thereby modern capitalist economic growth, it does not view such ownership as the starting point. Rather, over the ages, including in pre-Islamic times, the existence of private ownership, and its distinctiveness from public ownership, evolved.

Pre-Islamic times saw three kinds of ownership of land in Arabian society: (1) community land, such as pastures used for livestock grazing, (2) land owned by individuals, such as wealthy persons from Mecca, who owned land in the Arabian cities of Mecca and Ta’if, and in Syria, and (3) tribal land, owned by tribal chiefs (*i.e.*, a royal possession) used for their own livestock. The evolution of private ownership occurred alongside, and in part because of, development of societies and social

<sup>1</sup> See generally John Makdisi, *Islamic Property Law* ch. IIA (Durham, North Carolina: Carolina Academic Press, 2006) (concerning the nature of property). [Hereinafter, *Makdisi*.]

<sup>2</sup> THE QUR’AN — *A New Translation* by M.A.S. Abdel Haleem (Oxford, England: Oxford University Press, 2004), 2:29 at 6. [Hereinafter, *QUR’AN*.]

<sup>3</sup> *QUR’AN*, *supra*, 45:13 at 324.

<sup>4</sup> MUHAMMAD HASHIM KAMALI, *THE RIGHT TO LIFE, SECURITY, PRIVACY AND OWNERSHIP IN ISLAM* 265 (Cambridge, England: Islamic Texts Society, 2008). [Hereinafter, *KAMALI*.]

organizations, and agricultural and industrial progress. In Arabia, Islam played an role in this evolution:

When the Prophet migrated to Madina [Medina, *i.e.*, the *Hijra*], he not only confirmed the private ownership of land by Muslims and non-Muslims, but also set a precedent by allocating land to individuals for the purposes of housing and farming, often on the basis of need or as an appreciation of meritorious service.<sup>5</sup>

Notably, private ownership was not a right reserved for Muslims. After the death of Muhammad, the Four Rightly Guided Caliphs (*Rashidun*) tended to respect this right. There also was a metamorphosis from the concept of tribal land to state property. The Caliph ‘Umar bin Al Khattāb, took over land owned since pre-Islamic times by the Emperor of Persia and his family, treating it as state property.<sup>6</sup> As for land (whether arable or waste, barren or cultivated) in subjugated territories, *i.e.*, areas conquered by Muslim forces, he and the other Caliphs treated it either as (1) state property, if conquest was by force, or (2) property the disposition of which was governed according to a treaty, which could include private ownership, if conquest occurred without war.

Such developments produced a two-pronged outcome. On the one hand, the default rule in the *Shari’a* is private ownership. It is the “default rule” in the sense:

- (1) the normal expectation is property is privately owned,
- (2) private ownership is the predominant kind of ownership in Muslim countries, and
- (3) Islamic Law contains protections for such ownership.

On the other hand, the Principle of Original Permissibility intimates private ownership is not unbridled, *i.e.*, there must be limits to protect the common good. Thus, restrictions not only are permissible, but plenty exist, on the right of private owners to enjoy, use, and alienate their property. On balance, then, private ownership is respected, even cherished, but yields to communal interests in the event of a conflict between the two.

## [B] Public Ownership and Nature

Aside from a thoroughly communist regime, or certain religious communities, in any legal system there is a basic distinction between private and public property. The *Shari’a* is no exception. It is apparent from the above explanation that the *Shari’a* respects the institution of private property. Public property is the focus of the present discussion. (There is a third delineation in Islamic Law, namely, property placed in a *waqf*, which is a pious foundation.)

<sup>5</sup> KAMALI, *supra*, at 265.

<sup>6</sup> The Caliph ‘Umar, sometimes called “Umar the Great,” lived from 581/83 to 644 A.D., and reigned as the second of the *Rashidun* from 634 to 644, after the death of the first such Caliph, Abū Bakr. He was a member of the same tribe as Muhammad — the *Quraysh* tribe — and specifically from the Banu Adī clan, and was a Companion of Muhammad (*Sahābah*).

Also common to legal systems, including the *Shari'a*, is the touchstone of private ownership, whether individual or joint: exclusivity. Only one identified individual, or an identified group of them, are entitled to enjoy, use, and alienate privately owned property. Non-exclusivity distinguishes property that is owned by the public, i.e., community or collective property. No single person or persons has the right to the benefits of the property, nor may any one person or persons deprive another or others of the enjoyment of collective property. The Principle of Original Permissibility is the foundation for the recognition by the *Shari'a* of public ownership.

Examples of public property are a highway or major road, or a major river like the Tigris, Euphrates, or Nile Rivers. In contrast, a blind alley, or a small river or canal, is the joint property of the owners whose buildings or land adjoin the alley or river. By definition, public property may be used freely by everyone, so long as each person's use does not cause prejudice to the rest of the public. Thus, Professor Schacht gives the example of a person erecting a booth on public property — say, to sell dates. That use is permissible, if it does not adversely affect the use of the property by others. If it does, then the others can sue for removal of the booth.

In Arabic, "public property" is called "*al-milkiyyah al-'ammah*," or simply "*milki al-'ammah*." Following from the Principle of Original Ownership, all persons share an interest in certain items from the natural world. Even if trees, fuel, or water fall into the hands of a private owner, the community is the true owner of the wealth they furnish. This *Shari'a* precept is a logical outgrowth of the Principle of Original Permissibility. Moreover, it is supported by a *hadith* recorded by Al Shawka'ni, which states:

People are partners in three things: water, grass and fire.<sup>9</sup>

These three things are defined broadly.

"Grass" encompasses grazing land and animal feed from un-owned land. "Fire" refers to fuel of any kind, such as wood and by extension, trees and forests whence wood comes. "Water" refers to that resource wherever found, and in whatever state, says *Imam* Malik. The water could be above or below the surface of the earth, and in liquid state in rain, springs, streams, rivers, lakes, seas, and oceans, or in solid form (e.g., presumably the ice of the North and South Poles). Professor Kamali remarks there is a different version of the same *hadith* that adds a fourth thing, namely, salt that is easily obtained (without desalination of salt water).<sup>10</sup> In sum, the *Shari'a* singles out three and arguably four kinds of property to be of community interest. They are necessary for human life.

What specifically are the ramifications of the *Shari'a* precept that even if these four things — grass, fire, water, and salt — are in private hands, the wealth from them is owned by the community? First, the public interest in these special items renders them subject to legal restrictions. Notwithstanding private ownership of a forest, or a source of fuel, water, or salt, the state can take action to ensure the private owner is not acting at variance with community interests. For example,

selfish depletion of these assets to the detriment of the community can trigger intervention to protect them for the community.

This protection addresses what in American legal scholarship is known as the "Tragedy of the Commons." The Tragedy, in brief, is that when each individual property owner acts in accordance with self-interest, the wealth from the property in which the community has an interest is depleted.<sup>11</sup> Put differently, no individual property owner internalizes the social costs of his or her enjoyment of that property. Over-fishing of a body of water by water-front property owners is an illustration.<sup>12</sup> Some *Shari'a* scholars, such as Mustafa Al Sib'ani, argue the above-quoted *hadith* provides legal justification for nationalization (called "*ta'min*" in Arabic) of sources of energy (e.g., electricity), certain food (particularly salt), and water.<sup>13</sup> So, the first implication of the *Shari'a* precept is as long as both a public interest exists in property privately owned, and the property provides a thing necessary for the community, then governmental action to protect that interest against otherwise lawful use of the property by the private owner is valid.

Second, the ownership of property by an individual does not extend below the surface all the way to the core of the earth. By inference, it would appear that *Shari'a* does not confer individual ownership rights above a parcel of real property infinitely into the sky and outer space. Instead, an owner of land owns its surface, and the part of the land below the surface (and, presumably, above it) that he or she normally is able to use. The uses include agriculture and industry, and entail improvement of the land through, for example, adding fixtures such as buildings to it. This customary use does not require the owner to use sub-surface property that is out of reach, as it were. In other words, as a practical matter ownership extends to reach. Thus, Professor Kamali concludes:

minerals buried deep down are not "owned" by anyone and may be owned and utilised by the community as a whole.<sup>14</sup> This conclusion is potentially

<sup>11</sup> See GEORGE CAMERON COGGINS & ROBERT L. GLUCKSMAN, *PUBLIC NATURAL RESOURCES LAW* § 31.52 (2nd ed., 2010); Kara L. Phillips & Amy L. Sommers, *A Tragedy of the Commons: Property Rights Issues in Shanghai Historic Residences*, 28 PENN STATE INTERNATIONAL LAW REVIEW 137-175 (2009).

<sup>12</sup> Interestingly, the 2009 Nobel Prize in Economics was awarded to Professor Elinor Ostrom (the first woman to win the award) for her work that criticizes the tragedy of the commons approach, and shows how private sector groups can cooperate, in the absence of government regulation, to achieve socially beneficial outcomes.

<sup>13</sup> See KAMALI, *supra*, fn. 17 at 297.

Mustafa Al Sib'ani (1915-1964) was a Syrian political leader. He was born in Syria and educated in Egypt, where by some accounts he was influenced by the Muslim Brotherhood, which at the time was focused on fighting colonialism and advancing Arab nationalism. During the Second World War, he fought against British and French armies in the Middle East (as did the Brotherhood), and was twice arrested by Allied forces for these activities. Also by some accounts, he participated in the establishment of the Syrian Brotherhood. In 1960, he became a Professor of Law at the University of Syria. In 1965, Professor Al Sib'ani co-founded the *Shari'a* School in Damascus, and was appointed its first Dean. He stands as one of the 100 most influential recent figures in the Muslim world, ranking at number 17 on the list of educational and social reformers, ahead of Sayyid Quth (1906-1966) of Egypt, a leading intellectual figure in the Muslim Brotherhood (ranking at 19), which was founded by Hassan Al Banna (1906-1949). See Z.M. KHAN, A.R. MOHIN, MANZOR AHMED, SHAUKAT ULLAH KHAN & Z.A. NIJAMI EDS., 100 GREAT MUSLIM LEADERS OF THE 20TH CENTURY xxxviii (New Delhi, India: Institute of Objective Studies, 2005).

<sup>14</sup> KAMALI, *supra*, at 254.

<sup>9</sup> AL-SHAWKANI, *NAYL AL-ABTAR*, vol. V, p. 303, quoted in KAMALI, *supra*, at 253.

<sup>10</sup> See KAMALI, *supra*, at 253.



dramatic for Arab Muslim countries in which oil wealth is considered the personal property of a royal family. Assume oil qualifies as a "mineral." On the one hand, if oil reserves are held by royalty and wealth from its extraction and sale is deposited in personal accounts, then the public interest of a necessary item (fuel) is not protected. On the other hand, if those reserves are held by royalty as trustees for the community, and all proceeds from oil sale are channeled into accounts for the benefit of the community, then the arrangement appears consistent with the *Shari'a*.

Third, a governmental authority or religious leader has no authority to take property in which the community has an interest and assign it to a private owner for the benefit of that owner. If the authority or leader controls such property, then the control must be exercised on behalf of the public. This point is made by *Imāms* Shāfi'i and Mālik, but seems to be accepted by the majority of *Hanafi* and *Hanbali* jurists, too. By way of example, suppose a plot of land boasts a large spring of water. If the plot is un-owned, then ensuring that the water is used with the public interest in mind ought to be straightforward. The relevant government authority can itself perform the essential functions of containing, bottling, and distributing water, and safeguarding the cleanliness and security of the spring. Or, the government can assign the right to do so to a private business association, with the discipline on it that the private body act in the public interest. What the government cannot do is assign all or part of the water rights to a private party for that party to own and exploit for its personal benefit.

### [C] Four Categories of Publicly Owned Property

Of course, the traditional categories of "grass," "water," and "fire" have been superseded in modern times. That is not to say the traditional categories are only of historical significance. Manifestly, certain kinds of property are (directly or indirectly) akin to "grass," "water," or "fire." Rather, the point is that in Muslim countries, public property tends to fall into one of four categories.<sup>15</sup>

- Property for the Benefit of the Community:

Examples of publicly owned property in this category are hospitals, infrastructure such as bridges and roads, educational facilities (specifically, public schools), natural resources including lakes, rivers, and mountains, and property placed in a charitable endowment or trust (*waqf*). These properties are owned and operated by the state, or appropriate governmental authority. But, the state acts as a trustee for the community.

Accordingly, the state lacks the legal authority to sell, transfer, or assign the property to a private party, though it may assign rights limited in scope and duration to a private party to help improve and use the property. An illustration is land with a large, fresh water lake, which is enjoyable for boating, fishing, and swimming. The government assigns the rights to a private business association to control access to the lake,

keep the water and surrounding area clean, and provide amenities like a café and restrooms, so as to preserve the lake for present and future generations in a manner consistent with sustainable development. In return, the government permits the partnership to charge a fee to users, but regulates the amount and any increases in such fee.

- Easily Exploitable Property and Barren Land:

Certain kinds of property may be exploited cheaply by an individual (or group of individuals acting separately), indicating the value of the property to that person (or persons) is lower than the value to the community. This scenario is like the Tragedy of the Commons, in which one person (or several acting on their own) extracts and enjoys benefits from a property, depleting the property of its true, higher, value to the collective. Under the *Shari'a*, easily exploitable property is considered public property. Typical examples are un-owned barren land, forests, and land from which mineral wealth (*e.g.*, land containing salt or a spring) may be captured and used without much expenditure of labor. Such examples are akin to public pasture, or "*himā*," which is defined as:

the consecration of land and preventing private ownership and development (*ihyā'*) thereof, in an attempt to reserve it for pasture and the grazing of livestock.<sup>16</sup>

Not surprisingly, easily exploitable property is owned and operated by the state, or appropriate governmental authority, for the community.

That is, the state manages the property as a trustee for the public. The state may assign certain rights, limited in scope and duration, rights to this property to a private party. One recorded *hadith*, recorded by Māwardī and Abū Dāwūd, ostensibly indicates that only the Prophet Muhammad held the right to make this kind of assignment: There is no *himā* but for God and his Messenger.<sup>17</sup> However, Māwardī considered this inference erroneous, because of the context in which Muhammad assigned the property. He assigned land in Medina (the land of al-Baqi') as public pasture for horses owned by the Ansār and Muhājirīn.<sup>18</sup> In other words, Muhammad acted on behalf of the community. The Four Rightly Guided Caliphs, in particular Abū Bakr and 'Umar, adopted this interpretation, and thereby assigned public pasture in ways they believed benefited the community. Since the *Rashidun* Era, the *Shari'a* has recognized as valid the authority of the government to assign limited rights to an easily exploitable property, if the assignment serves an over-arching public purpose.

<sup>16</sup> KAMALI, *supra*, at 267.

<sup>17</sup> Quoted in KAMALI, *supra*, at 267 (quoting MAWARDI, AL-AHKAM, 185, and referencing a slight variation of this *hadith* in ABU DAWUD, SUNAN ABI DAWUD ED., AL-BUGHIA' at 444, *hadiths* nos. 3083, 3084).

<sup>18</sup> "Al Baqi'" is the name of an area in Medina, Saudi Arabia, near the Holy Mosque. Part of the Al Baqi' area has been a cemetery since the time of Muhammad.

The Ansār (which means "helper") are the people from Medina who helped the Prophet and his Companions who emigrated from Mecca. The Muhājirīn are the people who emigrated from Mecca to Medina before, with, or after the Prophet at the beginning of Islam. Their name is derived from "*Hijra*," which means "immigration" or "migration," is the name of the Islamic calendar.

<sup>15</sup> See KAMALI, *supra*, at 266-68.

In specific, the purpose of assignment must be to facilitate development of the property in a manner that benefits the public. An illustration is land that can be used as a quarry for valuable rocks, which in turn may be used in construction of public facilities like hospitals and schools. The state may assign rights to the quarry to a construction partnership, which can extract the rock. The government pays the partnership a fee for its quarry work, and the community benefits from the use of the rock in public buildings.

Finally in respect of easily exploitable property, un-owned barren land has been the subject of some controversy among the Four *Sunnite* Schools. At issue is whether such land, when located outside a residential area, can fall into private hands without state action. That is, is it legally permissible for a private party to acquire ownership over barren land without the intervention of the state? The majority view across all Four Schools is "no." Their answer is based on a *ḥadīth*, recorded by Tabrizi, which states: Anyone who reclaims barren land may own it.<sup>19</sup> Two renowned students of Abū Ḥanīfah, namely, *Imām* Abū Yūsuf and Al Shaybānī, agree this *ḥadīth* provides the requisite authorization. Hence, they argue no further permission from a government authority is needed.

Nevertheless, two of the great scholars around whose work two of the Schools were founded, *Imāms* Abū Ḥanīfah and Mālik, gave a different response. They were concerned that a private party might catalyze conflict with other prospective claimants to barren land, if he or she simply proclaimed ownership over it. Thus, they urged prior government permission should be a prerequisite for valid acquisition of ownership over barren land. This view — that advance authorization from a governmental authority is needed before claiming ownership to un-owned, barren land outside of a city, town, or village, remains the *Hanafi* School position, but not the majority view.

• Conquered Lands:

The first two categories of public property reference state ownership and control over land. When Muslim forces capture a territory, land in it is a spoil of war. Are conquered lands considered public property of the victorious Muslim state? That question generates debate among Islamic legal scholars. The bottom line conclusion, based on the *Sunnah* of the Prophet and historical precedent, is that it depends on the discretion of that state. *Imām* Abū Yūsuf argues each of the two positions laid out below is valid.<sup>20</sup>

The first position answers the question posed in the affirmative. Conquered land may become public property, i.e., the collective property of the people in the victorious Muslim state, and may be owned and controlled by their government on their behalf. In Arabic, conquered land is known as "*kharāj*" land, and it may

include arable land that is, or is not, being farmed. The word "*kharāj*" actually refers to a land tax. That is for good reason. The conquering Muslim state has the option of distributing this spoil of war to private owners, in which case collective ownership would cease, as would the existing pattern of ownership among the conquered peoples. This kind of occurred episodically in the earliest years of the Great Arab Islamic Empire, during the Four Rightly Guided Caliphs. 'Umar bin Al Khattāb appears to have levied this tax. He applied it to conquered lands, but only if they were fertile. 'Umar and his successors permitted owners of those lands to retain their properties, but they had to pay the *kharāj* tax.

For example, the state could distribute the land among its soldiers, and oblige them to pay a tax of 10 percent of the yield they earn from that land to the state treasury, known in Arabic as "*bayt al-māl*." *Imām* Abū Ḥanīfah adds that in the event of disease or natural disaster, which wipes out the crop, the *kharāj* obligation would be lifted. Alternatively, the state could transfer usufruct to the existing inhabitants. That is, having captured the territory, the state could claim itself as the new owner of the property. It could argue it retains this ownership on behalf of the community. That community would consist not only of the people in the previous boundaries of the state, but also the persons in the newly conquered territory. The state could allow the conquered peoples to remain in possession of, use, and enjoy the land. These occupants would be obliged to pay the land tax (*kharāj*) to the state treasury (*bayt al-māl*), except in the case of crop failure.

The second position answers the question posed in the negative. Early on in the *Rashidun* Era, specifically under the Caliph 'Umar bin al-Khattāb, the question of what to do with agricultural land conquered in Iraq arose. 'Umar permitted the conquered people not only to remain on their land, but also left them free to mortgage their property, and sell, gift, or pass it by inheritance. All that the Caliph required of them was they pay the land tax (*kharāj*). Unsurprisingly, the conquered peoples came to believe they retained not only usufruct interest in the property, but also ownership of it — i.e., complete, not deficient, ownership — and were liable only for the *kharāj* tax. Muslim scholars at the time justified this pattern as true to the *Sunnah* of the Muhammad: When the Prophet conquered the lands of Khaybar, he left them in the hands of their Jewish owners and occupants on condition that they paid one half of their yield to the Muslim community. Ownership of this one-half [of the yield from the land, but presumably not the land itself] thus belonged to the community as a whole.<sup>21</sup>

In sum, with this *Sunnah*, plus the experience under the Caliph 'Umar, the *Shari'a* rule is as follows. Conquest may or may not change the pattern of ownership. The victorious Muslim state has the discretion over whether conquered peoples retain both possession (usufruct) and ownership of their land now within Muslim territory. But, whoever occupies the land — whether the original owners, or persons such as

<sup>19</sup> Quoted in KAMALI, *supra*, at 267 (quoting TABRIZI, *MUSHAQAT*, vol. II, *ḥadīth* no. 2944).

<sup>20</sup> The full name of Abū Yūsuf is: Yaḡub ibn Ibrahim al-Ansari. *Imām* Abū Yūsuf was the first *Qādi* Al Qadhat in the Islamic world. Based in Baghdad, he served under the 'Abbāsid Caliph Harun Al Rashid, who reigned from 786-809 A.D. Yūsuf died in 798. Not only was he a member of the *Hanafi* School, but also he was a renowned student of *Imām* Abū Ḥanīfah, founder of that School, and helped spread the influence of the School.

<sup>21</sup> KAMALI, *supra*, at 268.

"Khaybar" is a name of a town 100 miles north of Medina, Saudi Arabia. It is renowned for its date farms. In the times of Muhammad, Khaybar was home to a large Jewish community. Several Islamic legal precepts are based historically in events that occurred in and around Khaybar.



soldiers to whom the state distributes the land — will be liable for a *kḥaraj* tax, except when there is a crop failure due to disease or natural disaster. The amount of the tax may be as low as 10 percent, and as high as 50 percent, of the yield from the land in question.

- Religious Facilities:

The key illustration of public property in this category obviously is a mosque. The Qur'an, in *surah* 72, *ayah* 18, states:

Places of worship are for God alone — so do not pray to anyone other than God — . . .<sup>22</sup>

This passage has a dual meaning. First, as property, a mosque belongs to Allāh. Second, the purpose of a mosque is solely to give praise and thanksgiving to Allāh. Both meanings — the first in a direct way, and the second in an indirect manner — support the *Shari'a* rule that private ownership of a mosque is impermissible. Rather, the mosque is public property, and even then in the sense of the public holding Vice-Regency, with God as the Regent, over the property.

In theory, any property in the above-four categories can be put in private hands. A public highway can become a privately owned and operated toll road. A forest, or farm land, can be transferred from public to private hands. A place of worship could be owned and managed by a private party. But, the *Shari'a* does not permit such conversion.

#### [D] Governmental Assignment (*Iqtā'*) of Public Property and Oil Concession Contracts

The government — and only the government, or more technically, the senior religious authority in a country, such as an Imam — has the right to assign property to an individual or group of individuals. In Arabic, this power of a government to assign to an individual or group rights to a property in which the government holds title is called "*iqtā'*." In effect, *iqtā'* is a prerogative of a government to interfere with public property by conferring an ownership or possessory interest of some kind in that property to a private party. The analogous concept in American Property Law is a land grant. Typically, the property that is the subject of assignment is barren land with the potential to generate wealth because of natural resources on it, or because of its strategic location.<sup>23</sup>

This right is not unbounded. There are five key limits. First, *iqtā'* covers only property that has no private owner, and which the government holds valid ownership. Second, this right must be for a specific purpose, typically relating to

<sup>22</sup> Qur'an, *supra*, 72:18 at 394.

<sup>23</sup> Whether an asset in the public treasury (*bayt al-māl*) may be the subject of *iqtā'* is disputed. The majority of the Four Sunni Schools approving of this assignment, but the *Māliki* School and Al Shaybāni (a celebrated student of Abū Hanīfa) disapprove, precisely because the asset is in the public treasury and should remain there for the benefit of the community, and not be given away. The *Shāfi'i* School takes a middle position, permitting profit from an asset in the public treasury, but not the asset itself, to be assigned. See KAMALI, *supra*, at 275. The discussion above focuses on *iqtā'* in respect of real property, and presumes the property is not considered part of the public treasury.

the benefit of the community (*maṣlahah*). Third, the rights assigned must be proportionate with the capacity of the assignee. If the assignment is to develop resources and put them in service of the community, then the assignee must have the technical and logistical ability to carry out this project. Fourth, if the assignee fails to adhere to the terms of the *iqtā'*, then the government must revise the terms of the assignment, or even re-assign the property to another party. Revision or re-assignment is not an option, but a mandate, so as to ensure the government acts on behalf of the public interest in a case in which the assignee is incompetent, lazy, or even corrupt. Fifth, the assigned right is for a defined period.

The historical origins of *iqtā'* are intellectually interesting and help explain its nature and purpose. As Professor Kamali explains:

The basic authority for *iqtā'* is found in the *Sunnah* [tradition] of the Prophet, who is reported to have given land grants to some of his Companions, including Bilāl b. al-Hārith, Zubayr b. al-Awām, 'Umar b. al-Khaṭṭāb, 'Abd al-Rahmān b. 'Awf and others. When the Prophet established a state in Madina [Medina], there were three types of land in the city: privately-owned, unowned barren land, and grazing land for animals. The Prophet then announced, as in the *ḥadith* . . . [recorded by Tabrizi, which states: "Anyone who reclaims barren land may own it."<sup>24</sup>], that anyone who reclaimed barren land could become its owner. Some individuals came forward and were consequently given grants of land for development, and the land so assigned became known as *iqtā'*. A similar situation arose after the Muslim conquest of the Persian and Roman empires, where the state had areas of land on its hands, without owners either due to the owner's demise, or his dislocation or escape. It was consequently deemed necessary to assign land to people who could utilise it.

. . . [T]he first caliph Abū Bakr authorised a land grant to Zubayr, and then Abū Bakr's successor, 'Umar b. al-Khaṭṭāb, assigned some land on a similar basis to 'Alī b. Abī Tālib [the fourth Caliph] and others. The caliph 'Umar practiced *iqtā'* on a wider scale in the newly conquered territories. Some of the land grants made by the Pious Caliphs are known to have been to people who had rendered services to Islam and rendered distinguished service to the community, though this was practiced on a fairly limited scale. In principle, the Imam may not use *iqtā'* as a means of showing personal favour to anyone, or for reasons other than the benefit and *maṣlahah* of the community, and making the land available for productive purposes.<sup>25</sup>

Evidently, *iqtā'* presents an opportunity for abuse of public property. That is all the more true because of the centralization of power associated with *iqtā'*. Only the government, or more technically, the chief religious authority (Imām), has the right to make land grants. Governments rise and fall, but public property is supposed to endure. The temptation exists for a government to dole out assignments based on the extent to which prospective assignees loyally support it, including through their

<sup>24</sup> TABRIZI, *MISHKAT*, vol. II, *ḥadith* no. 2944, quoted in KAMALI, *supra*, at 267.

<sup>25</sup> KAMALI, *supra*, at 274-275.

financial, political, or military assistance. The safeguard against succumbing to this temptation is the *Shari'a*, grounded on the *Sunnah* of Muhammad, and the practice of the early Caliphs. Only if an assignment serves the public interest (*maṣlahah*), or in rare cases if it is made for outstanding service to the public, or to the religion of Islam, is it legally valid.

Practically speaking, there are three categories of *iqṭā'*. First, through a proprietary land grant, a government may assign rights to public property that establish ownership. The Arabic term for this grant is "*iqṭā' tamlik*." ("*Tamlik*" is the feminine form of the verb "to own," and is derived from the noun "*milk*," which is "ownership.") Under it, the assignee becomes the owner of the granted property. However, a proprietary *iqṭā'* cannot be made for public property that is, or has on it, public facilities. Examples of excluded property would be grazing land for livestock, or a park — all livestock farmers, and the community at large, respectively, would not be keen to see the property owned privately for fear their enjoyment of it would be circumscribed. Another example would be property that has mineral resources on it that are easily exploitable.

The second category covers the quintessential purpose of *iqṭā'*. Through a developmental land grant, a government assigns rights to public property for the purpose of advancing the value of the property, or extracting wealth from it. The Arabic term for this category is "*iqṭā' istighlāl*." ("*Istighlāl*" is a verb meaning "to use" or "to advance," and is derived from "*istaghalla*," a noun meaning "use" or "advance.") In all three categories of land grants, the assignee must not use the property so as to cause harm to another person. In this category, that restriction is poignant. Suppose a private party is assigned the rights to barren land to develop oil or natural gas thought to exist beneath its surface. The private party must not exploit the land in such a way that only it profits from oil and natural gas sales. The wealth from the land is to be shared with the community — indeed, it belongs to the community. Presumably, this "harm principle" also constrains a private party from environmental degradation, such as dumping hazardous materials on the property, failing to clean up waste, or destroying precious animal and plant life.

The third category of *iqṭā'* is commonly observed in modern metropolises throughout the Muslim world. It is a usufruct land grant, called in Arabic "*iqṭā' irfāq*." ("*Irfāq*," is derived from "*arfaqa*." They can be used as nouns or verbs. "*Irfāq*" is the past tense, "attached," "*arfaqa*" is the present tense, "attach.") This grant assigns to an individual temporary possession of public property to assist that individual in providing goods or services to the community, or accessing private property. An example would be allowing a small retail vendor (such as a hawker stand selling *falafel* sandwiches) to use public property for his or her stall. Another example would be a right of passage over public property for an individual to ingress and egress private land.

While helpful, the classification terminology — proprietary, development, and usufruct assignments — is flawed in two respects. First, the proprietary land grant category confers ownership, but in what sense? Is the ownership complete, covering both title and possession? Undoubtedly, the private party assignee has the right to possess and derive benefits from the property. Yet, does title to the property remain with the government? In brief, is the assignment of a usufruct interest in what

remains public property? The answer is not clear from the rubric "proprietary." Second, are the terms "development" and "usufruct" sufficiently precise? Both a development and usufruct assignment involve temporary transfer of possession, but not ownership of public land. That is, they — like the first category — confer a usufruct interest to a private party, namely, a right of that party to use and enjoy public land for a defined period. Might it be more accurate to re-characterize the third category as a non-development assignment?

Least it be thought that *iqṭā'* (assignment, or land grant) is unrelated to commerce, it is important to note that one of the most important applications of this right concerns energy concession contracts. Various Arab Muslim governments (e.g., Saudi authorities) are in the position of assigning contracts to a foreign multinational energy corporation. Under such concession agreements, the foreign company has the rights to a parcel of land for the company to develop in terms of oil or natural gas resources.

The Saudi government reportedly has used a variation of *iqṭā'* in concession agreements with major American petroleum companies. Citing a 1987 article by Israeli legal scholar Professor Aharon Layish entitled *Saudi Arabian Legal Reform as a Mechanism to Moderate Wahhabi Doctrine*, Professor Kamali observes a:

combination of *Shari'ah* principles pertaining to mineral resources, such as *iqṭā'*, *ijāra* (lease) and *ihyā' al-mawāt* (the reclamation of waste land) have been relied upon [by the Saudi government] in various parts of the concession agreements. This is in order to obtain the necessary legal devices that could respond to some of the new developments pertaining to the grant of concessions to foreign companies. . . . [The] concession agreements provide that disputes between the parties [are to] be settled by arbitration. The Saudi authorities have "recently decided" that the arbitration agreements "shall not be contrary to Islamic law" and that the proceedings shall take place in Saudi Arabia in order for the award to be enforceable. . . . [T]he idea of deriving a combined formula from the joining-up of different contract types would fall under the notion of *tafiq* (patching-up) which is a well-recognized formula in conventional Islamic jurisprudence. One would have thought that the element of novelty here was that *iqṭā'* was being used for commercial purposes, and hence the need for recourse to *tafiq*.<sup>26</sup>

It is worth concluding that *tafiq* is another example of the existence in the *Shari'a* of concepts that permit adaptation of existing rules to new commercial realities.

<sup>26</sup> KAMALI, *supra*, at 274-275. The article by Professor Layish appears in 107 *The American Journal of Oriental Studies* issue 2, 272-293 (1987).



## § 19.02 PRIVATE PROPERTY

## [A] Lawful versus Unlawful Acquisition

In any territory, regardless of the governing legal system, property (*māl*) may be owned or un-owned. Owned property, that is, property owned by a person, in Arabic is called "*māl mamlūk*," whereas un-owned property is known as "*māl muḥāl*," which literally means "permissible property." ("*Mamlūk*" means "owned," and is used as an adjective or the past tense of the verb "*tamlūk*," which means "to own" (feminine).) In any society, and under any legal system, there are only two ways to acquire property — legally, or illegally. By definition, all cultures that exalt the rule of law favor lawful and condemn unlawful acquisition. Islamic culture is no exception, as the Qur'ān states:

You who believe, do not wrongfully consume each other's wealth but trade by mutual consent.<sup>27</sup>

This passage, *surah* 4, *ayah* 29, indicates that under the *Shari'a*, the touchstone of lawful acquisition is "consent," not the command of government. That indication is one illustration of the consistency of Islamic property law with basic tenets of capitalism. Moreover, the words "each other's" connote that "wealth" is privately owned. That private ownership is legitimate is apparent from what follows, namely, trading based on consent. Even more generally, the passage can be read as at least indirect support for global free trade based on mutual consent and just terms and conditions.

To focus, however, with the practical point about lawful acquisition, the key precept is nearly intuitive. Under the *Shari'a*, property acquired in an unlawful manner may be confiscated by the appropriate governmental or religious authority. Unlawful acquisition methodologies include bribery, fraud, oppression, robbery, theft, and usurpation (*ghaṣb*).<sup>28</sup> (A usurper is known as a "*ghaṣīb*.".) Conversely, property acquired by sale, bequest (giving property by will), gift, or in some instances involving un-owned things, gathering, is lawfully acquired. As explained below, under the *Shari'a*, the ways lawful acquisition occur depend on the property.

Generally speaking, an owner (*mālīk*) may acquire ownership originally, or derivatively through another. Original ownership occurs where the owner is the first occupant or holder of a thing (*ayn*) that had no previous owner (in Latin, a "*res nullius*"). Derivative ownership occurs in one of three ways:

- Transfer of possession:

Derivative ownership is created when possession is transferred from the old to the new owner. The *Shari'a* disaggregates the process of transferring possession into two steps:

Step 1: Delivery, called "*taslīm*."

<sup>27</sup> Qur'AN, *supra*, 4:29 at 53. See generally MAKHDI, *supra*, ch. III (concerning property acquisition during life).

<sup>28</sup> See generally MAKHDI, *supra*, ch. VI (concerning attacks on property ownership, including robbery, theft, usurpation, and nuisance, and discussing causation and the defense of necessity).

Step 2: Taking possession, known as "*kaḥd*."

This step also is called "taking delivery" (*tasallum*), or "receiving" (*istifā*).

- Non-possessory transfer of ownership:

Derivative ownership can be created through certain transactions that do not lead to a transfer of possession, but which do create *in rem* rights in another person, the new owner. Ownership is transferred, even though possession is not.

An example is a legacy (a gift made through a will, *i.e.*, a bequest). The heirs have ownership to assets mentioned in the will, though those assets are not transferred until the death of the testator. Another common example is land. It is not necessary to take possession of land in order to transfer ownership of it. However, there are stricter rules of evidence in Islamic Law — and, indeed, in many legal systems — regarding proof of ownership of land than there are concerning other types of property.<sup>29</sup>

- Pledge:

Finally, derivative ownership may be transferred through a pledge of an object, followed by certain conditions. (Pledge arrangements are discussed below.) A pledge arrangement must be done by a contract. That means, both offer and acceptance are required. The contract is said to be binding (*lāzim*) when the creditor takes possession of the object that has been pledged.

Conversely, under the *Shari'a*, ownership cannot be acquired by finding a thing. Doing so would be a (*ghaṣb*) of the rights of the true owner (*mālīk*) by the usurper (*ghaṣīb*).

## [B] Lawful Acquisition of Un-Owned Land

If property is previously un-owned, *i.e.*, it is *māl muḥāl* (permissible property), then lawful acquisition of it occurs through domination. "Domination," called *istilā'*, is demonstrated through one or more of three behaviors:

- (1) Possession of property.
- (2) Occupation of property or
- (3) Activity in relation to the property that evinces an intention to own the property, such as work on the property

Domination may occur with respect to real property, or personal property, *i.e.*, as to immovable or movable objects. The acquirer may be an individual, group of persons, or governmental authority.

However, the consensus of Islamic *fukahā'* hold that it may not occur in respect of property of importance to a community. For example, land with mineral wealth

<sup>29</sup> See SCHACHT, *supra*, at 141.

— such as energy resources (natural gas or oil), or salt, would be excluded from un-owned land that can be acquired by domination. Likewise, land adjacent to a city, town, or village serves that population center, by way of providing space for cemeteries, forests (from which to gather wood for fuel), livestock pasture, public passage, or recreation. In all these instances, un-owned land is excluded from the category of permissible land, *i.e.*, it cannot be acquired by an individual through domination. Rather, it is treated as public (community) property to serve the needs of the community.

A governmental authority may assign rights to un-owned land in the excluded category to develop the property in service of the community, such as constructing housing, or rendering the land fertile for farming. (In effect, the assignment is a usufruct interest.) But, room for maneuver is limited. The government is not supposed to assign such rights, in respect of land near a town or village, to an outsider. A non-local party might not take the same degree of care of the community needs as a local assignee, or at least that is the presumption. Moreover, the period of assignment is restricted to 3 years, after which the government may re-assign the property to another local party if the first assignee failed to develop it for the benefit of the community. Overall, this exclusion is an important feature distinguishing the *Shar'ia* from other legal systems, in which private parties can acquire through domination land of valuable interest to the community.

The three forms of behavior articulated above that constitute domination may be distinct, or overlap. Consider a hypothetical parcel of un-owned barren land called "Amal Acre," located outside a city. Suppose Maryam puts a fence around this acre, or builds a home and workshop on it in which she lives and works, respectively. The first behavior would be possession, and the second behavior would be occupation. Her actions also seem to qualify in the third category of behavior, as they bespeak her intention to own Amal Acre. Other examples of behavior that would qualify under the *Shar'ia* as *istilā'* (domination) include extracting resources from the land, or reclaiming land (*e.g.*, from the sea, as Dubai has done for internationally renowned construction projects). Hunting on the land, too, would qualify. In *surah* 5, *ayah* 96, the Qur'ān states:

It is permitted for you to catch and eat seafood — an environment for you and the traveler — but hunting game is forbidden while you are in the state of consecration [for pilgrimage] [*i.e.*, the *Hajj*]. Be mindful of God to whom you will be gathered.<sup>30</sup>

Thus, if Maryam catches any land animals, birds, or fish, or finds a valuable treasure such as gold or pearls, on Amal Acre, then she acquires ownership of this property. Interestingly, she loses ownership if the game she catches escapes, unless she immediately tries to recapture it. If the recapture effort fails, then she would retain ownership, presumably by virtue of that effort. Suppose Maryam tames, but does not kill, wild animals, which for a period regularly visit Amal Acre, but thereafter migrate elsewhere. She retains ownership of Amal Acre because of having tamed the animals, though she loses ownership over the animals, once they stop frequenting Amal Acre, to anyone else who hunts or captures them.

<sup>30</sup> Qur'an, *supra*, 5:96 at 77.

Assume, however, Maryam only puts markers, such as stones or posts, around Amal Acre. That behavior would not qualify as behavior constituting domination, because she does not possess or develop the land. The only legal effect of the demarcation would be to give Maryam a priority in a claim to own the land *vis-à-vis* other claimants. But, the priority lasts only for three years from her demarcation of Amal Acre, after which it lapses. During the three years, another person could occupy and develop the land, though Islamic jurists would consider this action reprehensible.<sup>31</sup> Observe (as explained earlier in respect of easily exploitable property and barren land) that regardless of what Maryam does, under the majority of the Sunnite Schools, she does not need advance permission from a government body to lay claim to the un-owned land, but under the *Hanafi* School, she would need prior authorization.

Continuing the Amal Acre example, suppose Maryam finds treasure on this parcel. The "treasure" could be solid-state wealth, gold or pearls (as suggested earlier), or a mine with valuable resources like salt, or it could be liquid-state wealth, such as water (*e.g.*, a spring). Is Maryam the owner of that treasure? The answer is "it depends," specifically on the timing of her discovery. If her discovery pre-dates her ownership, that is, she has not exercised dominion over Amal Acre, then the treasure belongs to the community. That answer, upon which all Four *Sunnite* Schools agree, is logical. The property itself, while un-owned by any one party, belongs to the community. If her discovery post-dates her acquisition, then the answer still is "it depends." Two of the Schools, the *Hanafi* and *Shāfi'i* School, agree treasure found on privately owned property is itself property of the land owner. That is because the treasure is part of the property.

*Hanbali* School *fukahā'* agree with their counterparts in these two Schools, except in one key case: water. *Imām* Ibn Hanbal examined the *hadith*, recorded by Al-Shawkaani and quoted earlier, which states: "People are partners in three things: water, grass and fire."<sup>32</sup> Based on it, he argued water, or even liquids that

<sup>31</sup> See Kamali, *supra*, at 268.

<sup>32</sup> Al-Shawkaani, *Nayl al-Arṭah*, vol. V, p. 303, quoted in Kamali, *supra*, at 253.

Still another exception, in addition to the "water exception" of the *Hanbali* School and "mineral wealth" exception of the *Māliki* School, is for gold and silver. Some Islamic scholars argue they are special kinds of mineral wealth, and therefore belong to the community. The appropriate religious authority may manage this wealth in the public interest (*maslahah*).

At least one prominent scholar, Al Shishāni Shirāzi, argues that the nature of the mineral wealth should determine whether that wealth belongs to the community, or may be owned by an individual who acquires property. Al Shishāni Shirāzi establishes a test: is the mineral wealth an essential commodity, in the sense that the livelihood of people is dependent on it? If the answer is "yes," then the mineral wealth belongs to the community. If the answer is "no," then the mineral wealth should be treated as a treasure trove. (Islamic legal rules on treasure troves are discussed below.) The government may impose a tax of one-fifth of the value of the treasure (the "*khums*," or "one-fifth share," tax), and then give the remainder to the owner of land on which the treasure was discovered. Notably, Al Shishāni Shirāzi applies this test to mineral wealth regardless of whether it is found on owned or un-owned land.

As for Al Shishāni Shirāzi himself, his full name is: Abo Isḥaq Al-Shirāzi Ibrāhīm Ibn 'Alī Ibn Yūsuf Al Fairouz Abadi Al Shirāzi Al-Shāfi'i. He lived from 1003-1083 A.D. (393-476 A.H.). He was born in Fairouz Abad, a small village in Persia, and moved to Baghdad, and became an important *Shāfi'i* *imām*. He wrote *Al-Muḥaḥab* (The Politic), *Al-Lam' Fi Usul Al-Fiqh* (Shine in the Principles of Jurisprudence), *Al-Tanbih* (The Alert), *Al-Ma'ūsuh Fi Al-Jadal* (Aid in Controversy), and *Al-*



resemble water lying deep beneath the earth, are not the private property of the finder, but rather are to be shared by the community. As for the *Māliki* School, it draws an even broader exception than the *Ḥanbalī* School. Any mineral wealth found by a person such as Maryam belongs to the community. The *Māliki* School urges this conclusion regardless of when Maryam finds the treasure — before or after acquiring ownership by dominion. The *Māliki* School holds that any mineral wealth found on any land belongs to the community. Not even the highest governmental authority has the power to grant an assignment to it on a permanent basis. This authority may assign temporarily rights to develop the property on behalf of the community, but the assignment must not exceed the life of the assignee. Never does the assignee acquire ownership or the right to alienate the mineral wealth.

Notably, *Sharī'a* scholars view as “highly recommended” the acquisition of un-owned property through work. That is because work entails intellectual and physical exertion, and if done with sincere devotion to a worthy cause, “is often equated with worship (*ʿibāda*) that earns the pleasure of God.”<sup>33</sup> This approach is based on at least two *ḥadīths* recounted by Tabrizi:<sup>34</sup>

- No one has ever eaten food purer than that which is eaten through the labour of one's hands; the Prophet (*cum king*) David, peace be upon him, used to earn his living through the labour of his hands.
- God Most High loves His servant who occupies himself in sustained work. Equally well, these *ḥadīths* support the acquisition of un-owned land by occupation.

Once un-owned property is acquired through domination, then it never is acquired by that means again (with the arguable exception of adverse possession, discussed later). That is, all further lawful acquisition of the property by another person, subsequent to the original owner, occurs by the usual means such as sale, gift, or inheritance. This rule holds true even if owned property is abandoned by its owner, and appears unattended, even barren. Such property remains owned, and if the owner cannot be found, then the public treasury (*bayt al-māl*) may assert control and management of it. The treasury may treat it as property with no identifiable owner, and possibly assign rights to it, or sell it.

### [C] Lawful Acquisition of Owned Land

In modern times, the vast majority of cases of lawful acquisition concern land that is owned currently, or has been at one time. The *Sharī'a* rules on ways to acquire ownership of owned land are straightforward. If property already is owned, then a person may acquire ownership through any one of four methods.<sup>35</sup> Acquisition of property by any of these methods is acquisition based on mutual consent of the relevant parties.

*Molakaḥ Fi Uṣūl Al-Fiqh (The Summary of Jurisprudence).*

<sup>33</sup> KAMALI, *supra*, at 269.

<sup>34</sup> TABRIZI, *MISHKAT*, vol. II, *ḥadīth* no. 2759, quoted in KAMALI, *supra*, at 270.

<sup>35</sup> See KAMALI, *supra*, at 269-277.

#### • Sale

Owned property may be sold for value by its rightful owner, thereby conferring ownership to the buyer. Such transactions are by contract, and — as in the non-Muslim world — buying and selling real and personal property are commonplace events throughout Muslim countries.

#### • Work

Property may be acquired lawfully through personal effort, one's own labor, or the sweat of one's brow, as it were. It is worth stressing that self-exertion — work — to earn income and acquire assets in a lawful manner so that one can support oneself and one's family is a form of service to God, called *ʿibādah*. This category, of course, includes the purchase of real and personal property, *i.e.*, acquisition by contract. Presumably through self-exertion, an individual is in a position to contract for property. As explained earlier, “work” also includes acquiring possession, and thereafter ownership, of previously un-owned things, as where an individual collects (gathers), fishes, or hunts in the wild.

#### • Gift

Alternatively, property may be obtained by gift, which involves no self-exertion by the acquirer. Any owned property may be given as a gift, for free and with no expectation of anything in return, by its rightful owner, thereby conferring ownership to the beneficiary of the gift. In these respects, Islamic Law is no different from any other legal system, whether sacred or secular. It may be added that property obtained under the *zakāh* (almsgiving) is acquired and owned by the beneficiary, following the transfer. That is because *zakāt* is a right held by the poor to a portion of the wealth of the rich.

#### • Inheritance (Bequest)

Owned property may be lawfully acquired through a bequest, *i.e.*, an inheritance by a beneficiary from a testator-property owner upon his or her death. The beneficiary will be a legal heir of the testator. This method, while a gift, may be treated as a separate category, given the array of special rules that apply to it. That inheritance is a legally valid way of acquiring ownership is evident from the Qurʾān itself, as *surah* 4 states:

<sup>11</sup>Concerning your children, God commands you that a son should have the equivalent share of two daughters. If there are only daughters, two or more should share two-thirds of the inheritance, if one, she should have half. Parents inherit a sixth each if the deceased leaves children; if he leaves no children and his parents are his sole heirs, his mother has a third, unless he has brothers, in which case she has a sixth. [In all cases, the distribution comes] after payment of any bequests or debts. You cannot know which of your parents or your children is closer to you in benefit: this is a law from God, and He is all knowing, all wise. <sup>12</sup>You inherit half of what your wives leave, if they have no children; if they have children, you inherit a quarter. [In all cases, the distribution comes] after payment of any bequests or debts. If you have no children, your wives' share is a quarter; if you have children, your wives get an eighth. [In all cases, the distribution comes]

after payment of any bequests or debts. If a man or a woman dies leaving no children or parents, but a single brother or sister, he or she should take one-sixth of the inheritance; if there are more siblings, they share one-third between them. [In all cases, the distribution comes] after payment of any bequests or debts, with no harm done to anyone: this is a commandment from God, and He is all knowing and benign to all.<sup>136</sup> These are the bounds set by God: God will admit those who obey Him and His Messenger to Gardens graced with flowing streams, and there they will stay — that is the supreme triumph!<sup>136</sup>

This passage is not restricted to any particular kind of private property. It covers all asset categories, including movable and immovable objects, in the estate of a testator. The passage also lays out the shares in the estate to which each close relative is entitled. (Note there are inheritance shares prescribed in the Qur'an, and a general rule that a testator may direct a maximum of one-third of his estate to a person or institution that is not his or her legal heir, or to an heir with the agreement of the other heirs.)

At what moment in time does an heir acquire ownership by virtue of inheritance? The answer to this practical question is apparent from the above quoted Qur'anic passage. There are two claims to an estate given priority over the shares of the legal heirs of a decedent: first, funeral expenses must be covered; then, any unpaid debts of the decedent must be paid. Thereafter, the heirs acquire their respective interests in the estate. Consequently, the *Hanafi* School teaches ownership in inherited property vests in an heir only after the first two claims are addressed. So, an heir could take operational control over the property of a decedent to facilitate payment of funeral expenses and debts, but not to begin using and enjoying that property for himself or herself.

Significantly, in respect of all types of lawful acquisition, consent in and of itself is necessary, but not sufficient, for lawful acquisition. A second feature of a transaction in personal or real property is essential for a trade to be lawful. That feature is fair value, which is especially relevant when the acquisition is via work (e.g., purchase) as opposed to gift (e.g., inheritance). Property is wrongfully appropriated if it is obtained without paying fair value. Thus, Professor Kamali writes:

"Wrongful appropriation of the property of others (*akl al-māl bi'l-bātil*)" is a broad Qur'anic concept that comprises within its scope not just theft, robbery and fraud, which are usually committed by persons other than the owner himself, but also hoarding, gambling and usury in which the owner may be acting himself — but since they do not fall within the scope of trading by mutual consent, they are all forbidden. . . . Another instance of the wrongful appropriation of property specified in the Qur'an is bribery, which distorts the course of justice and leads to the sinful enrichment of some people at the expense of others ([*surah*] 2:[*ayah*] 188). It is therefore not the element of consent on its own, but this when it is combined with an

*exchange of values through fair-trading, that distinguishes a lawful transfer of ownership from a wrongful appropriation of the property of others. For consent may be present in bribery, but is lacking in a fair exchange of values.*<sup>37</sup>

To be sure, the Qur'an does not detail what constitutes "fair value" in every instance. Scholars and students of the modern law of expropriation know there are a variety of formulas to determine whether the owner of an asset seized by a government has been compensated fairly. Arguably the most sophisticated formula, in the *North American Free Trade Agreement* (NAFTA), is payment of the market value of the expropriated asset as of the time of the expropriation. Obviously not a technical free trade agreement (FTA) or bilateral investment treaty (BIT), the Qur'an lays out the general principle that both (1) consent and (2) exchange of fair value are required for property acquisition to be fair.

As for termination of ownership, that occurs through the same means — sale or other lawful manner of transfer. Notably, it is not possible for an owner to terminate his or her interest via abandoning property, absolving himself or herself of responsibility for the property, or renouncing the property.

## [D] Finding Treasure (*Luqta*)

In Arabic, a treasure trove is called "*luqta*." The treasure may consist of money, other valuable objects, or both. It may exist on the surface of the earth, or lie beneath the surface of the earth. Perhaps amusingly to most contemporary lawyers, for whom finding material treasure and keeping it is more of a dream-come-true than a pressing legal matter, Islamic jurists have spent considerable time on the disposition of treasure troves.

Generally speaking, when a person finds a thing, her right to dispose of it is limited to one transaction: making a charitable gift of the thing. But, she can do so only after she gives public notice of the find, and no other person has come forward to claim ownership of the found object. A notable exception exists if the finder is a poor person. Such a person can use the found object, whereas if the finder is a rich person, or at least not impoverished, then she cannot use the found object for herself. Rather, a well-off finder has only one choice: make a charitable gift, called "*ṣadaka*." Interestingly, a well-off finder could give the object to her parents or children, if they are poor. In that sense, it is not a complete *ṣadaka*, because her family could benefit from it.

Overall, the better practice is to hold the object in trust — as *amāna*.<sup>38</sup> That way, the finder conveys her clear intention to return the object to its true owner, rather than usurp the rights of the true owner. If a true owner does come forward, then the finder has a choice. She can seek return of the object, or she can leave it with the finder. In the former instance, the true owner can pay the finder for any increase in value the finder contributes to the object, or obtain payment from the finder for any decrease in value the finder caused to it. Where the true owner elects

<sup>36</sup> Qur'an, *supra*, 2:11-13 at 51-52. See generally MAKDISH, *supra*, ch. V (concerning property acquisition upon death).

<sup>37</sup> KAMALI, *supra*, at 248 (emphasis added).

<sup>38</sup> See SCHACHT, *supra*, at 137. See generally MAKDISH, *supra*, ch. IIF (concerning lost property).



to let the finder keep the object, she can claim from the finder a compensatory payment, in effect, a sale price. The *Shari'a* does not contain a principle like "finders keepers, losers weepers." But, it is possible to acquire ownership by finding an object, and then paying the original owner for its value.

To elaborate on these principles, consider the basic hypothetical problem: "suppose Jihan finds some treasure . . ." The question is how the treasure should be treated. Who owns it, and under what circumstances? Are taxes due to the government, and if so, then how much? Does the kind of land on which, or underneath which, the treasure is found, affect the disposition of the treasure? Does the nature of the treasure itself affect its disposition? To these questions, there is a consensus among the Four *Sunni* Schools as to what to do in the following scenarios:

- *A treasure trove is discovered on owned land*

The treasure trove belongs to the owner of the property on which it is found, not to the finder of the trove. There is no "finder's keepers" principle, unless the finder is the property owner

- *A treasure trove is discovered on owned land*

The "finder's keepers" principle applies. Hence, the finder of the treasure on un-owned property — whether it is barren land, a forest, or a mountain — becomes the lawful owner of the treasure.

- *A treasure trove is that has no identifiable owner:*

An attempt should be made to find the true owner. If a Muslim establishes a valid claim to the owner, then he or she may be given the treasure, and become the owner of it. No taxes are owed on the treasure. If a non-Muslim makes a valid claim, then he or she may receive the treasure and own it. However, a tax of one-fifth of the value of the treasure — the so called "one-fifths share," or "*khums*," tax — must be paid by the non-Muslim to the government. The non-Muslim keeps the remaining four-fifths of the treasure.

- *A treasure trove is discovered, with an Islamic mark, but no person lays claim to it:*

If a treasure trove is found that bears a sign or other indication that it is of Islamic origin (e.g., it belonged to a Muslim), then an effort to find the true owner should be made. If this attempt fails, and if no person establishes a valid claim to a treasure trove, then the benefits from the trove are to be put in service of the poor. The poor may include the finder of the treasure, thus the "finder's keepers" principle does not apply to wealthy finders. No *khums* (one-fifth share) tax is owed on the treasure.

- *A treasure trove is discovered, with a non-Islamic mark, but no person lays claim to it:*

If a treasure trove is found that bears a sign or other indication that it is of non-Islamic origin (e.g., it belonged to a Christian), then an effort to find the true owner should be made. If this attempt fails, and if no person

establishes a valid claim to a treasure trove, then two outcomes are possible, depending on whether the original owner of the land on which the treasure trove was discovered is identifiable. First, the government may impose a *khums* (one-fifth share) tax on its value, and give the remaining four-fifths of the trove to the original owner of the land on which the treasure was discovered. If the original owner is deceased, then his or her heirs may receive the remainder of the trove. Second, where neither the original land owner, nor his or her heirs, can be traced, the entire amount of the trove becomes the property of the government. In effect, it goes to the public treasury. Note, however, that *Imām* Abū Yūsuf disagrees with these outcomes, and argues for application of the finder's keepers principle in this scenario.

- *A treasure trove is discovered, with no marks whatsoever, and no person lays claim to it.*

An un-marked treasure trove is treated like a trove bearing Islamic marks. In essence, it is deemed to be of Islamic origin.

In summary, the general presumption of "finder's keeper" does not apply in most cases. Rather, the best solution is to find the true owner of the treasure trove. If the true owner is not identified, then the second-best solution is to use the treasure to serve the needs of the poor, or at least the public treasury.

These rules raise two problems. First, why is it permissible to discriminate against a non-Muslim with a valid claim to a treasure trove, by imposing the *khums* tax? Indeed, why should religious markings on the treasure matter? Second, are the rules, especially the second and third, entirely consistent? The second rule seems to champion the finder, but the third rule relegates the claim of a finder to a search for the owner.

### [E] Individual versus Joint Ownership

The *Shari'a* recognizes the possibility of joint ownership of property, an occurrence that is especially common with respect to land.<sup>39</sup> Often, joint ownership arises from inheritance, or from acquisition of proceeds by a partnership. Islamic Law identifies two kinds of joint property: (1) indivisible, and (2) divisible.

Most kinds of joint property can be divided. For example, joint ownership of a building could be divided among the joint owners, such that each person owns a separate part of the building. That is to say, separate ownership of different stories of a building, or different rooms in the building, is possible. The process of division of the property among the owners is called "*kisma*."

Joint ownership necessarily entails joint use by the owners, so long as the property remains undivided. However, the nature of the sharing varies from case to case.<sup>40</sup> For example, partners may share a building through simultaneous use of

<sup>39</sup> See generally MAKHDI, *supra*, ch. ILC (concerning joint ownership).

<sup>40</sup> See SCHACHT, *supra*, at 139.

different rooms in that building. Or, they may rotate use of the entire building, one at a time.

There are some instances in which divisible property that is jointly owned by partners can be divided without the consent of other partners. However, that division must not adversely affect the use of the resulting divided parcels. More likely, especially in the context of the sale of jointly-owned land, is the invocation of a right of pre-emption. This right is known in the *Shari'a* as "*shufa*."

Briefly, *shufa* is the right of a person to substitute herself for an outside buyer, and thus herself buy the real estate (or portion thereof). That is, if one joint owner offers her share in jointly owned property for sale, then the other joint owner has a priority of right to buy the share that is up for sale. (That is equally true if there are more than two joint owners.) *Shufa* vests in two and possibly three persons, in descending order of preference: (1) the co-owner, i.e., a co-owner is the first person entitled to exercise the right of pre-emption; (2) the owner of a servitude in the property (e.g., the owner of any encumbrance, such as an easement, on the property); and (3) depending on which of the Four Schools is applicable, the owner of adjoining property, that is, the neighbor.

As travelers to urban areas in the Middle East and Southeast Asia knows, increasing population density in the post-Second World War era has necessitated "building upwards." Some of the tallest buildings in the world are found in Dubai, United Arab Emirates (UAE) and Kuala Lumpur, Malaysia. An Islamic Property Law issue that arises because of this trend is who among owners or co-owners of a building has the right to build a new upper storey? The answer is the owner of the presently-existing upper storey.<sup>41</sup> That is, the right to construct a new story is not associated with the building itself, but with whoever owns the highest storey. Therefore, it is possible to sell the presently-existing upper storey, and with it the right to build a new storey. However, the two are not severable. It is not possible for the owner of the existing upper story to sell the right to build a new storey, without at the same time selling her storey.

## [F] Termination of Ownership

A practical everyday question is how is ownership terminated? In Islamic Law, as in other legal systems, the usual manner of termination is through voluntary transfer — the same kinds of transactions discussed above, such as sale, bequest, or inheritance. However, there are two other intriguing ways an ownership interest may be cut off: usurpation (*ghaṣīb*) or apostasy.

First, another person simply may have usurped the rights of the true owner (*mālik*). If that usurpation goes unchecked and unpunished, then the usurper (*ghaṣīb*) becomes the owner of the object in question — at least in a *de facto* sense. Second, an apostate, who in Arabic is called a "*murtadd*," stands to lose all her ownership interests in property. That cessation is not immediate.<sup>42</sup> Initially, ownership rights of an apostate are held in abeyance. Cessation occurs if the

<sup>41</sup> See SCHACHT, *supra*, at 142.

<sup>42</sup> See SCHACHT, *supra*, at 138.

*murtadd* dies, or if she leaves the territory of the Muslim state in which she resided and fails to return to the Islamic faith. This manner of termination of ownership interest illustrates the interaction of the sacred and profane in Islamic Law. Moreover, it poses a potentially significant barrier, depending on the individual involved, to conversion. That is, it is a restriction on freedom of conscience.

## §19.03 POSSESSION

### [A] Right to Possess

Possession is a necessary and commonplace feature of a contemporary capitalist free-enterprise system. Some tenants possess arable agricultural land. Others possess commercial office space, such as dental, medical, and legal aid clinics, restaurants, and stores. Still others possess apartments or homes, in which they and their families live. This wide array of examples pertains just to real property. Possession also occurs in respect of movable property. Cars and trucks, farm equipment, physical capital goods (i.e., machine tools), and party supplies (such as tables, chairs, and tents) are all examples in which possession of personal property is conveyed temporarily from its owner to a possessor. The common consequent appellations and legal relationships, respectively, are creditor (lender) and debtor (borrower). Still another instance is a deposit of collateral. For example, a securities firm extending credit to investors to purchase stocks or bonds may require (under applicable securities regulations) to require a borrower to maintain funds in a margin account equal to a fixed percentage of the value of the financial instruments purchased on margin (i.e., with borrowed funds).

In these and many other examples, a possessory relationship is designed to yield an economic gain to the owner, possessor, or both. Clearly established property rights in respect of possession not only are a manifestation of the freedom of an owner to use her property as she deems fit, but also bolster economic growth. Possession is well known to Islamic Law. As it has with the right to own property, the *Shari'a* always has recognized and provided for the right to possess.<sup>43</sup> Here is another instance in which it has a property concept relevant to modern capitalist economic growth.

In Arabic the right to possess property is called "*yad*." The possessor is called "*dhul yad*" (or "*dhul al yad*"). The terms "*yad*" and "*dhul yad*" are used in the context of *in rem* property rights. But, like "*milk*" (ownership) and "*mālik*" (owner), they also are found in other contexts. For example, "*yad*" can refer to the authority of a husband in a marriage, or of a father in a family. Thus, the term can arise in Islamic Family Law.

<sup>43</sup> See SCHACHT, *supra*, at 136. See generally MAKDISI, *supra*, ch. 11.B (concerning leasehold).



## [B] Legitimate versus Illegitimate Possession

In Islamic Property Law, there are two basic kinds of possession. Possession may be legitimate, known as "*yad muhikha*." Or, possession may be illegitimate, called "*yad multila*." These categories have analogs in American Property Law, namely, lawful and unlawful possession, and are mutually exclusive categories. A possessor (*dhul yad*) cannot at once be in legal and illegal possession of the same property.

Among the many instances of legitimate possession, there is fiduciary possession, called "*yad amana*." In contrast, illegitimate possession results from usurping property owned by another person. Usurpation of property is called "*ghashb*." A usurper is called a "*ghashib*." (Of course, illegitimate possession can result from theft or highway robbery, but these instances are covered by Islamic Criminal Law.)

From a religious perspective, *ghashb* is considered sinful.<sup>44</sup> A *ghashib* is liable for a discretionary punishment ("*ta'zir*"), and must return the property to its rightful owner. From a legal standpoint, Professor Schacht concludes usurpation results in "the highest degree of liability known to Islamic law."<sup>45</sup> That is because a *ghashib* bears what may be termed "treble liability."

First, a *ghashib* bears legal liability for any loss to, or diminution in the value of, the usurped object (e.g., a partial or total loss in value). After all, the *ghashib* may well have caused the loss, even if simply by exposing the object to danger that was not foreseeable (like adverse weather conditions, such as lightning or rain to an electronic gadget, or adverse environmental conditions, such as a snake bite to a camel, horse, goat, or cow that is being possessed). Indeed, the theory of imposing this liability on the *ghashib* is precisely that he or she exposed the object to a dangerous condition.

Second, a *ghashib* is liable for loss caused by the usurped object. That is, a usurper bears downstream, or consequential, liability, for injury to another person, animal, or object caused by the initial usurpation (*ghashb*) of property. If, for example, a *ghashib* usurps a horse, which then kicks and hurts a child, the *ghashib* is liable for the injury.

Third, a *ghashib* may be held legally liable for loss or damage to the usurped object even if that loss or damage occurs before the usurpation, or manifests itself after the object is returned to its rightful owner. At first glance, this result seems surprising, because it means legal liability can include a damage caused while a usurped object is in the possession of its rightful owner. However, the theory is that the *ghashib* broke the continuity — the chain of rightful possession — by his or her usurpation (*ghashb*). Professor Schacht outlines the example of an owner inflicting a wound on a slave, followed by usurpation of the slave by a *ghashib*, and thereafter followed by return of the slave to the owner, and finally by the death of the slave from the wound. The *ghashib* breaks the effect of wound inflicted by the owner, hence justifying liability on the *ghashib*.

<sup>44</sup> See SCHACHT, *supra*, at 160.

<sup>45</sup> SCHACHT, *supra*, at 160.

Nor surprisingly, a usurper is not entitled to any increase in value or other benefit accruing from usurpation. That is true in a religious and legal sense. Nor should a *ghashib* have that entitlement. It is a principal not only of the *Shari'a*, but indeed a universal legal norm, that a wrongdoer ought not to reap rewards from his or her wrongful behavior.

The liability scheme, opines Professor Schacht, partly grew out of harsh realities in the formative period of the *Shari'a*. Misappropriation of private property was common, and protecting owners by distinguishing between legitimate and illegitimate transfers of possession was necessary, during the early Caliphates. Be that as it may, the severe religious and legal liability triggered by illegitimate possession is further evidence of the respect the *Shari'a* accords to private property. Islamic Law seeks to protect the property of an owner, while allowing her to alienate it temporarily for productive use.

An obvious practical question concerns disputes about rights of possession, namely, how are they resolved? There is an adage in American Property Law that "possession is nine-tenths of the law." The *Shari'a* has a similar rebuttable presumption. As Professor Schacht writes: "[p]ossession confers a prejudice as to ownership."<sup>46</sup> Aside from this presumption, disputes to possessory rights are adjudicated on a case-by-case basis and are fact specific. As one simple example, suppose a plaintiff sues a possessor of an object, claiming the possession is illegitimate. One possible defense might be the possessor holds the object in deposit on behalf of a third party. If that is true, then a *qadi* will not entertain the suit. The *qadi* will rule the plaintiff's claim as invalid. On the other hand, if it is untrue, then the claim will be a valid one, namely, for usurpation (*ghashb*).

## [C] Adverse Possession

One of the most fascinating points about Islamic Property Law from a comparative legal standpoint concerns adverse possession. In standard first-year courses on Property Law in the United States and other countries in which that Law is sourced in English Common Law, the doctrine of adverse possession is encountered. What is rarely mentioned is that the *Shari'a* contains the doctrine of adverse possession, and did so nearly 1,000 years before the doctrine became firmly rooted in American jurisprudence.

Under the *Shari'a*, no claim of ownership to land can be made against the possessor of that land after the prescribed adverse possession period. This period varies. Professor Schacht identifies 30, 33, or 36 years being the most commonly used. If no ownership claim to the land in question is made during the period, then no claim can be lodged after it expires. Oddly, though, Professor Schacht observes that Islamic Law does not contain a more general doctrine than adverse possession to would protect possessory interests. That is, "the concept of protection of possession is absent from Islamic law."<sup>47</sup> The above discussion of legitimate versus illegitimate possession clearly is at odds with this observation, rendering it, perhaps, erroneous.

<sup>46</sup> SCHACHT, *supra*, at 139.

<sup>47</sup> SCHACHT, *supra*, at 139.

There are special rules in the *Shari'a* concerning possession of unoccupied, uncultivated waste land. They address the practical question of how waste land becomes possessed. The straightforward answer is cultivation. It is through the cultivation of waste land that such land becomes occupied and, thereby, possessed. Conversely, land that is not put to use is deemed under the *Shari'a* to have no owner. Logistically, except for digging a well or planting a tree, to cultivate unoccupied waste land, a prospective farmer — occupant first must obtain a license from an authority, such as an *imam*.<sup>48</sup> Assuming the license is granted, the occupant marks off the land with an enclosure. The occupant must cultivate it within 3 years of receiving the license in order to claim legitimate possession. If the land still is fallow after three years, then the license lapses.

### [D] Deposits (*Amāna*), Pledges (*Rahn*), and Liens (*Habs*)

"*Amāna*," meaning a "deposit," is a common example of possession, and one essential to the advancement of an economy.<sup>49</sup> An *amāna* also implies a relationship of trust, that is, a fiduciary relationship. A depositor of property literally entrusts that property with a depositary, which is a person or institution that holds possession of the deposit. The depositor is the owner of the property, yet voluntarily surrenders possession of the property for to the depositary for safekeeping and for a prescribed period. For instance, the deposit may be an escrow arrangement, whereby the depositor is purchasing real property or other substantial item, and the seller requires a percentage of the price (e.g., 20 percent) paid in escrow pending the closing of the deal.

The depositary is an "*amin*." The term connotes a person in a position of trust, but of course can refer to a bank or other commercial entity. Traditionally, an individual *amin* would give to the depositor a personal assurance, or transmit an assurance from a member of the family of the *amin*, that the property would be held in safe custody. In contemporary times, that assurance typically comes from an institution. Either way, the obligation of the *amin* is clear. It holds legitimate possession of the deposited property on behalf of the owner—depositor under terms and conditions to which they agree. The depositary must not use the deposited property, nor is it permitted to commingle that property with its own assets. Moreover, the depositary must not refuse to return the property, nor deny the existence of an *amāna* relationship. To engage in any of these behaviors would be to commit a transgression, or "*ta'addi*" — in effect, a tort.

Consequently, what the commercial banking community typically regards as an automatic right of set off appears not to be possible under the *Shari'a*. In American Banking Law, a bank usually enjoys some right of set off (offset), which varies in strength and degree. The bank can use funds deposited by a customer with it to satisfy an obligation owned by the customer to the bank. For example, if a customer has U.S. \$50,000 on deposit, but owes \$30,000 to the bank arising from a loan, the bank may be able to return only \$20,000 to the customer. To be sure, whether the bank has this right varies from one jurisdiction to another, and

depends on applicable banking regulations. Under Islamic Law, however, the basic *amāna* relationship appears not to permit the bank a set off right. Conceivably, the bank and customer may agree to such a right.

Closely related to a deposit (*amāna*) is a pledge arrangement. The Arabic term for pledge is "*rahn*." Pledge arrangements arise in routine property and contract transactions. They involve security — collateral — used to guarantee payment of a debt. Without such security, many commercial transactions would not occur, simply because sellers would be unwilling to take on the credit risk of the buyer. That is, pledging a valuable asset partly offsets the uncertainty a seller has about the ability or willingness of its counter-party to perform its obligations. The fact the *Shari'a* contains the concept of *rahn* is further evidence it can and does facilitate transactions, and is consistent with modern capitalist growth. Interestingly, Professor Schacht reports a pledge (*rahn*) corresponds to the Roman concept of *pignus*.<sup>50</sup> In other words, a pledge is an example of transmission of a Roman legal concept through educated non-Arab converts to Islam schooled in the liberal Hellenistic tradition, which including training in law and oratory.

Under the *Shari'a*, the purpose of the pledge is to serve as collateral security. As Professor Schacht puts it:

The pledge presupposes the existence of a debt.<sup>51</sup>

If there is no pre-existing debt relationship, then a pledge is impossible. Therefore, the *Shari'a* does not permit a suretyship arrangement (i.e., an arrangement under which one party assumes primary, direct liability to a creditor for the debt, default, or other kind of failure of another party) if the asset is pledged merely to secure a person, or a right of retaliation, with no antecedent debt.

Note the distinction between a surety and guarantor.<sup>52</sup> A surety bears primary liability, and the creditor can look to the surety for satisfaction even if the principal debtor does not default or otherwise fail in its obligations. The surety has accessorial liability, whereas a guarantor has secondary, conditional liability. That is because a guarantor is liable to a creditor only if the debtor fails in its duties to the creditor. The liability of a surety begins at the same time as that of the debtor, and the surety is a party to the principal obligation running between the debtor and creditor. The suretyship contract is executed at the same time as the contract through which the debt obligation arises. Typically, both are the same instrument. In effect, a surety is bound to the creditor as is the debtor, whereas a guarantor is liable under a separate, independent instrument executed before or after the primary debt obligation. Thus, a surety often does not receive compensation for giving a guarantee. The same consideration supporting the debt contract is associated with the suretyship. A guarantor does get some fee. A pledge can arise under a surety or guarantor situation. For example, the primary debtor may pledge an asset to the creditor, whether there is a surety or a guarantor also liable on the debt.

<sup>50</sup> See SCHACHT, *supra*, at 21.

<sup>51</sup> See SCHACHT, *supra*, at 140.

<sup>52</sup> See BRYAN A. GARNER, ED., BLACK'S LAW DICTIONARY 1579-1580 (St. Paul, Minnesota: West, 9th ed. 2009) (entry for "surety").

<sup>48</sup> See SCHACHT, *supra*, at 141.

<sup>49</sup> See generally MARICEL, *supra*, ch. II.D-E (concerning pledges and bailments).



How is a pledge arrangement made under the *Shari'a*? Not surprisingly, the answer is "like any other contract." That is, a pledge must be arranged contractually, with the essential constitutive elements of offer (*ijāb*) and acceptance (*kaḅūl*). The pledgor (i.e., the debtor seeking to provide an asset to secure its debt) makes an offer of a pledge arrangement to a pledgee (i.e., the creditor, the person to whom the pledge is given). If and when the pledgee accepts, then the pledge contract is formed. The contract becomes binding *lāzim* when the pledged object is possessed by the pledgee. Of course, in many transactions the pledge does not take actual possession of the object from the pledgor. Rather, the pledged object is deposited with a third party, such as a trustee. The trustee must be *'adl*, i.e., of good character. Then, the pledge contract is *lāzim* upon the depositing of the object with the trustee.

The typical terms of a pledge contract are as follows:

- Expenses associated with a pledge arrangement are divided between the pledgor (debtor) and pledgee (creditor). The pledgor is liable for any expenses associated with the making of the pledge arrangement. The pledgee is liable for expenses incurred in connection with retaining the pledged property. Neither the pledgor nor pledgee can use that property to cover these expenses.
- The pledgee must return the property as soon as the pledgor pays off the debt.
- If the debt is not paid when it matures, then the pledgee has the right to sell the property to satisfy the debt. If the sale proceeds exceed the amount of the debt, then the pledgee must hold them in trust (*amana*) for the pledgor.
- The debt continues to be outstanding until it is paid, or until the pledged property is sold and the proceeds cover the debt.
- During the pendency of the pledge, the pledgor cannot use or otherwise dispose of the pledged property in anyway. The rule is strict. The rule eliminates the possibility that the pledgor could demand return of the property to sell it, and thereby raise the proceeds to pay off the debt that the property secures. That kind of sale is for the creditor, not the debtor.
- The pledgee, or other depositary, of property is an *"amin"* (a person or institution in the position of trust). Hence, there is a fiduciary relationship between the pledgee and pledgor.
- The pledgee is liable for the object pledged. This liability is triggered by a transgression — a *"ta'addi,"* which is equivalent to the American concept of a "tort." For example, it would be a transgression for the pledgee to use the property. • The amount of the liability the pledgee bears equals the lesser of (1) the value of the object, or (2) the value of the debt secured by the object. The first valuation method is used if the pledgee loses the object and is at fault for the loss.
- However, the pledgee is not liable for an accidental loss to the pledged property.

In addition to these terms, an obviously important question in any pledge contract negotiations concerns the kind of assets that are acceptable as security.

That is, what kind of property can be pledged as security for a debt? To lawyers familiar with American Property Law, the answer is rather surprising. There is a wide range of choice, and for the most part, the answer is up to the pledgor and pledgee to negotiate. But, there is one highly important exception — land. Real property cannot be pledged to secure a debt. Consequently, Professor Schacht points out that "[t]he concept of mortgage is unknown in Islamic law."<sup>53</sup>

Related to the topics of deposits (*amāna*) and pledges (*rahn*) are liens. Like American Property Law, the *Shari'a* recognizes liens on property. They are called *"ḥabs,"* which technically refers to a right of retention. Conceptually, a lien differs from a pledge. A pledge is designed to secure repayment of a debt that is unrelated to the collateral security pledged by the debtor. A lien is designed to secure a claim associated with the object on which the lien exists. Thus, a lien is a property right, specifically, an *in rem* right of retention with respect to a thing, where the transaction being secured is related to that thing. One example is of a *ḥabs* covering an object to secure payment of wages for work done on that object.<sup>54</sup>

What liability does the lienor (i.e., the party holding the *ḥabs* on the object, in effect, the creditor) have as regards the object? Among the *ulema* (religious scholars) and *fukahā'* (legal scholars), there is disagreement. Some scholars say it is the same liability as that of a pledgee. Other scholars urge a lienor bears greater liability than a pledgee.

<sup>53</sup> SCHACHT, *supra*, at 140.

<sup>54</sup> See SCHACHT, *supra*, at 140.

## Chapter 20

### PROPERTY LAW: PROTECTING AND RESTRICTING PRIVATE OWNERSHIP

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In today's globalized world, it is increasingly evident that peace can be built only if everyone is assured the possibility of reasonable growth: sooner or later, the distortions produced by unjust systems have to be paid for by everyone. *It is utterly foolish to build a luxury home in the midst of desert or decay.*

Fighting Poverty to Build Peace, Message of His Holiness Pope Benedict XVI for the Celebration of the World Day of Peace, 1 January 2009, ¶ 14 (emphasis original)

#### SYNOPSIS

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- [A] Self-Defense
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##### § 20.02 RESTRICTIONS ON OWNERSHIP: GENERAL DOCTRINES

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##### § 20.05 CATEGORY #3 RESTRICTIONS: PROMOTING COOPERATION AND RIGHT OF PRE-EMPTION (*SHUF'AH*)

##### § 20.06 CATEGORY #4 RESTRICTIONS: EFFICIENCY AND BARREN LAND



## § 20.01 PROTECTING PRIVATE PROPERTY

## [A] Self-Defense

The firm basis for private ownership in Islamic Law would be meaningless in practice if the *Shari'a* lacked strong protections of that ownership. Such protections do exist, and no doubt have contributed to the tradition of private ownership through the centuries in Muslim societies. As long as ownership of property is acquired through lawful means, the *Shari'a* protects that ownership, i.e., it contains rules to safeguard the exclusive right of the lawful owner to that property. Indeed, the *Shari'a* protects ownership by an individual, two or more individuals acting jointly, or the community.

Prominent examples of this protection are in the *Mejelle*, the Civil Code of the Ottoman Empire between 1877 and 1926, which codified part of the *Hanafi fiqh*. It lays out the legal maxim on which protection mechanisms are based. Articles 96 and 97 state:

96. The dealing by one person with the property of another, without his leave, is not lawful. 97. Without legal cause it is not allowed for anyone to take the property of another.

97. Without legal cause it is not allowed for anyone to take the property of another.<sup>1</sup>

There are three categories of protection mechanism in the *Shari'a*: a right of lawful acquisition; a right of self defense; and claims under the Criminal (Penal) Law.

The most obvious way, and a way of everyday importance, in which the *Shari'a* protects property ownership concerns lawful acquisition. If a person makes a *bona fide* acquisition of property, then she can rest assured she is the legally recognized owner — the *malik*. What happens if an innocent purchaser buys property from a seller, but after the sale is complete, a third party (*istihkāk* or *istirdād*), claims that he is the true owner? The third party claim is the seller had no right to sell the property. In this kind of case, the seller is liable for the default in ownership, which in Arabic is called the "*darak*." The liability runs to the third party, and is in the amount of the price paid by the innocent purchaser. As for the *bona fide* purchaser, her acquisition of the property remains intact.

Perhaps the most rigorous manner in which the *Shari'a* protects property ownership is via self-defense. A property owner is legally entitled to defend his or her property, and doing so is spiritually beneficial. One *hadith*, compiled by Tabrizi, says:

He who dies in defence of his property is a martyr (*shahid*).<sup>2</sup>

<sup>1</sup> THE MEJELLE — BEING AN ENGLISH TRANSLATION OF MAJALLAH EL-AHKAM-I-ADLIYA AND A COMPLETE CODE OF ISLAMIC CIVIL LAW ARTICLES 96-97 at 15 (Petaling Jaya, Malaysia: The Other Press, January 2001) (translated by C.R. Tyser, B.A.L., D.G. Demetriades & Ismail Haqqi Effendi). [Hereinafter, MEJELLE.]

<sup>2</sup> TABRIZI, *MUSHA'AT*, VOL. II, *hadith* no. 3512, quoted in MUHAMMAD HASHIM KAMALI, THE RIGHT TO LIFE, SECURITY, PRIVACY AND OWNERSHIP IN ISLAM 251 (Cambridge, England: Islamic Texts Society, 2008). [Hereinafter, KAMALI.]

This right of self-defense is notable, because in non-Islamic legal systems it typically is thought of in the context of defending one's own person from bodily harm.

By contrast, under Islamic Law, at least, the right extends to any violation, such as encroachment, of one's real or personal assets. Professor Kamali explains:

The *Shari'ah* also extends the right of self-defence, *mutatis mutandis* [with the necessary changes made], to the protection of one's property. The jurists of the leading schools of law have thus drawn the conclusion that an attack on one's property entitles the victim to repel aggression *by the least violent means that can repel it*, but if he believes that it cannot be repelled in any other way than killing the assailant, then it is permissible for him to kill him in self-defence, in which case he will have acted within his rights.<sup>3</sup>

Certainly, the right is bounded by the proportionality principle. Still, the fact that in an extreme situation, defense of property is valued over the taking of a life is remarkable.

No less surprising is the broad scope of the *Shari'a* right of self-defense of property. The right extends even to the defense of third-party property, as the *Hanafi* School jurist Ibn Al Humām writes, reflecting the position of the *Shāfi'i* School as well:<sup>4</sup>

In the event where robbers take the property of others and the latter cry for help, and it is then given, and the robbers are confronted; it is lawful to fight and if necessary kill the robbers to retrieve the property from them.<sup>5</sup>

Professor Kamali summarizes the legal prerequisites thusly:

Islamic law recognizes the right of all individuals to defend the private party of others in the same way as their own property, provided that the following conditions are met: First, that there is a hostile attack which requires immediate action, and which leaves no room for other alternative courses of action. Second, that the defendant uses no more force than he believes is necessary in order to repel the aggression.<sup>6</sup>

Curiously, though, it is unclear whether a third — and arguably critical — prerequisite exists. Must the third-party property owner ask for help?

<sup>3</sup> KAMALI, *SUPRA*, at 251 (EMPHASIS ADDED).

<sup>4</sup> The full name of Ibn Al Humām is "Ibn Humām is Muhammad Ibn Abdul Wahid Ibn Abdul Hamid Ibn Masoud Ibn Humām Alciowy." He lived from 1388 to 1457 (790-861 A.H.) in Egypt. He is well known for the book *Ibn Humām Al-Hanafi*. He wrote many books on Islamic jurisprudence, such as: *Sharh Al-Hidaiah Fi Al-Fiqh* (Illustration and Guidance in Islamic Jurisprudence), *Al-Tahrir Fi Usul Al-Fiqh* (Liberalization in the Principles of Jurisprudence), and *Al-Mushtarak Fi Usul Al-Din* (Apposement in the Fundamentals of Islam). See ABDEL-HAI AL-HANBALI, *SHARHAT AL-TUHAJIR GOLD NOUGETS* (7/298).

<sup>5</sup> KAMALUDDIN BIN AL-HUMAM, *FATH AL-QADIR*, VOL. IV, p. 276 (Mathba'at al-Tijariyya al-Kubrā edition), quoted in WAFI, *HUQUQ AL-INSAN*, p. 304, in turn quoted in KAMALI, *SUPRA*, at 251.

<sup>6</sup> KAMALI, *SUPRA*, at 252.

Manifestly, the expansive Islamic legal right of self-defense raises religiously troubling and practically difficult questions. On religious terms, the *Shari'a* right — triggered by a cry for help — is a far cry from the famous Biblical Parable of the Good Samaritan. Violence in that Parable is unthinkable. Likewise, the *Shari'a* right is orthogonal to a “Turn-the-Other-Cheek” precept so central to Catholic Christianity. Is defending property, one’s own or that of another, from a threat on the ground that it is correct in God’s eyes an affront to human dignity, to the human person — who, even if a property violator, is created in the image and likeness of God?

On practical grounds, is there a risk of sliding down a slippery slope? For example, does the right extend to a bank or stock market account, and condone violence against bankers and stock brokers during a period of financial turbulence in which the value of the account tumbles? How does the right of self-defense relate to restrictions on ownership, and in certain situations spiral from a tit-for-tat situation to a blood feud? Does the *Shari'a* right allow for anticipatory self-defense (i.e., an attack against a would-be-violator from whom a property violation is expected), or even pre-emptive self-defense (i.e., an attack against a perceived threat to property to remove any chance of the threat manifesting itself)? In sum, is the reference in the quote from Professor Kamali to *mutatis mutandis* almost farcical, because the necessary changes cannot be made to a right to defend one’s body from physical harm to make that right appropriate when all that is at stake is a piece of land or inanimate object?

### [B] Protecting Private Property: Penal Law

Along with self-defense, a rigorous manner in which the *Shari'a* protects private ownership interests is through the Penal Law.<sup>7</sup> Two forms of property crimes are considered claims (rights) of God (*haqq Allah*), namely, theft (*sariqa*) and highway robbery (*kat' al-tarik*, with “*kat'*” meaning “robbery” and “*tarik*” meaning “highway”). Both types of non-consensual taking of property are punishable with extreme sanctions. Other forms of property offenses are dealt with by discretionary (*ta'zir*) punishments decided upon by an Islamic Law judge (*qadi*). In both instances, the underlying theory or justification for punishment is two-fold: deterrence and revenge. First, the offender is specifically deterred from committing another unlawful act against the property of another or others. There is, too, general deterrence, in that the threat of punishment discourages all others in the community from unlawfully taking or using property they do not own. Second, revenge as a punishment is meted out. The offender suffers harm in return for the injury the offender inflicted on the property of another. Whether this harm brings personal gratification to the property owner is perhaps less important than the perspective of the community. The harm avenges the offense, and is repayment for it.

To the Penal Law protections of ownership interests may be added rules in the *Shari'a* against business practices that involve the use of property, or more

<sup>7</sup> See generally JOHN MAKDISI, *ISLAMIC PROPERTY LAW* ch. VI (Durham, North Carolina: Carolina Academic Press, 2005) (concerning attacks on property ownership, including robbery, theft, usurpation, and nuisance, and discussing causation and the defense of necessity) [Hereinafter, MAKDISI].

generally the market power of a property owner, in a manner detrimental to the community. Profiteering and hoarding are leading instances, against which the Qur'an inveighs. So, too, is hoarding (discussed below). Such enjoinders dovetail with rules in the *Shari'a* against anti-competitive practices, such as against monopoly.

## § 20.02 RESTRICTIONS ON OWNERSHIP: GENERAL DOCTRINES

### [A] Good Neighborly Relations

While championed and protected by the *Shari'a*, the right of private ownership is not unbounded. That is clear enough from the Vice-Regency Theory and its implications. That also is clear from a general requirement incumbent on all Muslims to be good neighbors. Consider the following passage from *surah* 4:

<sup>36</sup>Worship God; join nothing with Him. Be good to your parents, to relatives, to orphans, to the needy, to neighbours near and far, to travelers in need, and to your slaves. God does not like arrogant, boastful people, <sup>37</sup>who are miserly and order other people to be the same, hiding the bounty God has given them. We have prepared a humiliating torment for such ungrateful people.<sup>8</sup>

This passage is redolent of the Two Great Commandments in Catholic Christianity, which Christ proclaims as recorded in Matthew's Gospel:

<sup>34</sup>When the Pharisees [literally in Hebrew, “separatist,” and referring to a group of observant Jews who helped establish elaborate oral laws to apply the written law of Moses after the destruction of the Temple in 70 A.D. and Roman conquest] heard that he [Jesus] had silenced the Sadducees [members of a religiously conservative high priestly family, granted by King Solomon control of the Temple, and one of the ruling families of the Jews until the Temple destruction, who opposed new interpretations of the Torah suggested by the Pharisees], they gathered together, <sup>35</sup>and one of them [a scholar of the law] tested him by asking, <sup>36</sup>“Teacher, which commandment in the law is the greatest?” <sup>37</sup>He said to him, “You shall love the Lord, your God, with all your heart, with all your soul, and with all your mind. <sup>38</sup>This is the greatest and the first commandment. <sup>39</sup>The second is like it: You shall love your neighbor as yourself. <sup>40</sup>The whole law and the prophets depend on these two commandments.”<sup>9</sup>

Consider, too, three *hadiths* recounted by Sahih Muslim:

<sup>8</sup> THE QUR'AN — A New Translation by M.A.S. Abdel Haleem (Oxford, England: Oxford University Press, 2004), 4:36-37 at 54 (emphasis added). [Hereinafter, QUR'AN.]

<sup>9</sup> The Gospel According to Matthew, 22:34-40, in, THE CATHOLIC STUDY BIBLE 82 (Oxford: Oxford Academic Press, 1990). See also pp. 433 (definition of “Pharisee”), 436 (definitions of “Sadducee” and “Second Temple”), 437 (definition of “Temple”).



- He will not enter Paradise whose neighbour is not secure from his wrongful conduct.<sup>10</sup>
- He who believes in Allah and the Last Day [i.e., the Day of Judgment] should either utter good words or better keep silent; and he who believes in Allah and the Last Day should treat his neighbour with kindness; and he who believes in Allah and the Last Day should show hospitality to his guest.<sup>11</sup>
- Gabriel kept impressing me ([about the importance of] kind treatment) towards the neighbour (so much) that I thought he would confer upon him the (right) of inheritance.<sup>12</sup>

The last *hadith* has a humorous feature to it. Muhammad is saying that the Archangel emphasized so strongly the principle of treating neighbors well that he, Muhammad, thought Gabriel would bestow on the neighbor the status of a family member and heir. That feature makes the point in a subtle yet powerful way. Notably, by their very terms, none of the above-quoted statement is confined to relations with fellow Muslims. The *Shari'a* obligates Muslim property owners to build and maintain good neighborly relations with Muslims and non-Muslims alike.

### [B] Social Responsibilities of Private Owners

Put directly, a private owner has a social responsibility (in Arabic, "*wazifah ijtima'iyyah*") with respect to his acquisition and enjoyment of property. Unsurprisingly, this responsibility is not stated in economic terms. That is, *Shari'a* scholars traditionally do not justify doctrines according to modern microeconomic theory. Nonetheless, the emphasis on the social responsibility of private owners can be understood through an economic prism, or at least be seen as consistent with a law-and-economics approach.

The *Shari'a* seeks to have private owners internalize the externalities — particularly the social costs — of the use of their property, and adjust their behavior accordingly. If they do, then extravagance and waste are avoided, the outcome is efficient, in that property is used in a manner that reflects a full benefit

<sup>10</sup> *Saheeh Muslim* — BEING TRADITIONS OF THE SAYINGS AND DOINGS OF THE PROPHET MUHAMMAD AS NARRATED BY HIS COMPANIONS AND COMPILED UNDER THE TITLE AL-JAM'-'US-SAHEEH BY IMAM MUSLIM, RENDERED INTO ENGLISH BY ABDUL HAMID SIDDIQI, WITH EXPLANATORY NOTES AND BRIEF BIOGRAPHICAL SKETCHES OF MAJOR NARRATORS, CORRECTED AND REVISED BY DR. HASSAN VOL. I.A, book 1 (The Book of Faith), p. 38, *hadith* no. 46 (Lahore, Pakistan: Sh. Muhammad Ashraf Booksellers and Exporters, 1990). [Hereinafter, *MUSLIM*.]

<sup>11</sup> *MUSLIM, supra*, vol. I.A, book 1 (The Book of Faith), p. 38, *hadith* no. 47. A variant of this *hadith* directly enjoins Muslims from harming their neighbors, thereby embodying the Harm Principle:

He who believes in Allah and the Last Day does not harm his neighbour, and he who believes in Allah and the Last Day should show hospitality to his guest, and he who believes in Allah and the Last Day let him speak good or remain silent.

*Id.*, vol. I.A, book 1 (The Book of Faith), p. 39, *hadith* no. 47R1 (emphasis added).

<sup>12</sup> *MUSLIM, supra*, vol. I.VA, book 45 (The Book of Virtue, Good Manners, and Joining of the Ties of Relationship), p. 200, *hadith* no. 2624.

— cost calculation.<sup>13</sup> If the private owners refuse to internalize the social costs of a particular use to which they have put their property, then official intervention is legitimate. Under the *Shari'a*, a governmental or even religious authority may take action, including ending the individual's ownership of the property in question, to rectify the problem.

Yet, official intervention against a private ownership interest is to be minimal, or (in modern American legal parlance) least intrusive. If an owner acquires property lawfully, then any intervention — whether to take the property entirely, or impose some kind of restriction on it — must involve compensation. Further, the compensation from the authority to the owner must be fair. Just as the right of the owner to enjoy his or her property is not absolute, so, too, is the remedial power of a government or religious authority to take action to protect the community interest associated with that property.

Interestingly, the Egyptian Supreme Constitutional Court has developed a contemporary doctrine that has its origins in Islamic jurisprudence. This doctrine is known in Arabic as "*al wazifah al ijtima'iyah lil uelkya*." The doctrine sets limits to the social responsibility associated with private property. The Court used the doctrine to strike down certain articles in the Agricultural Property Reform Acts that Egypt had enacted in the 1950s during a period of nationalization.

### [C] Four Categories of Restrictions

With its doctrine of good neighborly relations, it should not be surprising that Islamic Law, like American Property Law, contains restrictions on what an owner can do with his or her property. Those restrictions fall into one of four broad categories:<sup>14</sup>

- (1) Restrictions to prevent harm to others.
- (2) Restrictions to protect the public interest.
- (3) Restrictions to ensure efficient use of barren land.
- (4) Restrictions to promote cooperation.

These categories are discussed below. Conceptually, a fifth category exists — Inheritance and Bequest. The *Shari'a* restricts legacies to one-third of the size of the estate of a decedent, i.e., a testator can direct only up to one-third of his or her estate, as the remaining two-thirds is distributed in accordance with long-standing distributional principles to legal heirs. This cap on bequests, and minimum threshold on inheritance, is a clear limit on the free disposition of private property by an owner. They help ensure surviving heirs are cared for, and do not become wards of the community or state for support, and thus are entirely consistent with the public interest. However, the rules concerning inheritance and bequest are regarded as a distinct specialty of Islamic Law.

<sup>13</sup> See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* ch. 3 (New York, New York: Wolters Kluwer Law & Business, 7th ed. 2007).

<sup>14</sup> See KAMALI, *supra*, at 278. See generally MAKDISI, *supra*, ch. IV (concerning rights and restrictions on property transfer).

Though diverse in detail, the four categories of restrictions on private ownership have a unifying nature. All of them are designed, directly or indirectly, to benefit (*maṣlahah*) the community (*ummah*). The second category is transcendent, and in a simple sense, all of the other categories could be collapsed into it. Preventing harm, of course, is a service to the community. Efficient use of land, plus cooperation on land use matters among co-owners, business partners, and neighbors, serve the community. The second category also is a large one, many contexts, and even embracing taxation. After all, land taxes (*kharāj*), if used properly by governmental authorities, advance community interests, and the religious tax (*zakāt*) helps mitigate the miserable lot of poor people.

Further, a key community benefit is fair, equitable distribution of property, both within a family and across a society. For instance, there are restrictions to prevent excessive concentration of wealth, such as through hoarding, and abusive use of property, such as profiteering, at both levels. There are obscene concentrations of wealth in some Muslim countries, notably in the Persian Gulf region. The culprit lies not with the *Sharī'a*, but with a political, economic, or cultural structures in which Islamic rules on restricting private property so as to serve the public interest are observed in the breach.

## § 20.03 CATEGORY #1 RESTRICTIONS: PREVENTING HARM (ḌARAR)

### [A] Harm Principle, Intent, and Preemption

The Arabic term for "harm" is "*ḍarar*," and "prevention of harm" is known as "*ḍaf' al-ḍarar*." The first Islamic legal category of restrictions on private ownership is the prevention of harm. An owner cannot enjoy his property in a way that causes exorbitant harm (known as "*ḍarar fāḥish*," where "*fāḥish*" means "excessive") to another person. Professor Kamali further explains the restriction:

the owner is entitled to the enjoyment of his property without restriction, provided that this does not lead to inflicting harm on others. In the event where a manifest harm is inflicted on the community or another individual through the exercise of proprietary rights, then the authorities must evaluate whether that harm is greater than the benefit that the owner seeks to realize by the use of his right. If the harm is negligible and does not warrant imposing restrictions on the exercise of the basic right of ownership, then it must be tolerated. But if the harm to others is greater by comparison, the owner's right of use may be limited to the extent needed to eliminate the harm, or, whenever possible, to reduce it to a tolerable level.

The general rule concerning neighbours, whether to the side, or on upper or lower levels, is that the owner is entitled to the use of his property in any way he wishes, provided that he does not inflict a manifest harm on his neighbour, for which he would be liable to pay damages for the harm

caused.<sup>15</sup>

Clearly, implementing such restrictions in practice involves a cost-benefit analysis, which necessarily means a careful review of facts specific to a particular case. Often, what may be acceptable in one community may be an excessive harm in another one. Noise, for instance, created by a property owner in downtown Cairo will have to be considerably louder to constitute a nuisance than in the small town of Maaloula, Syria.

Nonetheless, the basic idea is that the freedom of a private owner to enjoy his or her property extends is bounded by harm that enjoyment causes others. The key source for this idea is a *ḥadīth* reported by Abū Dāwūd:

... Samura bin Jundub had a palm tree, and its branches extended into a garden that belonged to a man from the Anṣār [the people from Medina who helped the Prophet and his Companions migrate from Mecca], who lived with his wife. Each time Samura tried to reach the branches, it made the owner uncomfortable. So the man asked Samura if he would like to sell his tree, to which Samura gave a negative response. Samura was subsequently asked to remove the tree and cut it off, but he still refused. The man then complained to the Prophet and the Prophet asked Samura once again to consider selling his tree, but he refused again. Samura also turned down the next suggestion, that he should make a gift of it to the plaintiff. The Prophet then told Samura "You are inflicting harm," and said to the plaintiff [the man from Anṣār] to "Go and cut down the palm tree."<sup>16</sup>

Unfortunately, the exact nature of the harm is not clear. Perhaps the neighbor did not like Samura reaching across the dividing line into his side of the property, finding it an invasion of the privacy he and his wife felt entitled to enjoy on their property. Perhaps the neighbor felt Samura's intrusions threatened his garden, or simply that the protruding branches blocked sunlight needed for his plants to grow.

A fascinating comparison exists between this *ḥadīth* and the *Mejelle*. Article 1196 of the *Mejelle* treats the same factual predicate — a tree branch protruding over to an adjacent property — as does the *ḥadīth*. But, it is more precise than the *ḥadīth* as to the injury, namely, both air flow and shade are at stake:

If the branches of a tree in someone's garden have extended over the garden or house of his neighbour, the neighbour has a right to cause his own air to be freed, by cutting those branches, or drawing them back and tying them.

But the tree cannot be cut down, for the reason that its shade does injury to what is sown in the neighbour's garden.<sup>17</sup>

Article 1196 calls for a less extreme remedy than the *ḥadīth*. Rather than chopping down the whole tree, why not prune protruding branches? Rather than the neighbor marching across the property line and exercising a self-help remedy, why not

<sup>15</sup> Kamali, *supra*, at 278, 283.

<sup>16</sup> Abū Dawūd, Susan Abū Dawūd, vol. II, p. 283, quoted in Kamali, *supra*, at 278-279 (emphasis added).

<sup>17</sup> *Mejelle*, *supra*, Article 1196 at 194-195 (emphasis added).



obligate the tree owner to clip back the excessive branches? These distinctions aside, both the *hadith* and the *Mejelle* are clear in tolerating, indeed, counseling, an interventionist response that limits unrestricted freedom of a property owner to do what she pleases on her property.

The chronology is worth noting. The *hadith* obviously long pre-dates the development of American Property Law, and the *Mejelle*, coming in the late 19th century, is broadly contemporaneous with that development. The idea arising in the *hadith* would take hold as a principle in Western philosophy through the writings of English philosophers John Locke (1632-1704) and John Stuart Mill (1806-1873), and come to be known as the "Harm Principle." Here, then, is another instance of a *Shari'a* precept that pre-dates a commonly accepted feature of American Property Law. That is, as in American Property Law, under the *Shari'a*, an owner of property does not have an absolute or limitless right to enjoy that property. His or her right stops where the injury of another begins. Thus, for example, an owner of real property cannot enjoy use of his or her land in a way that disturbs the exercise of the same right by a neighbor to use the neighbor's land. In practice, of course, controversies typically involve case-by-case balancing of competing interests, and a weighing of the nature and degree of the harm against the encroachment on freedom associated with an intervention.

Another noteworthy point about the Harm Principle as manifest in the *Shari'a* concerns intent (*niyaa*). To what extent, if any, does the intent of a property owner matter? That is, if an owner acts (or omits to act) on his or her property in a manner that causes harm, but the owner in no way intends to cause harm, then does the adjacent property owner still have a claim? Generally in Islamic Law, intent is a factor to be considered in determining the outcome of a case. The Penal Law, particularly the crimes of murder and infliction of bodily harm, are examples. The punishment meted out varies depending on the intent of the perpetrator. However, in Property Law, an exception to this pattern exists. Abū Yūsuf, a leading student of the founder of the *Hanafi* School, *Imām Abū Hanīfa*, argued intent is irrelevant in respect of harmful acts (or omissions) by a property owner. All that should matter is the result of the act (or omission).

This view is manifest in the *Mejelle*. That is unsurprising since it was the Civil Code of the Ottoman Empire between 1877 and 1926 and codified part of the *Hanafi*fiqh. Thus, the *Hanafi* School condones interference with the freedom of a property owner to enjoy his or her property when that owner causes harm to another, regardless of what that owner does or does not intend. There are Islamic scholars who take the opposite view. Al Shāṭibī argues intention should matter, because God envisages a purpose for a person when that person exercises a right (like ownership), and interference with that right is justified if the person does not adhere to the Divine purpose.<sup>18</sup> Still, the *Hanafi* School position seems to predominate in the *Shari'a*.

Finally, does the *Shari'a* version of the Harm Principle allow for preemptive action against a property owner to prevent occurrence of an anticipated harm that

would be caused by that owner exercising his or her proprietary rights? The question is relevant whether the potential victim is an individual with an adjacent property, or the community at large. The short answer is yes, depending on two factors — the probability and severity of the harm. Table 20-1 (on the next page) summarizes the doctrine of advanced intervention, and assumes the harm (*darar*) — if it were to occur — would be excessive.

Cases of near-certain or probable harm, at one extreme, and remote harm, at the other extreme, are easy. On them, all Four *Sunni* Schools agree on the propriety, or lack thereof, of intervention against a property owner to block an anticipated harm. Difficult cases are ones in which the probability of harm is moderate, *i.e.*, there is uncertainty. What the Table does not reveal, and what the *Shari'a* does not appear to answer in a definitive way, is how to gauge the probability and severity of harm. Should an objective test, such as a reasonable person, be used? Or, is the correct vantage the subjective impression of an adjacent property owner? As for any interference against an anticipated harm, the general rule of proportionality that pervades Islamic Law would seem to apply.

<sup>18</sup> Al Shāṭibī is a leading *Māliki* School scholar. He was born in Granada, Spain, and died in 1388 (790A.H.).

Table 20-1:

## Shari'a Doctrine on Anticipatory Intervention Against Property Rights

Anticipated Harm (Darar) to Another Property Owner, or to the Community, Caused by Exercise of Property Rights of First Property Owner	Almost Certain to Occur	Probable	Uncertain	Slight Chance
	Very High Probability of Harm Occurring	Harm is Likely to Occur	Doubt as to Whether Harm Will Occur	Unlikely or Low Probability that Harm Will Occur
Legal Result	Yes.	Yes.	Depends.	No.
Is Blockage of First Property Owner Permissible?	Interference with freedom of ownership is justified.	Interference with freedom of ownership is justified.	The <i>Mālikī</i> and <i>Ḥanbalī</i> Schools allow for preventive action. They give priority to prevention of harm over the benefit of a property owner to enjoy freely her property. They focus on the excessive nature of the harm, and take a precautionary approach. In contrast, the <i>Ḥanafī</i> and <i>Shāfi'ī</i> Schools do not approve of intervention. These Schools give priority to the proprietary rights of the owner over harm prevention. They argue the right of the owner is certain, but harm is uncertain.	Interference with freedom of ownership is not justified.

[B] 1877 Ottoman *Mejelle* and Examples of Harm Principle

Neither the Qur'an nor the *ḥadīth* provide the level of detail on restrictions on ownership to cover the myriad of real-world situations that arise in daily life. Thus, Islamic jurists (*fukahā*) have given shape to the generic Harm Principle over the centuries. The easy cases are ones in which a property owner uses his or her property in a way with no purpose other than to harm another person. There is no

benefit to the property owner (other than the perverse one of inflicting harm), who is nothing more than a transgressor. In these cases, the *Shari'a* unambiguously condones intervention to regulate the exercise of property rights by the owner, even if the harm is not yet manifest, and its occurrence is probable but not certain. Professor Kamali reports this result is:

based on the *ḥadīth* -cum-legal maxim, that "Harm may neither be inflicted nor reciprocated."<sup>19</sup>

A similarly easy set of cases involve exercise of property rights in a way that bring about a benefit to the owner, and cause a harm to another person or persons, but that harm can be avoided or mitigated if the owner revises his course of action. In other words, there is an alternative manner of enjoyment that is reasonably available to the owner. In such cases, the owner must pursue the alternative course.

The hard cases all involve balancing the free exercise of property rights against the adverse actual or threatened consequences to another from that exercise. There is no reasonably available alternative to the owner: her enjoyment spells harm to another.

. . . [W]here the owner cannot avoid inflicting harm to others, and he does need to do what he has to do, then two possibilities arise, one of which is that the anticipated harm is a general one, and the other that it is more limited or specific in its scope and effect. In the former case, the general harm must be avoided, and the owner's right of use is obstructed, but if the expected harm is specific, it is to be tolerated and may not stand in the way of the owner's right of use. This ruling is in accordance with the legal maxim that "A specific harm is tolerated in order to prevent a general one."<sup>20</sup>

Yet, this distinction between a general *darar* and specific *darar* is rather theoretical and vague. How, in practice, does the *Shari'a* differentiate the two kinds of harms?

The answer, not only in Islamic Law, but in most if not all legal systems, is case-specific. The facts and circumstances of each case must be probed to determine if a harm is "general" or "specific." Within Islamic legal circles, through the ages the debate has raged as to the appropriate balance between protecting the free exercise of ownership rights and safeguarding neighbors against harm.

In earlier times, the *Ḥanafī* and *Shāfi'ī* Schools championed the rights of owners over neighbors. For instance, they argued an owner is free to:

open windows whether or not they overlook the neighbour, or expose their women to unsolicited viewing; he is also entitled to build a high-rise that may overshadow the neighbour's house or even block the sun from it, or indeed build a shop or a factory, and dig a water well whether it harms the neighbour or not.<sup>21</sup>

<sup>19</sup> Kamali, *supra*, at 280.

<sup>20</sup> Kamali, *supra*, at 281.

<sup>21</sup> Shaykh 'Alī al-Khāfi, *al-Mukhtār fī'l-Shar' al-Islāmiyyah wa'l-Muqarānā bi'l-Shar' al-Wāḍiyyah* (Beirut: Dar al-Nahḍah al-Arabiyyah, 1990), quoted in Kamali, *supra*, at 283.

The full name of Shaykh 'Alī al-Khāfi is: 'Alī Muḥammad al-Khāfi. He lived from 1891-1978.



There were misgivings in the *Shāfi'i* and *Hanbali* Schools about unabashedly abhorring all restrictions on ownership, and the actions cited in the above-quoted paragraph, while valid (*sahih*) at law, were reprehensible (*makruh*) from a religious standpoint.

However, in recent times the *fukahā'* of the *Hanafi*, *Māliki*, and *Hanbali* have re-balanced matters in favor of neighbors. Actions by a property owner that cause harm that is outside the boundaries of local custom are neither fair nor considerate. Some cases pose obvious breaches, such as a property owner

opening a bakery next to a perfumery or drug store, or digging a well so close to his neighbour's house as to draw and divert the water from it, nor can he build a structure that overlooks and exposes the neighbour's household to unsolicited viewing, nor may the owner open a dumping yard for refuse disposal that is harmful to the neighbour. . . .<sup>22</sup>

The owner may be enjoined from such actions, or held liable for compensation to an aggrieved neighbor, for harm caused. In other cases, reference to local custom is important, as what is disturbing in a small town may be everyday life in an urban area.

Despite debates among and within the Four Schools, one of the most useful delineations of tolerable from unacceptable harms is the *Mejelle*. It is generally regarded as representing the majority view throughout the Schools. At the outset, the *Mejelle* articulates four general principles applicable in Property Law and other legal specialties:

26. To repeal a public damage (*Zarar*) a private damage is preferred . . .
27. Severe damage (*Zarar*) is made to disappear by a lighter damage. . . .
28. When two wrongful acts (*Fesad*) meet, the remedy of the greater is sought by the doing of the less. . . .
29. The smaller of two harms (*Sherr*) is chosen. . . .
30. The repelling of mischief (*Mufasid*) is preferred to the acquisition of benefits. . . .<sup>23</sup>

Article 26 explains it is preferable to have damage visited on a private party than spread across the community. Article 26 thereby provides the answer to a question of theoretical and practical significance: Who is protected by the Harm Principle? The answer is the protected circle includes not only neighbors, such as adjacent property owners, but also anyone in society, whether or not they are a property owner. Article 27 is a simple rule of proportionality, stating that lesser is preferable to greater damage. Articles 28 and 29 are the "lesser of two evils" rule, which directs the choice of the least bad alternative when there is no perfect option. Article 30 is

(1309-1398 A.H.) in the village of the Al Shuhada', Al Minufiyah, Egypt. He wrote *Al-Waqf Al-Ahli* — Its Inception, Legitimacy, Disadvantages, Resolution, and Reform, *The Impact of Death on Human Rights and Obligations*, and other books on Inheritance Law.

<sup>22</sup> KAMALI, *supra*, at 283.

<sup>23</sup> MEJELLE, *supra*, Articles 26-30 at 6-7.

another proportionality rule used when the trade off is repelling mischief or enjoying a benefit. This rule prefers the former alternative, *i.e.*, avoiding harm. In brief, the modern thrust of Articles 26-30 of the *Mejelle*, as applied to Property Law, is clear. Avoidance of *darar* matters more than protecting the benefit of free exercise of property rights. Injuring the owner (by constraining his or her freedom to do what he or she wants on his or her property) is a lesser evil than injuring a neighbor (by reducing or eliminating some fundamental benefit).

Subsequently, the *Mejelle* turns to the context of Property Law. While not precise in all respects, it lays out the basic freedom of ownership doctrine, subject to the Harm Principle, and then provides examples:

1192. Everyone makes such dispositions of his *mulk* [owned] property, as he wishes. But if the right of another is attached to it, it prevents the owner from making a disposition, as independent owner, in respect of his *mulk*. See Art. 1197.

For example. — In a building, in which the upper storey is the *mulk* property of one, and the lower storey the *mulk* property of the other, by reason of the owner of the upper storey having a right of support as regards the lower storey, and by reason of the owner of the lower storey having, as regards the upper storey a right to be roofed, that is to say, to be covered and protected from the sun and rain, one, unless he has leave from the other, cannot do anything, which will damage him, and he cannot pull down his own building.

1197. No one can be prevented for making such disposition as he likes in regard to his own *mulk*, unless there be excessive damage to another. In that case he can be prevented. As is set out in detail in Section 2.<sup>24</sup>

In terms of territory, what is the scope of the property rights of an owner? The *Mejelle* contemplates an invisible line, or plane, dividing one property from another, extending beneath and above the surface of the earth.

So, an owner has rights to the earth below and space above her property, but may not extend edifices across that imaginary plane. Articles 1194-1195 embody the rule:

1194. Whoever is *mulk* owner of a piece of land, is owner of what is above it and what is below it. That is to say, he is able to make what use of it he wishes; for instance, on building site which is his *mulk* property, to make what building he likes, and to raise it as high as he likes, and, by digging the ground, to make a cellar, and to sink a well as deep as he likes. Compare Art. 1197.

1195. A person cannot extend, over his neighbour's house, the eaves of a room made new on this house. If he does the quantity above that house is cut off. See Article 1224 [concerning rights of water flow].<sup>25</sup>

<sup>24</sup> MEJELLE, *supra*, Articles 1192, 1197 at 194-195 (emphasis added).

<sup>25</sup> MEJELLE, *supra*, Articles 1194-1195 at 194 (emphasis added).

There were misgivings in the *Shāfi'i* and *Hanbali* Schools about unabashedly abhorring all restrictions on ownership, and the actions cited in the above-quoted paragraph, while valid (*ṣaḥīḥ*) at law, were reprehensible (*makrūh*) from a religious standpoint.

However, in recent times the *fukahā'* of the *Hanafi*, *Māliki*, and *Hanbali* have re-balanced matters in favor of neighbors. Actions by a property owner that cause harm that is outside the boundaries of local custom are neither fair nor considerate. Some cases pose obvious breaches, such as a property owner

opening a bakery next to a perfumery or drug store, or digging a well so close to his neighbour's house as to draw and divert the water from it, nor can he build a structure that overlooks and exposes the neighbour's household to unsolicited viewing, nor may the owner open a dumping yard for refuse disposal that is harmful to the neighbour. . . .<sup>22</sup>

The owner may be enjoined from such actions, or held liable for compensation to an aggrieved neighbor, for harm caused. In other cases, reference to local custom is important, as what is disturbing in a small town may be everyday life in an urban area.

Despite debates among and within the Four Schools, one of the most useful delineations of tolerable from unacceptable harms is the *Mejelle*. It is generally regarded as representing the majority view throughout the Schools. At the outset, the *Mejelle* articulates four general principles applicable in Property Law and other legal specialties:

26. To repeal a public damage (*Zarar*) a private damage is preferred . . .
27. Severe damage (*Zarar*) is made to disappear by a lighter damage. . . .
28. When two wrongful acts (*Fesad*) meet, the remedy of the greater is sought by the doing of the less. . . .
29. The smaller of two harms (*Sherr*) is chosen. . . .
30. The repelling of mischief (*Mufasid*) is preferred to the acquisition of benefits. . . .<sup>23</sup>

Article 26 explains it is preferable to have damage visited on a private party than spread across the community. Article 26 thereby provides the answer to a question of theoretical and practical significance: Who is protected by the Harm Principle? The answer is the protected circle includes not only neighbors, such as adjacent property owners, but also anyone in society, whether or not they are a property owner. Article 27 is a simple rule of proportionality, stating that lesser is preferable to greater damage. Articles 28 and 29 are the "lesser of two evils" rule, which directs the choice of the least bad alternative when there is no perfect option. Article 30 is

(1309-1398 A.H.) in the village of the Al Shuhada', Al Minufiyah, Egypt. He wrote *Al-Waḥf Al-Ahli* — Its Inception, Legitimacy, Disadvantages, Resolution, and Reform, *The Impact of Death on Human Rights and Obligations*, and other books on Inheritance Law.

<sup>22</sup> KAMALI, *supra*, at 283.

<sup>23</sup> MEJELLE, *supra*, Articles 26-30 at 6-7.

another proportionality rule used when the trade off is repelling mischief or enjoying a benefit. This rule prefers the former alternative, *i.e.*, avoiding harm. In brief, the modern thrust of Articles 26-30 of the *Mejelle*, as applied to Property Law, is clear. Avoidance of *darar* matters more than protecting the benefit of free exercise of property rights. Injuring the owner (by constraining his or her freedom to do what he or she wants on his or her property) is a lesser evil than injuring a neighbor (by reducing or eliminating some fundamental benefit).

Subsequently, the *Mejelle* turns to the context of Property Law. While not precise in all respects, it lays out the basic freedom of ownership doctrine, subject to the Harm Principle, and then provides examples:

1192. Everyone makes such dispositions of his *mulk* [owned] property, as he wishes. But if the right of another is attached to it, it prevents the owner from making a disposition, as independent owner, in respect of his *mulk*. See Art. 1197.

For example. — In a building, in which the upper storey is the *mulk* property of one, and the lower storey the *mulk* property of the other, by reason of the owner of the upper storey having a right of support as regards the lower storey, and by reason of the owner of the lower storey having, as regards the upper storey a right to be roofed, that is to say, to be covered and protected from the sun and rain, one, unless he has leave from the other, cannot do anything, which will damage him, and he cannot pull down his own building.

1197. No one can be prevented for making such disposition as he likes in regard to his own *mulk*, unless there be excessive damage to another. In that case he can be prevented. As is set out in detail in Section 2.<sup>24</sup>

In terms of territory, what is the scope of the property rights of an owner? The *Mejelle* contemplates an invisible line, or plane, dividing one property from another, extending beneath and above the surface of the earth.

So, an owner has rights to the earth below and space above her property, but may not extend edifices across that imaginary plane. Articles 1194-1195 embody the rule:

1194. Whoever is *mulk* owner of a piece of land, is owner of what is above it and what is below it. That is to say, he is able to make what use of it he wishes; for instance, on building site which is his *mulk* property, to make what building he likes, and to raise it as high as he likes, and, by digging the ground, to make a cellar, and to sink a well as deep as he likes. Compare Art. 1197.

1195. A person cannot extend, over his neighbour's house, the eaves of a room made new on this house. If he does the quantity above that house is cut off. See Article 1224 [concerning rights of water flow].<sup>25</sup>

<sup>24</sup> MEJELLE, *supra*, Articles 1192, 1197 at 194-195 (emphasis added).

<sup>25</sup> MEJELLE, *supra*, Articles 1194-1195 at 194 (emphasis added).



The *Mejelle* then turns to a number of specific problems that arise in everyday life. Articles 1198 to 1201 are especially important in providing guidance. Taken together, Articles 1198-1201 accomplish more than elaborating on the Harm Principle in Islamic property law. They also indicate how remarkably well-developed this Principle had become by the late 19th century in the Ottoman Empire.

The first three of these Articles lay out key general points. Article 1198 deals with erecting structures on land, stating:

Every one can make an erection as high as he likes and can make what he likes on a wall which is his own *mulk* property, unless there has been excessive damage, his neighbour cannot prevent him.<sup>26</sup>

Article 1199 defines the term "excessive":

Things are excessive damage (*zarar fahish* [i.e., *ḍarar fāḥish*]) which damage a building, that is to say, which *weaken it and become the cause of its falling down, or, which interfere with the essential requirements*, that is to say, the *original benefit which is expected from the building*, like dwelling in it.<sup>27</sup>

This highly important definition contains two tests.

The first test is objective — does the damage weaken and become the cause of collapse? The second test is subjective. It equates "essential requirement" with an originally expected benefit, and asks whether damage nullifies or impairs (to borrow a phrase from international trade law, specifically, Article XXIII of the General Agreement on Tariffs and Trade (GATT)) the expectation of an adjacent property owner concerning a benefit that owner had in mind originally? Both tests, of course, are problematical. For instance, as to the first test, what standard of causation is required — must the damage be the direct, proximate cause, or would it suffice if the damage is an indirect, contributing cause? In other words, does "the" really mean "the only cause"? As to the second test, how much latitude is given to the diverse array of expectations among neighbors? How are expectations proven? Does "original" mean the benefit the neighbor intended when he or she first bought the property, thus disqualifying a subsequent benefit anticipated or enjoyed? Regarding both tests, surely local custom and practice matter? Different communities, even within the same Muslim country, and certainly across different Muslim countries, are certain to have different views on whether a common set of facts — jack-hammering next door at 8:00 a.m., for example — causes excessive damage.

Despite these ambiguities, the Ottoman effort to define criteria for "excessive damage" not only is intrinsically commendable, but also bespeaks the sophistication of Islamic Property Law in balancing freedom of ownership against rights of neighbors. Without a remedy against "excessive damage," of course, the balancing test would be pure theory. But, the *Mejelle* continues, in Article 1200, with a remedy:

Excessive damage in whatever way it may be caused is to be removed.<sup>28</sup>

Similarly, Article 1214 has a general doctrine about nuisances, demanding their removal:

Things which are excessive damage to a passer by, like projecting enclosures and balconies which are above a public road, even if they be ancient, are caused to be removed.<sup>29</sup>

The phrase "in whatever way" in Article 1200 seems to modify "removed," thus suggesting wide latitude for methods to deal with harm caused by the property of another. Of concern is the extent to which self-help is permissible by this phraseology.

Following these general points, Article 1200 of the *Mejelle* provides dramatic examples that the *Shar'ia* protects the interests of adjacent property owners not only from direct physical harm, but also from indirect and relatively less tangible damage. Noxious odors, fumes, particulate matter, blockage of air flow, or water or sewage spillage, can constitute "excessive" damage:

For example. — When a forge or mill is made touching a house, and weakness is caused to the building of the house by the striking of the iron or the turning of the mill, or, when it is not possible for the owner to live in his house from the bad smell, made by a new linseed oil factory, or, the excessive smoke made by a new oven, because these damages are excessive damage, they can be put a stop to in any way which is possible.

Again, if someone, on a building site touching the house of another, makes a new water channel, and weakens the wall of the house by the taking of the water to his mill, or if someone makes a dust heap at the foot of his neighbour's wall, and, by throwing his sweepings there the wall is decayed, the owner of the wall can cause the damage to be removed.

Likewise, when the owner of a house is annoyed, by the dust coming from a threshing floor newly made by someone else near his house, to such an extent that he cannot live in that house, the damage from it is put to an end.

So also, if someone cuts off the wind of the threshing floor of another, with a new high building near the place of the threshing floor, it can be put a stop to, by reason of its being excessive damage.

Likewise, if someone makes a new cook shop in the market of the cloth merchants, and its smoke causes excessive damage by falling on the goods of his neighbours, it can be put a stop to.

And likewise, on the sewer which is in a person's house being broken, if there is excessive damage by the flowing into the house of his neighbour, on

<sup>26</sup> MEJELLE, *supra*, Articles 96-97 at 15.

<sup>27</sup> MEJELLE, *supra*, Article 1199 at 195.

<sup>28</sup> MEJELLE, *supra*, Article 1200 at 195.

<sup>29</sup> MEJELLE, *supra*, Articles 1214 at 199.

action brought by the neighbour, the repairing and improving of that sewer becomes necessary.<sup>30</sup>

Critically important to appreciate is the fact that the Article 1200 illustrations are not exclusive. They are indicative examples, and an Islamic judge (*qāḍī*) is free to use analogical reasoning (*qiyās*) to rule on a particular claim that an alleged injury, while not fitting squarely within an Article 1200 illustration, is sufficiently akin to one of them to be actionable. As long as the legal trigger is met — proof of “excessive damage” as defined in Article 1199 — there is in principle no limit to the scope of behaviors by one property owner that could be condemned as causing harm to neighbors.

Article 1201 of the *Mejelle* elaborates on the meaning of “excessive damage.” It introduces the concept of “fundamental necessity” for the context of the second test from Article 1199, concerning “original benefit.” Only “damage” to a “fundamental necessity” would fall within the scope of “excessiveness”:

To interfere with *benefits* which are *not fundamental necessities*, like *interfering with the sun* coming in or *cutting off the view or air* of a house, is *not excessive damage* (*zarar fahish* [i.e., *ḍarar fāhish*]).

But to stop the light *altogether* is excessive damage.

Therefore, when someone, with a new building has blocked the window of a neighbour's room which has one window, *if it is so dark that writing cannot be read*, he can be made to remove it, by reason of their being *excessive damage*. It cannot be said “Let the light come through the door, because it is necessary to shut the door on account of the cold and for other causes.”

But if the room has *two windows*, and one of them is blocked with a new building in the manner above mentioned it is not considered excessive damage.<sup>31</sup>

Evidently, light, view, and air all are within the realm of “fundamental necessities” to which a property owner has a legitimate original expected benefit. They are not *per se* “original benefits” that are “fundamental necessities,” in that some blockage is permissible. Complete occlusion — at least of sunlight, and by extension, of a view and air flow — would constitute “excessive damage.” In effect, it is unreasonable for an adjacent property owner to expect as original benefits unrestricted sunlight, full view, and unobstructed air flow in perpetuity. If that expectation were legally enforceable, then property development would be all but impossible, particularly in urban areas. Thus, Article 1201 draws the line at full versus partial closing, which again involves an examination and weighing of facts and circumstances.

<sup>30</sup> MEJELLE, *supra*, Article 1200 at 195-196 (emphasis added).

<sup>31</sup> MEJELLE, *supra*, Article 1201 at 196 (emphasis added).

## [C] Women, Privacy, and Physical Barriers

Do women need the protection of physical barriers from damage inflicted by neighbors, particularly men, who might peep on them? Conversely, do men need this kind of protection from the temptation to ogle women? The questions test the outer limits of the Harm Principle and are controversial. The *Mejelle* responds with a clear “yes.”

Articles 1202-1206 of the *Mejelle* single out places frequented by women as needing protection from “excessive” damage:

1202. That the places which women frequent, like a kitchen, the head of a well and the courtyard of a house, should be seen, is considered excessive damage (*zarar fahish*).

Therefore, if from a window newly made in someone's house, or from the window of a house which has been newly built, the places which the women frequent of the adjoining neighbour, or of the person who is on the other side of the street, are seen, an order is made for the removal of this damage.

And that person is compelled to put a stop to that damage, by building a wall, or wooden partition in such a way that the women will not be able to be seen.

But in any case he is not compelled to block his window.

Likewise if through the gaps of a fence made of wood, his neighbour's places which the women frequent are seen, the owner of the fence is ordered to stop [i.e., plug] those gaps, but he is not compelled to pull down the fence and make a wall. . . .<sup>32</sup>

In other words, women are entitled to greater privacy than men. The threat is posed by the wandering eyes of men who are neighbors, or living across the street. The remedy is to confer on women a physical property right, namely, to structural coverage.

Articles 1203 through 1206 elaborate on the general privacy rule of Article 1202:

1203. When one's window as regards the ground is higher than the height of a man, his neighbour cannot block that window on the ground that there is a probability that by placing a ladder, he looks into the neighbour's place which the women frequent. See Article 74.

1204. A garden is not considered to be a place which women frequent.

Therefore, when from a person's house his neighbour's places which the women frequent are not seen, except by his garden being seen, his neighbour cannot say, “Shut off the view which there is into my garden,” by reason of the women being seen at the time only when they come into the garden.

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And that person is compelled to put a stop to that damage, by building a wall, or wooden partition in such a way that the women will not be able to be seen.

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<sup>32</sup> MEJELLE, *supra*, Article 1202 at 196.

1205. If, when someone goes up into a fruit tree which is in his garden, his neighbour's place which the women frequent is seen, when that person goes up into that tree, he must give notice for the women to cover.

If he has not given notice, the judge prevents him from going up into that tree without notice.

1206. When two persons have divided a house which they held jointly between them, and from the place which is assigned to the share of one of them, the part of the other which the women frequent is seen, an order is made for them to make a screen between them.<sup>33</sup>

Evidently, Article 1203 circumscribes the general impulse toward intervention to protect women, dealing with the peculiar case of a high window and the possibility a neighboring man might climb a ladder to peep through that window. The reference to Article 74 helps explain Article 1203, as Article 74 says that no evidentiary is given to imagination lacking a foundation in fact. In other words, it seems even if there scenario is probable, it is not sufficiently so to justify intervention in the form of blocking the window.

Article 1204 presents a counter-intuitive idea, namely, that a garden is not a women's place. The idea is counter-intuitive for an array of reasons, from the Biblical Garden of Eden story to the time-honored observation that women and men alike enjoy working and spending time in gardens. Nonetheless, Article 1204 says there is no need to block the view from one property into a neighboring garden, in which women occasionally are present, because women are not normally expected to be in the garden.

Article 1205 seems almost incongruous with the two previous Articles. Under Article 1205, climbing a tree — not any tree, but a fruit tree — that would allow for a glimpse of women in a neighboring garden requires prior notice from the climber to the neighbor, so that if women are present in the garden, they have the chance to cover themselves. The notice is required of anyone, whether or not the climber owns the property on which the fruit tree is located. Oddly, Article 1203 demands no prior notice of a ladder climber, nor does Article 1204 demand prior notice from a person next door. Article 1206 deals with a final scenario in which post-partition property owners must screen off the areas in their respective shares in which women inhabit.

Articles 1202-1206 of the *Mejelle* translate a right to privacy into a restriction on the free exercise of ownership. Yet, by contemporary standards in the non-Muslim world, and parts of the Muslim world, the regime created by these provisions is wrong-headed. Possible wandering eyes of men are put on par with excessive damage caused by dust, smoke, sewage, and structural deterioration as harm in need of a remedy. The regime undermines the dignity of women, paternalistically presuming they are incapable within their own homes and gardens from taking care of themselves — a notion at odds with the general Islamic cultural (if not religious) sentiment that women are in charge of the household. Equally troubling, there is a sinister sense the rules imprison women behind high barriers, diminishing their

<sup>33</sup> *MEJELLE*, *supra*, Articles 1203-1206 at 196-197.

human spirit by architectural closure, and punishing them because of the sin of a few men. That sense is confirmed by the cold walls, iron bars, and even wire barriers that ring fence many homes in the Arab Middle East.

## § 20.04 CATEGORY #2 RESTRICTIONS: PUBLIC INTEREST (MAṢLAHAH)

### [A] Encumbrances (Servitudes)

Associated with restrictions on ownership to prevent harm are encumbrances, or servitudes, as they are termed in American Property Law. They concern benefits other persons need or ought to have, particularly if private property is to be managed in a socially responsible manner. Thus, these limitations can equally well fall under the category of restrictions to serve the public interest (*maṣlahah*).

In practice, whether a restriction is oriented to that interest, or harm avoidance, depends on its nature and beneficiary. As in American Property Law, under the *Shari'a* there are a diverse array of instances in which a private property owner must yield to neighbors and strangers alike certain rights of passage and water flow.<sup>34</sup> If neighbors are the general public, then categorizing the limit as one serving the public interest is more accurate than calling it harm avoidance to serve a single neighboring individual.

In particular, permissible servitudes under Islamic Law include a right to pass over a portion of a parcel of land, which in American Property Law is well-known as an "easement." Also required of a private property owner is a right to let water flow, or to pour out water, in respect of water (such as a river) passing through her land or sourced on that land (such as a spring). Further, neighbors and strangers have the right to draw water, or water their animals, from water passing or sourced on land of a private owner.

The right of flow (in Arabic, "*haqq al-majrā*") is based on a precedent set in a case during the *Rashidun* Era, specifically, the Caliph 'Umar:

al-Dahhāk Ibn Khalifa extended a water stream within his property, which had to go through the land of Muhammad bin Maslama. When Dahhāk asked for Maslama's permission, he refused, but Dahhāk went on to say that it would be equally beneficial for both of them, and that Maslama was welcome to use all the water he needed for his land first. But Maslama still refused to give permission. Dahhāk then informed the caliph 'Umar, who also tried to persuade Maslama to agree to the proposed extension of the water stream, which would be of benefit to both. Once again, Maslama is said to have declined the suggestion without having any reasonable excuse. So the caliph compelled Maslama and issued an order that authorised Dahhāk to extend the canal.<sup>35</sup>

<sup>34</sup> See JOSEPH SCHACHT, AN INTRODUCTION TO ISLAMIC LAW 142 (Oxford, England: Oxford University Press (Clarendon Paperbacks) 1982). [Hereinafter, SCHACHT.] See generally MARDISI, *supra*, ch. IV.F (concerning water rights).

<sup>35</sup> KAMALI, *supra*, at 279.



Note the three aspects of this interventionist response. First, it is state-sanctioned, suggesting self-help is not a first resort. Second, state support is given only after the complainant-neighbor (Maslama) has shown reasonableness (specifically, offering full water usage to the property owner, Ḍahhāk), and that owner has proven intransigent (by refusing permission without justification). Third, the response calls for the minimal amount of action needed to mitigate the harm.

The *Mejelle* also contains provisions tantamount to recognition of the existence of an encumbrance. For example, Article 1193 states:

When there is one street door for the lower and upper storey [of a building], the owners of the two storeys make use of that door as though it were owned in common. One cannot prevent the other from coming in and going out.<sup>36</sup>

Re-cast in terms of an encumbrance, the owner of the lower storey may be the single owner of the door. But, in practice the owner of the upper storey has a right of passage through the door.

### [B] Takings: Expropriation (*Muṣādarah*), Nationalization (*Ta'mīm*), and Their Contexts

"Takings" is a generic term referring to the expropriation — called "*muṣādarah*" in Arabic — of private property. An important kind of takings is an appropriation of private property into the hands of a government authority, whereby the government permanently acquires ownership. That event typically is called "nationalization," or "*ta'mīm*," and the term usually is applied when a government takes over an entire enterprise (e.g., a particular farm or commercial bank), industry (e.g., all dairy farms, or all commercial banks), or even sector of an economy (e.g., all farms, regardless of the kind of crop or livestock raised, or all financial services, including commercial banks, investment banks, and insurance companies). American Property Law has a long, deep jurisprudence on takings. The 5th Amendment to the United States Constitution concerns takings, and is the subject of a large volume of Supreme Court cases.

Professor Schacht reports that, by contrast, the *Shari'a* does not deal extensively with takings.<sup>37</sup> That observation is dubious, if not erroneous. There is a long history on the subject. Consider, for instance, a constraint on eminent domain arising in the *Abbasid* Caliphate, namely, that government assertion of a taking of a private interest must not be arbitrary or capricious, but rather premised on a legitimate basis:

. . . Chief Justice Abū Yūsuf . . . addressed the caliph Hārūn al-Rashid in the following terms: "No one may take away anything from anyone unless it is on the basis of a well-known and clearly established right."<sup>38</sup>

<sup>36</sup> MEJELLE, *supra*, Article 1193 at 194.

<sup>37</sup> SCHACHT, *supra*, at 142.

<sup>38</sup> KAMALI, *supra*, at 284.

Lest there be any doubt as to the existence of a robust takings doctrine in the *Shari'a*, the *Mejelle* resolves it.

Concerning expropriation, which in Arabic is called "*muṣādarah*," Article 1216 of the *Mejelle* says:

In time of necessity, by command of the Sultan, a man's *mulk* [owned] property can be taken for its value, and joined to the road. But until the price is paid his *mulk* cannot be taken out of his hands. . . .<sup>39</sup>

Other examples where a taking of private property may be appropriate include extension of a road, construction of a new road, dam, energy plant, park, or recreation ground, or circumscribing the operation of an agricultural or industrial enterprise (e.g., a farm or factory). Similarly, a property owner dumping refuse or sewage water onto a public thoroughfare, or one whose land is required to turn into a public pasture for the community, may necessitate a taking.<sup>40</sup>

Still another context in which expropriation is legitimate is compulsion by a government authority that an individual or business hoarding or stockpiling food must sell food (some or all of it) at a fair price, or even at a government-set price. (In egregious cases, a follow-on discretionary (*ta'zīr*) punishment may be applied against the hoarder.) The *Shari'a* forbids hoarding, which is called "*ihṭikār*." It is an abuse of ownership rights, and offends the public interest. Three *ḥadīths* speak directly to the point:

- Recorded by Ṣaḥīḥ Muslim —  
He who hoards is a sinner.<sup>41</sup>
- Recorded by Shawkānī —

The one who hoards with the intention of pushing prices higher for the

<sup>39</sup> MEJELLE, *supra*, Articles 1216 at 199.

<sup>40</sup> In respect of turning private property into public pasture, Professor Kamali quotes the following *ḥadīth*:

Pastures are only for God and His Messenger.

He alleges this *ḥadīth* is recounted not only by Abū Dāwūd, in *Sunan*, ed., Al-Bughṭā, 444, *ḥadīth* no. 3083, but also in Bukhārī, *Mukhtaṣar Ṣaḥīḥ Al-Bukhārī*, 95, *ḥadīth* no. 99. See KAMALI, *supra*, endnote 96 at 285, 300. However, a search of Dr. Muḥammad Muḥsin Khan, *The Translation of the Meanings of Ṣaḥīḥ Al-Bukhārī*, Arabic-English (Medina, Kingdom of Saudi Arabia: Dar Ahyā Us-Sunnah Al Nabawiya (House Revival of the Prophetic Teaching), March 1978), does not reveal the above-quoted *ḥadīth*. [Hereinafter, BUKHARĪ.] This *ḥadīth* is found in at least one edition of the *ḥadīths* as compiled by Al-Bukhārī, in the book *Musāqāh*, vol. II, *ḥadīth* no. 2241.

Regardless of the correct citation for this *ḥadīth*, precedents in favor of the proposition exist: Reports indicate that the Prophet turned al-Naqī' (a land area in Madina [Medina]) into a pasture to provide feeding grounds for horses owned by the people. This was equivalent to what Wahba al-Zuhayli calls "nationalization in contemporary terminology." The caliph 'Umar b. al-Khaṭṭāb also assigned two land areas, al-Rabḍa and al-Sharf, between Mecca and Madina, as pastures for the benefit of the community. The caliph expropriated that land from its private owners, about which the owners initially protested, but the caliph reasoned with them that the "horses of *jihād*" needed grazing land, and that the land would also be opened up for the use of the whole community, including the previous owners.

KAMALI, *supra*, at 288.

<sup>41</sup> MUSLIM, *supra*, vol. IIIA, book 22 (Book of Share Tenancy), p. 62, *ḥadīth* no. 1605.

*Mustims* is a transgressor.<sup>42</sup>

- Also recorded by Shawkāni —

The one who interferes with market prices in order to push them up, reserves for himself God's punishment of Hellfire on the Day of Resurrection.<sup>43</sup>

The logic for expropriation is a hoarder capitalizes on the need of common people for food. The hoarder advances his or her own self-interest by constricting the supply of an essential commodity, thereby causing the price of that commodity to rise. In consequence, the hoarder can charge prices above normal market equilibrium values, and earn super-normal profits. Consumers who can afford the elevated prices suffer by paying excessively. Consumers too poor to purchase the hoarded commodity are left wanting.

Observe, however, the three *hadīths* on hoarding are not identical. Because it is so brief, on its own without elaboration, the first one makes hoarding a strict liability transgression. In the second and third *hadīths*, the mere act of stockpiling foodstuffs does not suffice to justify an interference with private property. There also is a *mens rea* element. A hoarder must act with the intent to drive up prices and exploit disadvantaged prospective buyers. Otherwise, his or her property cannot be expropriated, indeed it would be counter-productive to do so. Stockpiling of essential commodities plays a constructive role in an economy, namely, a buffer against periods of low output.

Put simply, the second and third *hadīths* capture the true meaning of the first *hadīth*. That is apparent from the Explanatory Note of Dr. Hassan to the first *hadīth*:

All hoarders are not sinners. The hoarder in fact creates time utility and contributes to production and contributes to production, i.e., he stores goods in periods of plenty and sells them when there is comparatively more demand for them and as such he is entitled to a share in production, for he preserves goods for a certain period and helps in . . . maintaining the constant flow of their supply in the market. That hoarder is condemned as a sinner who withholds goods in the market from a genuine consumer for the purpose of creating artificial scarcity and then takes undue advantage of the helplessness of the people. Such a selfish hoarder who is devoid of humanly feelings deserves condemnation, but especially condemnable is the hoarder of foodstuff who is out to reap profits out of the helplessness of the poor people.<sup>44</sup>

Observe, too, that the second *hadīth* contains yet another element, which concerns Muslim buyers. But, the precise nature of this element is elusive from the *hadīth*

<sup>42</sup> YAHYA BIN 'ALI AL-SHAWKĀNI, *NAVĪ AL-AB'ŪT: SHARH MUNTAFĀ AL-AKHĪAR* vol. V at 249 (Cairo, Egypt: Muṣṭafā al-Bāḥi al-Halabī, undated) [hereinafter, AL-SHAWKĀNI], quoted in KAMALI, *supra*, at 289 (emphasis added).

<sup>43</sup> AL-SHAWKĀNI, *supra*, vol. V at 249, quoted in KAMALI, *supra*, at 290 (emphasis added).

<sup>44</sup> MUSELM, *supra*, vol. IIIA, book 22 (Book of Share Tenancy), pp. 62-63, Explanatory Note (4) to *hadīth* no. 1605 (emphasis added).

itself, and the Explanatory Note does not clear up the ambiguity.

One possibility is that a hoarder must act with the intent of charging Muslim buyers a higher price. In effect, the *mens rea* element is two-pronged: the hoarder must have (1) an intention to push up prices (2) for Muslims. As long as the hoarder intends to push up prices only for non-Muslims, then an expropriation is not justified. The other possibility is the hoarder simply seeks to drive up prices faced by every consumer, regardless of religious faith, but it so happens that Muslims are among the prospective buyers. That is, the hoarder acts with intent to push up prices generally, but Muslims are victimized by the higher prices. The difference between the two possibilities under the second *hadīth* concerns the evidence a government authority must adduce to justify an expropriation. Nevertheless, the broad point is clear enough — hoarding is a legitimate basis for expropriation of private property.

Enlargement of a mosque also qualifies as a reason for a valid expropriation. Precedents were set under the Four Rightly Guided Caliphs, specifically, 'Umar and 'Uthmān. Following these precedents, during the reign of King Fahd bin 'Abd al-Aziz, which spanned 1982-2005 the government of Saudi Arabia expropriated private property surrounding the Grand Mosque in Mecca to expand that Mosque, which of course houses the *Ka'ba*. The expropriations occurred from 1988-1995 and were controversial, despite their religious purpose. The Ottoman Empire had controlled Mecca, and many of the expropriated properties had been held by Turkish families since Ottoman period. Some of the contemporary Turkish owners donated the property willingly, motivated by the religious purpose to which their property would be put, and perhaps hoping for a corresponding religious reward. Other owners, however, were enraged at what they perceived as unfairly low compensation. Property around the Grand Mosque always has been some of the most prized, and pricey, real estate in the Muslim world.

These precedents are a point of contrast between the *Sharī'a*, a sacred legal system in which mosque and state are not officially separate, and the American legal system, where separation of church and state is a Constitutional principle. Taking private property by the government so it can expand a religious place of worship would be inconceivable in the United States, as well as many other non-Muslim countries.

### [C] Public Interest (*Maşlahah*) and Other Restrictions on Takings

The basic rule in the *Sharī'a* is expropriation (*muṣādarah*) is possible, if it is in the public interest (*maşlahah*). That is true whether the restriction on private property occurs after it is acquired by an owner or owners (the typical case), or before its acquisition. Significantly, this rule also applies to the nationalization (*ta'mīm*) of property. Indeed, in its first session, in 1964, the Academy of Islamic Research, which is headquartered in Cairo, stated that nationalization is permissible under Islamic Law, but only if it is in support of the public interest, and



then too, a compelling one, and done within reasonable bounds.<sup>45</sup> It cannot amount to usurpation (*ghaṣb*). By "public interest," the Academy focused on social and economic justice, specifically, the achievement of socioeconomic balance and the avoidance of gross inequities.

To be sure, the basic restriction on expropriation (*muṣāḍarah*) and nationalization (*ta'mim*) is generic. What specific legal parameters exist to delineate valid from invalid governmental takings? Aside from comporting with the general precepts of the Qur'an and *Sunnah*, there are four strict limits the public authority must respect in any expropriation or nationalization. The first two limits are procedural in nature, and the fourth limit concerns compensation once a decision in favor of expropriation or nationalization is taken. Substantively, the third discipline imposes the greatest rigor.

First, every effort to reach a compromise by reconciling the rights of a private owner to the interest of the public should be made. Expropriation (*muṣāḍarah*) or nationalization (*ta'mim*) of private property is a last resort. Recourse is made to it only when the conflict neither can be avoided nor resolved.

Second, the least restrictive intrusion should be exercised. In particular, an expropriation (*muṣāḍarah*) should not impose any greater burden on a private owner, or her property, than needed to accomplish the goal of the taking, namely, promoting the public interest. In no event should a property owner be made to suffer irreparable harm. To be sure, what kind of imposition on private interests is minimalist differs from one case to another, though nationalization (*ta'mim*) are almost invariably draconian.

Third, as intimated in the above-quoted counsel from Abū Yūsuf, there must be a *bona fide* public interest at stake. Obviously, partisan politics, corrupt self-interest of government officials, or even a moderate worry about public safety will not suffice. All such instances would fall under the well-known American legal rubric of being arbitrary and capricious, and considered wrongful. What criteria are used to identify a legitimate public interest? The key answer comes from Abū Hāmid Al Ghazālī, one of the greatest Islamic legal scholars, who lived from 1058-1111 A.D. in what is now Iran, Iraq, Syria, and Palestine, and who turned to Sufi mysticism.

In his treatise *Al Mustasfa min 'Ilm al Uṣūl* (*The Best from the Science of the Roots [of the Jurisprudence]*), Al Ghazali equates the public interest with necessity (*ḍarūrah*). As Professor Kamali explains:

*Maṣlaḥah* and necessity often co-exist, especially in the area of the five essential values of the *Shari'ah*. . . . The purpose of *maṣlaḥah* is to protect basic values of religion, life, intellect, family [sometimes referred to as "honor"], and property, which constitute the overriding goals of the *Shari'ah*. When *maṣlaḥah* works towards the protection of these values, and it concerns society at large, it is equated with necessity (*ḍarūrah*). *Maṣlaḥah* in this sense is, according to al-Ghazālī, equivalent to *ḍarūrah*, and the two tend to coincide in regard to the protection of these values. In

al-Ghazālī's phrase, "These five values represent the highest *maṣāliḥ* [the plural of *maṣlaḥah*, i.e., public interests], and they are in reality identical with necessities." When an owner's exercise of his [property] right threatens the safety of these values in such a way that one of them has to be given preference in order to protect the other, then the protection of the basic values takes priority over ownership rights. The authorities are therefore within their rights to take measures to ensure that private ownership does not jeopardize considerations of public interest.<sup>46</sup>

Note the rigor of Al Ghazālī's equation. A taking must be in the public interest, and public interest means defense of one of five supreme values in Islamic Law. Ostensibly, there is some circularity in listing property as one value in the context in which expropriation (*muṣāḍarah*) or nationalization (*ta'mim*) is at issue. Yet, the idea is one of rebuttable presumption: unless otherwise shown, private property interests are supreme.

These values are of utmost significance, because the social order is eroded progressively, and even could collapse quickly, when they are not practiced. They are the foundations on which the social order rests. Failure to observe them poses a grave threat to this order. There are plenty of potential uses for private property that a government can concoct to justify a taking. But, many of them amount to little else than desirability. Desirability is not the same as necessity. Desirability essentially is a preference of one or more powerful government officials, or a handful of well-connected elites. Necessity implicates concerns about the future of society itself.

Complementing the teach of Al Ghazālī is a point about probability. The benefits of the taking — defending core values — must not be hypothetical, improbable, speculative, or specious. They must be real, and affect the general community, not favor personal biases. How, then, might the third discipline be summarized? Significantly, Professor Kamali goes so far *maṣlaḥah* with a utilitarian calculation:

. . . the test here is that it [the taking or private property in support of *maṣlaḥah*] must bring the greatest benefit to the largest number of people.<sup>47</sup>

John Stuart Mill himself could not have put the point more clearly.

Conversely, in all instances in which the test is failed, it means essential benefits to religion, life, intellect, family (honor), or property are not in jeopardy. Then, private property and the rights of an owner must be championed over competing interests of the government or public at large. Otherwise, the taking would amount to nothing more than government usurpation (*ghaṣb*) of private property. Two *hadiths* recorded by *Imām* Bukhari in a Chapter bearing the rubric "The sin of him who usurps the land of others," clearly condemn usurpation:

- Allah's Apostle . . . said, "Whoever usurps the land of somebody unjustly, his neck will be encircled with it down the seven earths (on the Day of

<sup>46</sup> ABU HAMID AL GHAZALI, *AL MUSTASFA MIN 'ILM AL UṢUL* (Beirut, Lebanon: Dār Ihya' Tarīth al-'Arabī undated), quoted in KAMALI, *supra*, at 284.

<sup>47</sup> KAMALI, *supra*, at 286.

<sup>45</sup> See KAMALI, *supra*, at 288.

Resurrection [Judgment])."<sup>48</sup>

- Abū Salama narrated that there was a dispute between him and some people (about a piece of land). When he told 'Ā'isha . . . about it, she said, "O Abū Salama! Avoid taking the land unjustly, for the Prophet . . . said, Whoever usurps even one span of the land of somebody, his neck will be encircled down the seven earths."<sup>49</sup>

Neither *ḥadīth* is limited to a particular category of transgressor. Both apply equally to a disingenuous governmental takings or private party encroachments. In turn, the criterion established by Al Ghazālī, along with these *ḥadīths*, are further illustrations of a doctrine deeply rooted in the *Shari'a* that supports modern capitalist economic development.

Fourth, compensation must be paid to an owner suffering a loss, assuming she acquired the property lawfully. The general standard is a fair price for any expropriation (*muṣādarah*) or nationalization (*ta'mīm*), which as Professor Kamali explains:

is in harmony with the *Shari'ah* rules of justice and equality. . . . This is what the caliph 'Umar b. al-Khaṭṭāb did when he expropriated the private dwellings of some individuals for the expansion of the holy mosque of the *Ka'ba* after the payment of fair compensation to its owners.<sup>50</sup>

However, "fair" is hardly a precise directive. What is fair, and who judges?

Article 1216 of the *Mejelle*, quoted above, is not of much help, either. It states an owner whose property is condemned by eminent domain must be paid "value," and the payment must occur before the taking. But, the standard of valuation is unclear — historical book value on the date the asset was acquired, market value on the date of the taking, or some other benchmark? Suppose a nationalized asset subsequently is sold by the government owner to the public (e.g., via an auction of shares). Should the initial private owners of the asset be given the proceeds from the government sale? Since at least the Ottoman Empire, and continuing through the present, this question has provoked a plethora of disputes in Muslim countries — as it has and does in non-Muslim lands.

A wrenching situation arises when taking of private property is necessary to secure the public interest, yet the government contemplating the taking lacks sufficient funds to pay a fair price. The treasury (*bayt al-māl*) is low on funds, or possibly insolvent. Is the intrusion on private property permissible here? The answer is "yes." But, the test to ensure the taking is valid is rigorous. It must be clear the public interest can be protected only by expropriating the property without compensation.<sup>51</sup>

<sup>48</sup> BURKARL, *supra*, vol. III, book XLII (The Book of *Luqata* (A Well-Tied Pouch or Parse or Lost Things Picked Up By Somebody)), p. 379, *ḥadīth* no. 632.

<sup>49</sup> BURKARL, *supra*, vol. III, book XLII (The Book of *Luqata* (A Well-Tied Pouch or Parse or Lost Things Picked Up By Somebody)), p. 379, *ḥadīth* no. 633.

<sup>50</sup> KAMALI, *supra*, at 287.

<sup>51</sup> See KAMALI *supra*, at 289.

In practice, who applies the four disciplines — especially the third, *maṣlahah* — to a proposed expropriation (*muṣādarah*) or nationalization (*ta'mīm*)? This responsibility differs from one Muslim country to the next, depending on governmental structure. However, in theory, independent religious and legal experts are the ultimate authority. So, unless there is an urgent necessity (which is not typical in takings cases), where alacrity is demanded, consultation is required with *ulema* and *fukahā'* before deciding on a taking of private property. That is especially true if the taking is a nationalization, such as of an industry (e.g., steel) or service sector (e.g., banking).

## [D] Taxation

Taxation is a practical, everyday occurrence that is a restriction on private ownership designed to advance the public interest. One obvious kind of taxation is *zakāt*, though it is properly regarded as a religious obligation of almsgiving. To be sure, it is a legally enforceable obligation. That is because, as *surah* 51, *ayah* 19 puts it when describing the "righteous" who will go to Heaven, "the beggar and the deprived" have a claim on "a rightful share of their wealth," i.e., on *zakāt*.<sup>52</sup> Accordingly, a *Shari'a* court could order satisfaction of the obligation from the assets of a property owner who both refused to pay *zakāt* and was absent (possibly by fleeing the relevant jurisdiction). For present purposes, is *zakāt* property regarded as a restriction on private ownership designed to advance the public interest? Arguably, yes. Almsgiving helps ensure the underprivileged are cared for, and offsets tendencies toward socioeconomic stratification.

Similarly, is it appropriate to deem as a restriction on private ownership the obligation to provide maintenance (*nafaka*) to close relatives? As with *zakāt*, the answer, arguably, is "yes." The *Shari'a* requires a property owner to take care of his or her spouse, children, and parents. Protecting them is a preeminent obligation. The obligation, *nafaka* is enforceable at law. As with *zakāt*, an Islamic judge (*qāḍī*) can order payment of *nafaka* from assets of a recalcitrant and missing property owner.

Additionally, if they are in need, then children stay within the circle of closeness, even after they have matured into adulthood. Given the large family sizes in most Muslim countries, "close" should not be confused with "small." In fact, with fertility rates hovering near or even above 5 in some Gulf countries, the obligation to supporting close relatives applies to anything but a nuclear family. Just how large is the circle of close relatives? Would it include siblings, uncles, aunts, cousins, and so on?

There is a spectrum of possibilities among the Four *Sunni* Schools. At one end, *Mālikī* School *fukahā'* limit entitlement to *nafaqah* to parents and children of a property owner. Towards that end of the spectrum, the *Shāfi'i* School *fukahā'* say only a direct ascendant or descendant of a prospective obligor is entitled to maintenance. Grandparents and grandchildren, therefore, would be included by this School. Towards the other end of the spectrum, the *Ḥanbalī* School *fukahā'* urge that a relative is entitled to obligatory maintenance if that relative is entitled

<sup>52</sup> QUR'AN, *supra*, 51:19 at 343.



to an inheritance from the obligor, in accordance with distributional shares prescribed by the Qur'an. Consequently, siblings, and even half-brothers and half-sisters, are entitled to *nafaqah*. At the other end, *Hanafi* School *fukahā'* extend the maintenance obligation to collateral relatives without requiring they be entitled to a share of any inheritance. That means a property owner is obliged to assist persons who are not close relatives, and thus not legal heirs.

Of course, there are non-religious taxes that every Muslim government typically levies to fund its treasury (*bayt al-māl*) and thereby provide citizens with normal services. One example is a land tax (*kharāj*). Other examples are taxes levied on business or individual incomes, consumption (i.e., sales taxes, such as a Value Added Tax (VAT)), tariffs and other customs duties, and ports and cargo ships visiting ports. In all instances, four conditions must be satisfied for a tax to be considered legitimate.

First, it must serve the public interest (*maṣlaḥah*). Examples are defense, education, health care, infrastructure, and public safety. Second, it must be necessary (*darūrāh*). An illustration *Imām Mālik* suggests is when the treasury is depleted of funds. Third, the level of taxation must be the minimum necessary (i.e., represent the least possible intrusion on asset owners) to achieve its public purpose. *Abū Yūsuf*, student of *Imām Abū Hanīfa* and Chief *Qāḍī* of the *Abbasid* Caliphate, wrote in his book *Kitāb al-Kharāj*, that a government may not increase taxes if the *bayt al-māl* has sufficient funds to cover official operations and maintain public order. Fourth, no tax is to be levied on a person incapable of paying it. Underlying these conditions is respect for private property.

#### § 20.05 CATEGORY #3 RESTRICTIONS: PROMOTING COOPERATION AND RIGHT OF PRE-EMPTION (SHUF'AH)

A right of first refusal is a provision commonly found in commercial agreements in the non-Muslim world. For instance, a contract for the sale of a good may obligate the buyer to offer that good to the seller, before selling the good to a third party. Likewise, a partnership contract may state that in the event one partner leaves the association, the remaining partners must be given the opportunity to buy her shares in the association, before those shares are offered to an outsider. Rights of first refusal also are observed in the context of property transactions, where a buyer-owner must give the option to purchase the parcel of land in question to a defined person or group of persons, before offering that parcel on the open market.

What is distinct about Islamic Law, however, is that a right of first refusal is built into Property Law. A property owner has an obligation to offer property for sale to a co-owner, and possibly even to a neighbor, before selling the property to a third party. The right is not a matter of free contractual negotiation, i.e., property owners do not have the option to concede or reject this obligation. In the *Shari'a*, the term for this right is "shuf'ah," which translates as "pre-emption."<sup>53</sup> As just intimated,

<sup>53</sup> See generally Makdisi, *supra*, ch. IV.D (concerning preemption).

from the perspective of an owner, it is a restriction on her freedom to alienate her property as she pleases.

This restriction is justified, however, as a means to promote cooperation among people. By subordinating free alienation of property by one owner to the interests of others, *shuf'ah* (pre-emption) helps build a sense of community. Those interests are of a co-owner, or possibly a neighbor, in acquiring full title to the property for sale. The *Shar'i'a* seeks to promote confraternity between the prospective seller and people most closely related to the seller in terms of an interest in real property. One scholar explains:

The reason why this right is allowed is that the introduction of a stranger is likely to give rise to dissensions and inconveniences, and the principal on which it is based is that each co-sharer having a right in every particle of the property, one co-sharer selling his share would thereby affect the enjoyment of his by the other [new] co-owner, and this he [the would-be seller] cannot do without his consent, [and] rules are laid down in order to regulate competition among the three classes of pre-emptors [co-owners in the property itself, co-owners of an easement on the property, and neighbors]. The principal is that preference should be given to the strength of claim as measured by the closeness of connexion, hence the co-sharer in the property itself is preferred to the co-sharer in the easements connected with it, and the latter to the owner of adjoining premises.<sup>54</sup>

*Shuf'ah* also promotes responsible ownership. Any owner knows (or ought to) that maintaining good relations with her co-owners and neighbors helps shape their attitudes to the right of *shuf'ah*.

There is no debate among Islamic jurists (*fukahā'*) as to the nature of the property to which *shuf'ah* applies. *Shuf'ah* applies only to immovable property (i.e., real property), not to movable or personal property. It also applies only to sales transactions, not to gifts. That is clear enough from a *ḥadīth* recorded by *Imam Bukhari*:

There is pre-emption in everything which is shared, be it a land, or a dwelling, or a garden. It is not proper to sell it until he [the partner intending to sell his share] informs his partner; he [the other partner] may go in for that, or he may abandon it; and if he [the partner intending to sell his share] does not do that, then his partner has the greatest right to it until he permits him.<sup>55</sup>

But, there is a debate as to the beneficiaries. Obviously, there is a direct relationship between (1) the number of classes to whom a property owner owes a right of first refusal, and (2) the degree to which pre-emption restricts the right of that owner to sell her property to whom she pleases, on the terms she can negotiate.

<sup>54</sup> SIR ABDUR RAHIM, PRINCIPLES OF MUHAMMADAN JURISPRUDENCE ACCORDING TO THE HANAFI, MALIKI, AHAFA'I AND HANBALI SCHOOLS 273-274 (NEW YORK, N.Y.: HYPERION PRESS, 1981) [HEREINAFTER, RAHIM], QUOTED IN MUSLIM, *supra*, vol. IIIA, book 22 (BOOK OF SHARE TENANCY), p. 64, EXPLANATORY NOTE (1).

<sup>55</sup> MUSLIM, *supra*, vol. IIIA, book 22 (BOOK OF SHARE TENANCY), p. 64, *ḥadīth* no. 1608R2.

The scope of beneficiaries of preemption (*shuf'ah*) depends on the *Sunni* School concerned. The majority view, adopted by the *Mālikī*, *Shāfi'ī*, and *Hanbalī* School, is that only co-owners of an undivided property or partners in a property venture are beneficiaries of *shuf'ah*. The minority position, taken by the *Hanafi* School, draws the broadest line: pre-emption is right enjoyed by any co-owner of undivided real property, or partner in a real property venture, and also by any neighbor of real property. That is, an owner of a property that neighbors the parcel in question must be granted the first opportunity to buy that parcel. *Hanafi* School *fukahā'* agree that if there is a conflict between co-owners (or partners), on the one hand, and a neighbor (or neighbors), on the other hand, then the former category has priority.

The *Hanafi* School approach is the most "Catholic," in the sense of following the Great Commandment to love thy neighbor as set out in *The Gospel According to Matthew* at chapter 22, verses 34-40. This approach is based on passages in the *Qur'ān* and *hadiths* calling on Muslims to treat their neighbors well. It also is premised on the idea that preventing harm is an obligation that ought to be owed to more than just co-owners. As the Explanatory Note to the above-quoted *hadith* on *shuf'ah* states:

This right of pre-emption is recognized in favour of persons having interests connected with the property subject to sale. All the schools of law generally hold that the owner of an undivided share has such an interest, and the *Hanafis* concede it also to a person enjoying in common with the vendor certain immunities connected with property, such as private rights of way and water, and to a neighbour owning the adjacent property. These persons are called "pre-emptors," and their right consists in compelling the owner of the property to sell it to one of them in substitution for a stranger or a person who has no such interest.<sup>56</sup>

The *Hanafi* School approach is not limited to Muslim neighbors, which in practice means religion is irrelevant. Indeed, all Four Schools agree the *shuf'ah* right exists for Muslims and *dhimmīs* (i.e., non-Muslims protected under a treaty of surrender). Thus, for example, a Jewish or Christian co-owner (or neighbor) holds the right as would a Muslim.

Of course, the rationales beg a key question: exactly who is a "neighbor" according to the *Hanafi* School? The answer is evident with respect to adjacent land. It also is clear in respect of a multi-story building, such as apartment or office tower. An owner of a section of a floor (or the entire floor) above or below the floor on which property to be sold is located holds the right of *shuf'ah*. Suppose, however, a road, highway, stream, river, or lake separates the parcel for sale from the plot owned by a purported neighbor. Must the owner give a right of first refusal to the "neighbor"?

Among the Four Schools, there is no debate as to the indivisible nature of *shuf'ah*. Suppose an owner, Maryam, contemplating sale of her property has two co-owners, Abdullah and Benjamin, plus a neighbor, Faisal. Under all Four Schools, the co-owners are entitled to *shuf'ah*, and under the *Hanafi* School, Faisal is, too. Assume the real property is located in a *Hanafi* School jurisdiction, and all three

interested parties would like to exercise the right of pre-emption. Because this right is indivisible, Maryam cannot grant each of them a one-third interest in the property. Maryam is not obliged to — and indeed, cannot — satisfy each person's demand to exercise his or her valid *shuf'ah* right. Consequently, she cannot divide up the parcel into thirds and sell each a one-third portion. Rather, she has two options. First, Maryam can support a negotiated settlement among the three interested parties. Second, she can decide to assign *shuf'ah* to one of the parties. Effectively, that will mean Faisal loses out, because his status as a neighbor is a lower priority than that of Abdullah and Benjamin, who are co-owners with Maryam.

Procedurally, there are two rules on *shuf'ah* to which a property owner must adhere:

• *Advance Notice* —

The owner must give notice to his or her co-owners, and (under the *Hanafi* School) neighbors, of the intention of the owner to sell the property. That notice must be given before the sale to a third party (i.e., a non-co-owner, or, under the *Hanafi* School, non-neighbor).

• *Prior Permission* —

No sale is possible to a third party unless and until the co-owners and (under the *Hanafi* School) neighbors grant permission.

Obviously, these rules protect the right of *shuf'ah* vis-à-vis third parties. Giving notice as a *fait accompli* would vitiate that right. Likewise, not getting permission to sell to third parties would render the right meaningless. Indeed, if the owner sold the property without permission of a co-owner, the latter could bring a legal claim against the former.

Equally obvious are questions about the procedural rules. How must a property owner satisfy them? Are written notice and written permission required? Or, does oral communication suffice? How far in advance is notice needed? Are there extenuating circumstances in which the notice period may be shortened? If a legal action is brought against the owner following a sale to a third party, then is the preferred remedy rescission of the sale contract to restore the *status quo ante*, or damages to the aggrieved co-owner?

A holder of the right of *shuf'ah* is not without obligations. Most importantly, he or she cannot reasonably expect to hold the right for a protracted period. The longer the period during which a co-owner of property or (under the *Hanafi* School) neighbor takes to decide whether to buy the property, the greater the risk for the owner seeking to sell. Potentially interested third-party buyers may become frustrated at the dithering of the co-owner or neighbor. Property values may fall due to sudden adversities in domestic or international economic conditions. Banks may reign in property lending, or increase the fees and profit-sharing percentages they seek from real estate loans. There is no single time limit accepted throughout the *Shari'ā*. The *Shāfi'ī* School sets the limit at 3 days after the owner gives notice. It is unclear whether these are business days (i.e., whether weekends and holidays count towards the 3 days).

<sup>56</sup> RAHM, *supra*, at 273, quoted in MUSLIM, *supra*, vol. IIIA, book 22 (Book of Share Tenancy), p. 64, Explanatory Note (1).



## § 20.06 CATEGORY #4 RESTRICTIONS: EFFICIENCY AND BARREN LAND

One rationale in favor of encroaching on private ownership, and regulating the enjoyment and use of private property, is efficiency. All other factors being equal, private property ought to be deployed to its highest and best use. Efficiency is a rationale independent of harm (*ḍarar*) or public interest (*maṣlaḥah*) for circumscribing private ownership, and thus is worthy of its own category of restrictions. But, efficiency is not unrelated to the other categories. In particular, putting land to efficient use serves the interest of the community (*ummaḥ*), i.e., the productive allocation and deployment of land resources supports *maṣlaḥah*.

As a general principle, the *Sharī'a* authorizes a government authority to enact formal or informal measures that encourage private owners to use their land productively. A special onus is on owners of barren land. They must not let it remain in that state. They must do the necessary to reclaim and transform land from a desolate, infertile condition into arable, fruitful property. The reclamation process may include clearing away scrub brush, preparing soil, finding irrigation sources, and so forth. The *Sharī'a* does not direct the land owner as to what use she must put the land. It is up to the owner to decide whether planting an olive grove or building a camel race track, for instance, constitutes highest and best use. What is clear is leaving land in an unprofitable state is unacceptable.

The mechanism to enforce this restriction essentially is a taking and redistribution. The appropriate government authority can take barren land from its owner, and allocate it (title and possession) to a different private party the authority believes will put the property to productive use. The restriction and sanction are found in two *ḥadīths*:

- Recorded by Al Tabrizī —  
Anyone who reclaims barren land becomes its owner.<sup>57</sup>
- Recorded by Al Kāsānī —  
The one who appropriates land has no right to it after three years.<sup>58</sup>

Further, precedent from the Four Rightly Guided Caliphs supports this regime. As Professor Kamali explains:

[Concerning] the caliph 'Umar bin al-Khaṭṭāb . . . [and] a fellow Companion, Bilāl b. al-Hārith al-Muzanī, to whom the Prophet himself had assigned a certain amount of land. Years later, the caliph 'Umar told him [Bilāl] that the Prophet did not give the land to him so as to deprive others of it, but so that it could be reclaimed and developed. Bilāl refused and said that the Prophet himself had assigned (*aqṭa'ā*) the land to him. The caliph then ordered Bilāl to "take of the land what you can reclaim and return the

rest." The caliph then said, "The one who fails to develop the land he has occupied for three years is no longer entitled to it, and it may be given to anyone who wishes to develop it." This became a general ruling under the caliph 'Umar, but it is reported that Ziyād, the caliph 'Alī's (cousin and son-in-law of Muhammad) governor in Iraq, and later Mu'āwīya's [founder of the *Umayyad* dynasty and first *Umayyad* Caliph, who lived from 602-680 A.D. and ruled from 661-680 A.D., and who led a civil war against 'Alī for leadership of the *umma*] governor too, reduced this period of grace to two years.<sup>59</sup>

To be sure, taking and redistribution is not likely to be the first option. A government authority will informally encourage or cajole, and if need be, pass formal regulations, to change the behavior of a lazy, recalcitrant landowner. But, if these measures do not work, then the authority may resort to the greatest intrusion on private ownership, expropriation and reallocation, and these means will be considered reasonable.

To safeguard against arbitrary or capricious governmental behavior, there is a 3-year rule, intimated in the second of the above-quoted *ḥadīths*. An owner has 3 years to reclaim barren land, before her land is at risk of being taken and given to another party. Following the precedent from the Caliphate of 'Alī, and at the discretion of the government, that time may be reduced to two years. The decisional criteria as to the appropriate period are the public interest (*maṣlaḥah*) and *siyāsa shar'iyyah* (i.e., policy or administrative regulations that are within the boundaries of the *Sharī'a*).

Exactly when the 3 (or 2)-year period begins to run is not clear, certainly not from the Qur'ān itself. Presumably, the appropriate government authority must provide notice to an owner, before the period begins to tick. Again presumably, that is true regardless of whether the owner just purchased the parcel in question, or has held it for 50 years. Also unclear is whether an extensions of the period is permissible, and if so, for how long. Circumstances (e.g., a large barren tract that is difficult to tame) may justify an extension.

<sup>57</sup> 'ABD ALLAH AL-KHAṬṬĪB AL-TABRIZĪ, *MUSNAWAT AL-MAṢABĪH*, vol. II, *ḥadīth* no. 2944 (Beirut, Lebanon: Al-Maktab al-Islāmī, 2nd ed. 1979, Muhammad Nāsir al-Dīn al-Albānī, ed.), quoted in KAMALI, *SUPRA*, at 290.

<sup>58</sup> 'ALĪ AL-DĪN AL-KĀSĀNĪ, *BADĀ'ĪY AL-SANA'Ī FI TARTĪB AL-SHARĀ'Ī* (Cairo, Egypt: Matba'at al-Istiqāmah, 1966), vol. VI, p. 192, *Ḥurriyyāt* 517, quoted in KAMALI, *SUPRA*, at 290.

<sup>59</sup> See KAMALI, *SUPRA*, at 291.

## Chapter 21

### CONTRACT LAW: GENERAL PRINCIPLES AND CONTRACT FORMATION

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In a climate of mutual trust, the *market* is the economic institution that permits encounter between persons, inasmuch as they are economic subjects who make use of contracts to regulate their relations as they exchange goods and services of equivalent value between them, in order to satisfy their needs and desires. The market is subject to the principles of so-called *commutative justice*, which regulates the relations of giving and receiving between parties to a transaction. But the social doctrine of the Church has unceasingly highlighted the importance of *distributive justice* and *social justice* for the market economy, not only because it belongs within a broader social and political context, but also because of the wider network of relations within which it operates. In fact, if the market is governed solely by the principle of the equivalence in value of exchanged goods, it cannot produce the social cohesion that it requires in order to function well. *Without internal forms of solidarity and mutual trust, the market cannot completely fulfill its proper economic function.* And today it is this trust which has ceased to exist, and the loss of trust is a grave loss.

His Holiness Pope Benedict XVI, Encyclical Letter, *Caritas in Veritate* (*Charity in Truth*), 29 June 2009, ¶ 35, posted at [www.vatican.va](http://www.vatican.va) (emphasis original)

#### SYNOPSIS

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## § 21.07 EVIDENCE AND LONGEST QUR'ĀNIC VERSE

### § 21.01 ROLE OF CUSTOM AND PRACTICE

In Islamic legal discourse, "Contract Law" sometimes is referred to by its traditional name, the "Law of Obligations." In one sense, it is not easy for the modern legal practitioner or scholar to keep abreast of developments in Islamic Contract Law. That also is true — even more so — of Islamic Banking Law and Islamic Finance.

The difficulty is business and the market are inherently dynamic. Commercial parties and financial market participants continually innovate to enhance the quantity, quality, efficiency, and profitability of their transactions. They do so, or they wither and die in a competitive, global environment. Developments — some evolutionary, and some revolutionary — in their markets are a constant. Prices of essential commodities, natural resources, and energy, which are essential inputs in agricultural or manufacturing operations, change. Labor market conditions, such as the supply of skilled professionals needed for service providers, change. Political circumstances change. Governments rise and fall, civil unrest accompanies challenges to authoritarian regimes leads, and so on.

In another sense, it is risky to opine that keeping up with the *Shari'a* in Contracts, Banking, and Finance is difficult. That presumes a dis-connect between Islamic Law, on the one hand, and markets and players, on the other hand, and that the former must be squared with the latter. That is a secular approach to a sacred legal system. As Divine law, it is not the *Shari'a* that must be continually updated. Rather, proposed new ways of doing business and finance must be considered in the light of the immutable *Shari'a* principles. The process is one of probing Islamic Law to see what business or financial transaction can and cannot be done on the Scale of Qualifications between permissible (*halal*) and forbidden (*haram*), and how and why, in accordance with the Qur'an, *sunnah* of the Prophet Muhammad as documented by reliable *hadiths*, *ijma'* (consensus), *qiyās* (analogical reasoning), and perhaps other sources including *ijtihad* (reasoning).

In this process, customs and practices of merchants and financiers are weighed against requirements of the *Shari'a*. But, as a sacred legal system, there is no provision in Islamic Law that is equivalent to the famed Section 1-103 of the Uniform Commercial Code (U.C.C.). This provision, entitled "Construction of [the U.C.C.] to Promote its Purposes and Policies: Applicability of Supplemental Principles of Law," states:

- (a) [The U.C.C.] must be liberally construed and applied to promote its underlying purposes and policies, which are: (1) to simplify, clarify, and modernize the law governing commercial transactions; (2) to permit the continued expansion of commercial practices through custom, usage, and agreement of the parties; and (3) to make uniform the law among the various jurisdictions.

- (b) Unless displaced by the particular provisions of [the U.C.C.], the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, and other validating or invalidating cause supplement its provisions.

Put generally, Section 1-103 reflects the doctrine, and centuries-long history behind it, that the custom and practice of merchants, the "*lex mercatoria*" or "*law merchant*," is itself a source of commercial law. In the case of the U.C.C., it is a supplementary one.

Adherents to and advocates for the *Shari'a* never have acquiesced to the belief that Islamic Law is not exclusively theoretically valid, nor can they easily do so. That means they cannot accept as equally valid an independent customary law. To do so, to have a rule like U.C.C. Section 1-103 that pays such homage to the *law merchant*, would strike at the heart of what it means to be a Muslim, namely, to be one who submits to the will of God (Allāh). Nor have these advocates ever surrendered the point that the *ulema* — not government officials — are the sole persons qualified to interpret religious law.

Recall the hierarchy of established authorities, and the concomitant duty of obedience to them, set out in *surah* 4 of the Qur'an:

<sup>59</sup>You who believe, obey God and the Messenger [Muhammad], and those in authority among you. If you are in dispute over any matter, refer it to God and the Messenger, if you truly believe in God and the Last Day: that is better and fairer in the end.

. . .

<sup>60</sup>Will they not think about this Qur'an? If it had been from anyone other than God, they would have found much inconsistency in it. <sup>61</sup>Whenever news of any matter comes to them, whether concerning peace or war, they spread it about; if they referred it to the Messenger and those in authority among them, those seeking its meaning would have found it out from them. If it were not for God's bounty and mercy towards you, you would almost all have followed Satan.<sup>1</sup>

Translated into colloquial terms, these *ayat* do not say to commercial parties on the verge of, or in the midst of, a dispute, or to judges of that dispute: "refer to your long-standing customs and practices as a source of authoritative rules to apply to and resolve your dispute." Rather, these *ayat* guide the parties and judges to sacred scripture and non-prophetic utterances of Muhammad. Thus, Professor Schacht writes:

[The proposition that] *law must be ruled by religion* [is an idea widely accepted in the Muslim World, and even is an] essential assumption of the Modernists, who otherwise do not hesitate to interfere deeply with the

<sup>1</sup> THE QUR'AN — A New Translation by M.A.S. Abdel Haleem 4:59 at 56, 4:82-83 at 58 (Oxford, England: Oxford University Press, 2004). [Hereinafter, QUR'AN.]

traditional doctrine of Islamic law. *But the laws which rule the lives of the Muslim peoples have never been coextensive with pure Islamic law, although this last has always formed an important ingredient of them.* These conditions have prevailed in all parts of the Islamic world since the early Middle Ages.<sup>2</sup>

This proposition is a testament to the tremendous authority the *Shari'a* holds in the minds of Muslims, regardless of the precise degree of synchronization between it and the proverbial "law on the books" of the state in which they happen to reside.

For commercial parties and judges, no doubt the practical business experience, including service as an arbitrator (*hakam*) of Muhammad is relevant. When it becomes necessary to refer to one or more *hadiths*, the parties and judges can take comfort that the statements reflected not only the preeminence of religious precept, but also the empathy of reputable man of commerce. Still, not every commercial problem is readily answerable by recourse to the Qur'an or *Sunnah* of the Prophet. From air travel to the iPhone, from foreign exchange swap agreements among central banks to swapping music files through the internet, the substance and style of market transactions evolve. In part, that is because of new technologies, which in turn reflect profit motives of their inventors and purveyors. Such changes, some of which are revolutionary, are foreseeable to an omniscient God, but not to the average market participant or judge of a commercial dispute.

Thus, not surprisingly, through the ages, customary commercial practices and the *Shari'a* have interacted. They continue to do so, and always will. It is only natural for merchants to look to their own customs and practices, and to seek to persuade a judge in their case to recognize and apply them as *law merchant*. In any legal paradigm, sacred or secular, the interaction between the market and the rule makers is inevitable, and indeed, healthy. To purists, the risk of such interaction is that theory and practice diverge. And, so they do from time to time and place to place. The interaction between Islamic Law and pre-Islamic customary law, particularly in the area of contracts, is a good example.

Islamic Law has responded with a key strategy, as it were, to try to ensure consistency.<sup>3</sup> That strategy is for the *Shari'a* to leave as much as possible to custom and practice, while at the same time influencing that custom and practice with religious and moral precepts. After all, custom and practice evolves to suit the needs of the merchants, but why not guide the evolution by infusing customs with Islamic principles?

One example is conclusion of a contract at the time of the call to prayer, especially Friday (*Jum'a*) prayers. Religious authority holds all trading must cease, and contracts concluded during these prayers are voidable. In practice, in many Muslim markets, from Cairo to Kuala Lumpur, that does not always happen. Merchants carry out and complete their business, if need be, right through congregational prayer.

<sup>2</sup> JOSEPH SCHACHT, AN INTRODUCTION TO ISLAMIC LAW 84-85 (Oxford, England: Oxford University Press (Clarendon Paperbacks) 1982). [Hereinafter, SCHACHT.]

<sup>3</sup> See SCHACHT, *supra*, at 77-78.

Another example is a contract for the sale of real property. This contract is known as a "*bay' al wafa*" agreement. Customary law allows for sale of real property with a right of redemption (i.e., a right to reclaim or regain ownership upon default by the buyer) in favor of the property owner-seller. The idea is to avoid irrevocable alienation of land. Under a strict approach, this contract is not permissible, either as a sale or as a pledge.<sup>4</sup> Yet, this type of contract is used to transfer property in many Muslim countries.

## § 21.02 SHI'ITE DISTINCTIONS

There do not appear to be major differences on basic Contract Law between *Sunni* and *Shi'ite* Islam. That said, one area in which a distinction can arise is gap-filling. That is, on an issue where the law does not provide an answer, upon what basis will a court supplement the law to resolve a dispute?

Consider Article 1 of the United Arab Emirates (UAE) Civil Code. It states:

In the absence of a text in this Code, the Courts shall resort to Moslem *Shari'a* and choose the most adequate solution amongst those taught by the *Hanbali* and *Maliki* doctrines. Failing them, they shall resort, as need may be, to the *Shafi'i* and *Hanafi* doctrines.<sup>5</sup>

The UAE is a *Sunni* nation, of course. In contrast, gap-filling in Iran, a *Shi'ite* country, could produce a contrary result. There does not appear to be a provision within the Iranian Commercial Code specifically referencing *Shi'a* principles, this result is only one step removed. Article 10 of the Iranian Civil Code states:

Private contracts shall be binding on those who have signed them, providing they are not contrary to the explicit Provisions of a law.<sup>6</sup>

Moreover, the Constitution of Iran makes clear *Shi'ism* is the foundation of the country, and Articles 12 and 72 of the Constitution Iran ensure rules promulgated by *Shi'a* hold absolute sway.<sup>7</sup> Therefore, all laws written or applied by an Iranian court must pass an initial litmus test under *Shi'ite Shari'a*. If a contract dispute is litigated and involves a point on which *Sunni* and *Shi'a* differ, then courts in the UAE and Iran possibly could reach different results.

## § 21.03 IMPORTANCE OF HONESTY AND FAIR DEALING

One of the unfortunate stereotypes of merchants in the Arab Muslim world, particularly of Persian carpet dealers or vendors of traditional items like Bedouin coffee pots, is that they are untrustworthy. Among other factors, Hollywood

<sup>4</sup> See SCHACHT, *supra*, at 78.

<sup>5</sup> Federal Code of Civil Procedure, Article 1, United Arab Emirates, quoted in Faisal Kutty, *The Shari'a Factor in International Commercial Arbitration*, 28 LOYOLA OF LOS ANGELES INTERNATIONAL & COMPARATIVE LAW REVIEW 565, 594 (SUMMER 2006).

<sup>6</sup> Civil Code of Iran, Article 10, posted at <http://hajipour.online.fr/wp-content/civilcode.pdf>.

<sup>7</sup> Constitution of Iran, Articles 12, 72, posted at [www.iranonline.com/iran/iran-info/Government/constitution.html](http://www.iranonline.com/iran/iran-info/Government/constitution.html).



depictions of an unscrupulous shopkeeper in a crowded bazaar only too eager to cheat a naïve customer are to blame for the stereotype. In fact, no culture has a monopoly on low-integrity sellers. They exist in the Muslim and non-Muslim world alike.

What is often lost amidst the stereotypes, however, is how strongly Islamic Law exhorts, and indeed enjoins, Muslims to be honest in their transactions, and deal fairly with counter-parties, in their commercial transactions. The *Shari'a* provisions are not limited to the negotiation, agreement, conclusion, and performance of contracts with other Muslims. Those provisions apply to Muslims in their commercial dealings with any human being, man or woman, regardless of his or her religion.

Thus, Professor Hussain explains:

There are many verses in the Qur'an which encourage trade and commerce. . . .

. . . .

However, just as Islam regulates and influences all other spheres of life, it also governs the conduct of business and commerce. Muslims should conduct their business activities in accordance with the requirements of their religion to be fair, honest, and just towards others.<sup>8</sup>

One such direct passage from the Qur'an is *surah* 5, *ayah* 1:

You who believe, fulfill your obligations.<sup>9</sup>

Likewise, *surah* 17, *ayah* 35 states:

Give full measure when you measure, and weigh with accurate scales: that is better and fairer in the end.<sup>10</sup>

There also are *hadiths* linking professional business integrity with personal salvation:

A trustworthy and an honest and truthful businessman will rise up with martyrs on the day of Resurrection [i.e., Day of Judgment].<sup>11</sup>

It cannot be over-emphasized that the stress on honesty and fair dealing is deeply embedded in Islamic Law, and this stress contrasts with American Contract Law.

There is no encouragement to cheat on contractual dealings in American Contract Law, and there are legal disincentives to engage in fraudulent behavior. But, those disincentives are a matter of secular law, not sacrosanct principle. They may well rest on Judeo-Christian foundations that, owing perhaps to ignorance, prejudice, or political correctness, or some combination thereof, are not recognized

<sup>8</sup> JAMILA HUSSAIN, *ISLAMIC LAW AND SOCIETY — AN INTRODUCTION* 158-159 (Annandale, New South Wales, Australia: The Federation Press, 1999). (Professor Hussain is a Lecturer in Law at the University of Technology Sydney (UTS) in Sydney, Australia.) [Hereinafter, HUSSAIN.]

<sup>9</sup> QUR'AN, *supra*, 5:1 at 67.

<sup>10</sup> QUR'AN, *supra*, 17:35 at 177.

<sup>11</sup> BEN MAJAH, quoted in 'ABDUL RAHMAN I DOI, *WOMEN IN SHARI'AH* 350 (1990), quoted in HUSSAIN, *supra*, at 160.

as openly as they ought to be. The unscrupulous contractor may be at risk of civil or even criminal liability under secular law that is grounded (albeit not explicitly) in part on precepts found in the Bible, plus a yet worse punishment in the after life that is not part of the secular legal calculus.

In contrast, in the *Shari'a*, ethical and moral conduct in commerce is an explicit commandment from God (Allāh) through His Prophet (Muhammad), and from the non-prophetic utterances of that Prophet. They are set out in the Qur'an and *hadiths*, and indeed other sources as well. Consequently, to Muslims (and many non-Muslim observers), they have a profundity not present in a proscription set out in an avowedly secular commercial statute such as the U.C.C.

## § 21.04 BROAD DEFINITION OF "CONTRACT" ('AKD)

### [A] Inclusion of Gifts (*Hibat*)

Contracts were a part of human history long before the advent of Islam on the Arabian Peninsula. Early examples, written in cuneiform text, come from Ancient Mesopotamia. Contracts also have been part of the interaction between God and man. The Old Testament contains a series of special contracts — covenants — between the God of Abraham and the Jewish people. The New Testament recounts a New Covenant between the Son of God (Christ) and humanity. Muhammad, in his pre-Prophetic period, worked with his wife Khadyja in their commercial business, and knew well the process of buying and selling. In his Prophetic period, he gave many *hadiths* on contracts, distinguishing the acceptable from unacceptable.

To begin with the Islamic legal concept, "*akd*" is the Arabic word for a "contract." The word is a generic one, covering all types of agreements that give rise to legal rights and duties. However, in the *Shari'a*, the word "*akd*" has a broader meaning than the word "contract" in American Law. As Professor Hussain explains:

The definition of contract (*al-'akd*) is similar to that in the common law, but is wider in that it includes dispositions which are gratuitous as well as endowments and trusts.<sup>12</sup>

Thus, in particular, a gift, or donation — called "*hibah*" (singular) or "*hibat*" (plural) in Arabic — is considered a contractual arrangement. So long as a gift involved the absolute and unconditional transfer of ownership of an object, then the giving of that gift is considered a contractual transaction. In contrast, a considerable amount of time in any first-year American Contract Law course is spent differentiating a gift from a contract, with the "bottom line" conclusion being that only the latter is supported by consideration.

<sup>12</sup> HUSSAIN, *supra*, at 171.

### [B] When Gifts (*Hibat*) are Binding

Interestingly, Islamic legal scholars (*fukahā*) differ on an important question associated with gift contracts, namely, when does such a contract become binding and, therefore, legally effective?<sup>13</sup> The consensus is that a donation becomes complete (*tāmm*) only if the donee takes full possession of the object from the donor, or at least as full possession of the object as is possible given the nature (*asl*) and circumstances (*wasf*) of the transaction.<sup>14</sup> Taking possession necessitates permission of the donor. Until the donee takes possession, the donor may revoke (*rujā'*) the donation. Once the object is in the possession of the donee, i.e., once the donee has received the object from the donor, any revocation is considered, at a minimum, reprehensible (*makrūh*).

This minimum position, however, while articulated by Professor Schacht, does not appear to reflect the view of most *fukahā*. The majority view is a contract for a gift, or donation, is binding when the donee acquires from, and with the permission of, the donor, the fullest possible possession of the object. Two *hadiths* support this view:

- The Prophet . . . said, "He who takes back his present is like him who swallows his vomit."<sup>15</sup>
- 'Ubaida [a Companion of the Prophet] said, "If both the giver and the receiver have died but the present was set aside (i.e., separated) in the lifetime of the receiver, it will be given to his inheritors, and if it was not separated, it will go to the inheritors of the giver." Al-Hasan [eldest son of 'Ali, brother of Hussein who was martyred at the Battle of Karbala in 680 A.D., and grandson of the Prophet from his daughter Fātimah] said, "It will be given to the inheritors of the receiver (i.e., to whom the present was meant) no matter who died first, if the gift has been delivered to the messenger [of the receiver]."<sup>16</sup>

The first *hadith* is self-evidently strong in its metaphor. The second *hadith* is legalistic, covering three distinct possibilities — the donor and donee both predecease the transfer, but (1) the gift is allocated to the donee, (2) the gift is not

<sup>13</sup> See HUSSAIN, *supra*, at 173.

<sup>14</sup> See SCHACHT, *supra*, at 78, fn. 1 at 144.

<sup>15</sup> THE TRANSLATION OF THE MEANINGS OF SAHIH AL-BUKHARI, ARABIC-ENGLISH by Dr. Muhammad Muhsin Khan, vol. III, book XLVII (The Book of Gifts and the Superiority of Giving Gifts and the Exhortation for Giving Gifts), p. 465, unnumbered *hadith* following *hadith* no. 769 and starting ch. 18 (Islamic University, Medina, Kingdom of Saudi Arabia: Dar Ahya Us-Sunnah, Al Nabawiya, March 1978). [Hereinafter, BUKHARI.]

<sup>16</sup> BUKHARI, *supra*, vol. III, book XLVII (The Book of Gifts and the Superiority of Giving Gifts and the Exhortation for Giving Gifts), p. 478, *hadith* no. 790. This *hadith* is particularly reliable, as the nearly identical version appears in SAHIH MUSLIM — BEING TRADITIONS OF THE SAYINGS AND DOINGS OF THE PROPHET MUHAMMAD AS NARRATED BY HIS COMPANIONS AND COMPILED UNDER THE TITLE AL-JAM'US-SAHIH by IMAM MUSLIM, RENDERED INTO ENGLISH BY ABDUL HAMID SHIBGI, WITH EXPLANATORY NOTES AND BRIEF BIOGRAPHICAL SKETCHES OF MAJOR NARRATORS, CORRECTED AND REVISED BY DR. HUSSAIN, vol. IIIA, book 24 (Book of Donation), p. 73, *hadith* no. 1622R4 (Lahore, Pakistan: Sh. Muhammad Ashraf Booksellers and Exporters, 1990).

allocated to the donee, and (3) the gift is turned over to an agent for the donee.

Finally, there are two clear outright prohibitions on revocation. *Rujā'* is forbidden (*harām*) if the donee not only took possession, but also gave some counter-value to the donor. Likewise, it is *harām* to revoke a purely charitable gift (*ṣadaka*).

### § 21.05 FREEDOM OF CONTRACT WITHIN RELIGIOUS BOUNDARIES

Before turning to black-letter rules of Islamic Contract Law, it is important to appreciate the spirit of those rules. Consider a contrast. American Contract Law proceeds from the premise of freedom. Liberty of contract is the paradigm. All agreements between competent, consenting legal persons are presumed permissible, unless expressly prohibited by law. Freedom of contract is the cousin, as it were, of what is sometimes characterized in the American regime as the "sanctity" of contract. That characterization is apt insofar as it connotes a secular inviolability, unassailability, or indomitability of contract. Yet, "sanctity" — in the sense of its true connotation of "holiness," "sacredness," or "saintliness"<sup>17</sup> — is a term more closely tied to Islamic than American law.

The American freedom of contract paradigm has deep philosophical underpinnings, emanating from the Enlightenment. It also is a foundation of capitalism. In contrast, the reverse presumption — everything is prohibited unless expressly permitted by government — is a hallmark of a government-operated economy, i.e., of a communist system in which the government owns and controls the means of production, and makes all decisions about the allocation of factors of production (land, labor, human capital, physical capital, and technology). Indeed, Nobel Prize-winning economist Milton Friedman, in his classic 1962 book *Capitalism and Freedom*, suggests the link between contractual freedom and capitalism is connected to democracy itself. A free-enterprise economy is not truly possible without a relatively free political structure.

Notably, the 1980 United Nations Convention on Contracts for the International Sale of Goods (*CISG*) proceeds from a freedom-of-contract premise. The *CISG* has been acceded to by 74 countries (as of July 2009). Article 6 of the *CISG* is an opt-out clause:

The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.<sup>18</sup>

In other words, this provision allows parties that otherwise would be covered by the *CISG*, by virtue of Article 1:1, to elect not to be governed by the treaty. Article 6 is evidence not only of party autonomy to choose the law applicable to their contract, but more generally of freedom of contract.

<sup>17</sup> OXFORD AMERICAN DICTIONARY AND THESAURUS 1335 (New York: Oxford University Press, 2003) (entry for "sanctity").

<sup>18</sup> *CISG* Article 79, posted at Pace Law School (New York) Institute of International Commercial Law, [www.cisg.law.pace.edu/cisg/text/treaty.html](http://www.cisg.law.pace.edu/cisg/text/treaty.html). See also Article 95 (concerning contracting parties).



What, then, is the starting point in the *Shari'a* for Contract Law? The short answer is there is contingent freedom of contract, the contingency being religion. There is no general principle in Islamic Law concerning the freedom or liberty of contract.<sup>19</sup> The reason is that complete freedom of contract would be incongruous with the over-arching goal of infusing law with religious precepts. If Islamic Law is truly sacred, then it shall have to enjoin some types of secular bargains on religious grounds. Simply put, the starting point for Islamic Contract Law, like any other field of Islamic Law, is not secular freedom, but religious constraint. The constraint is set by God, as revealed to Muhammad and amplified by the *Sunnah* (tradition of the Prophet), *ijma'* (consensus of scholars in a School, at a particular time), and *qiyās* (analogical reasoning).

Lest it be thought this starting point inhibits development of a modern capitalist marketplace, however, Islamic religious and legal scholars (*ulema* and *fukahā'*, respectively) would reply it provides moral guidance to that development. They would agree with Catholic Christian teaching that there is no true freedom without limitation. Without some boundaries, "freedom" is anarchy and chaos. Boundaries allow for authentic expressions of economic and non-economic desires, with "authenticity" meaning respect for the dignity of the human person as a creature of God, and for the common good. Thus, *Shari'a* scholars would reject what they perceive as the unbridled, exploitative American-style capitalist marketplace, and counsel for contractual relationships that provide for genuine mutual gain in an ethically acceptable manner.

Moreover, as a practical matter, the *ulema* and *fukahā'* would point out that *Shari'a* is very flexible as to contracting. Private parties have a wide freedom to enter into mutually beneficial exchanges. Indeed, marketplaces were thriving in the eras of the *Rashidun*, and *Umayyad* and *Abbasid* Caliphates, while Europe plodded through its Dark Ages (or more precisely put, the Early Middle Ages, roughly from the fall of Rome in 476 to 1000 A.D.) and High Middle Ages (roughly from 1000, through the Fall of Constantinople in 1453, to 1517 and the Protestant Reformation).

Perhaps the most important religiously-inspired constraint is that a party to a contract should fulfill her obligations as called for in the contract. There is no single, all-encompassing term in Arabic for the concept of "obligation." However, the closest Arabic word strikes directly at the moral nature of the limitation. That word is "*dhimma*," which means "care as a duty of conscience." The obligation to perform a contract is not founded on a secular legal enactment or judgment. Rather, it springs from conscience. In turn, conscience is shaped by religious practice, namely, the effort to discern the will of God (Allāh) and submit to it. Here, then, is the intertwining of the sacred (Divinely-guided conscience) and the profane (worldly duties established by contract). Notably, in many Islamic law schools, Contract Law is referred to as the "Law of Obligations."

Critically, the religious boundary — that obligations must not be broken — protects contracts, and by extension supports the development of the commercial marketplace. Commercial relations become chaotic, and the economy anarchic, with

no certainty or predictability as to whether contracting parties will perform their duties. For instance, a party to a contract should return any deposit (*amāna*) to the owner of that deposit. An *amāna* is associated with a fiduciary relationship of trust between a property owner and the party with whom the property is deposited. An "*amin*" is the person in whose trust the property is placed. The obligation of the *amin* is to hold that property safely while in custody of it, and return it in good condition at the appropriate time to the proper owner.

Of course, this expectation exists for a depositary under American Contract Law. It is not that the *Shari'a* forbids usurpation of a pledged asset, while English and American Law encourages it. Rather, the point is that the ultimate source of the obligation is different in the two legal systems. Under the *Shari'a*, the *amin* has a duty of conscience to perform its obligations. It is a religiously-grounded expectation. Under American doctrine, the depositary may on an individual basis feel a moral compunction, but the legal basis for the duty is not (or at least not explicitly) Judeo-Christian teaching.

So, American Contract Law tends to focus on the form or effect of contracts. In contrast, the *Shari'a* tends to examine whether a religiously acceptable basis for business affairs exists. Its concern is about "moral norms under which certain transactions are allowed or forbidden."<sup>20</sup> Once those norms are set and applied, the specific form a deal takes is not of great concern. There is flexibility as to form within the parameters of the norms. The silence of the Qur'an as to direct linking of legal consequences to factual predicates is not surprising, as the *Shari'a* is a sacred legal system. More important than attaching specific consequences to every conceivable violation the legal mind can identify is imposing a behavioral standard fixed in religion and morality.

## § 21.06 CONTRACT FORMATION: ESSENTIAL CONSTITUTIVE ELEMENTS

For the most part, contracts are concluded in an informal manner under the *Shari'a*. That is, Islamic Law does not impose numerous or onerous formal requirements on parties seeking to establish a contract (*'uqd*). In that respect (and many others), the *Shari'a* provides a rule-of-law edifice for modern capitalist growth.

Islamic Law envisions a contract as a bilateral transaction, such as between individuals, businesses, a business and an individual, or groups (including families). The *Shari'a* has six technical prerequisites, all of which must be satisfied, for formation of a legally binding and enforceable contract.<sup>21</sup> They are:

- Offer (*ijāb*)
- Acceptance (*kabāl*)
- Consideration (*badal*)

<sup>20</sup> See SCHACHT, *supra*, at 12.

<sup>21</sup> See HUSSEIN, *supra*, at 171.

<sup>19</sup> See SCHACHT, *supra*, at 78, fn. 1 at 144.

- Capacity
- Legality
- Freedom, or Absence of Duress (*ikrah*)

These requirements are discussed in turn below. The adjective “bilateral” should not be emphasized too strongly. There is no injunction in the *Shari’a* against multiple parties (*i.e.*, more than two) to a contract. For example, in a routine contract for the sale of a good (*bay’*), there may be two buyers. Each buyer would be responsible for a specified portion of the purchase price, and entitled to a particular amount of the item in question.

Significantly, there is no disagreement among the Four Sunni Schools as to the essentiality of these elements. All Four Schools — *Hanafi*, *Maliki*, *Shafi’i*, and *Hanbali* — set out these six requirements. That also is true of the *Shi’ite* jurisprudence.

### [A] Offer (*Ijab*)

Professor Schacht speculates the element of offer (*ijab*), as well as acceptance (*qabul*), derived from ancient Near Eastern law, and came into the *Shari’a* through commercial practice in Iraq.<sup>22</sup> In contracts of lease and marriage written in cuneiform (*i.e.*, wedge-shaped writing or inscriptions, typically impressed in clay) from the 7th century to the 1st century B.C. in Babylonia (*i.e.*, the famed city in Mesopotamia, in what is now modern-day Iraq), the elements of offer and acceptance were present. In modern juridical parlance, the Babylonians engaged in a “bilateral construction” of contracts, at least for lease and marriage contracts.<sup>23</sup> The *Shari’a* has this same “bilateral construction of contracts,” which is to say under Islamic Law the juridical analysis of any commercial contract is bifurcated into offer and acceptance. That is true for all commercial contracts.

The possible Near Eastern origin of offer and acceptance should be both fascinating and humbling to legal scholars, students, and practitioners in the Common Law world. Contract Law is a required course in law schools in the United States, England, and elsewhere. Generations have seen or read of the Code of Hammurabi and other Ancient Mesopotamian documents, housed in the British Museum and Louvre. Yet, hardly if ever are the ancient Middle Eastern origins of the elements of contract formation, or their incorporation into the *Shari’a*, mentioned in the typical Contracts course. Despite the chronology, the course often leaves the misleading impression that the English invented the ideas of offer and acceptance, and the Americans perfected it. Quite the contrary, as the chronology indicates. The history of the concepts long predates the British Empire or the founding of the American Republic.

Interestingly, the technical bilateral construction of contractual relationships is not characteristic of Roman Law. There were no Roman legal terms for “offer” and

“acceptance.”<sup>24</sup> Rather, “offer” and “acceptance,” as expressed in Latin, connoted an agreement, or consensus, of the contracting parties. That connotation is less precise than a bilateral construction. The *Shari’a* does not conceive of a contractual relationship as a consensus, but rather as an offer followed by an acceptance. That sequential approach also is characteristic of American Contract Law.

Thus, Islamic Contract Law distinguishes between an *ijab* (offer), and a *qabul* (acceptance). Obviously, an offer is the first step in contract formation, aside from the willingness of parties to enter into a contract (*i.e.*, freedom). Both offer and acceptance are necessary for formation of a valid, binding contract (*’akd*). They are not sufficient in and of themselves, as there are other constituent elements. In many instances, the offer and acceptance are made during the same meeting. The general term for “meeting” is “*majlis*.” Frequently, contracting parties exchange *ijab* and *qabul* in a single *majlis*.

By what means must an offer be conveyed? The *Shari’a* is flexible on this question. Professor Doi identifies five possibilities:

... The offer can be made in a number of ways:

1. It can be made *verbally* (*bi’l-kalām*). This kind of offer is to be made in the same meeting.
2. It can be made in *writing* (*bi’l-kitābah*). This form of offer becomes effective as soon as the letter leaves the person offering and will remain valid until received by the recipient. The offer must be replied to immediately.
3. It can be made through a message sent with some person, a *messenger* (*rasūl*) whose honesty is not doubted and if the offer is accepted, it will be a good acceptance. *Maliki*, *Shafi’i*, and *Hanbali* jurists are of the opinion that the offer must be made by the owner of the property in return for a due consideration, but the *Hanafi* jurists say that it can come from either party.
4. It can be made through *signs and gestures*, particularly in those cases where the person offering is deaf or dumb (*i.e.*, a mute), or when the recipient does not understand the language of the person offering. The *Maliki* School regards as valid the well-known signs made by a person without any impediments, since the main idea is that the person offering should communicate the offer. Most jurists believe that the known signs of dumb persons made to constitute an offer are valid, but there are some jurists who consider signs and gestures invalid as modes of making an offer.
5. It can be made by *conduct* (*fi’l*). An offer made through the delivery of goods is valid according to the *Maliki* School.<sup>25</sup>

<sup>24</sup> See SCHACHT, *supra*, fn. 1 at 22.

<sup>25</sup> ‘ABD AR-RAHMAN I. DOI, *SHARIAH: ISLAMIC LAW* 551-552 (London, England: Ta-Ha Publishers Ltd., 2nd rev’d ed., 2008) (emphasis added). [Hereinafter, DOI.] (The author’s name is commonly transliterated as in the text above, and used on the copyright page and back of the treatise. But, the transliteration in this citation is more precise, and set out on the cover and title page of the treatise).

<sup>22</sup> See SCHACHT, *supra*, at 22.

<sup>23</sup> SCHACHT, *supra*, at 22.



There is only one manner in which an offer cannot be conveyed: silence. Any agreement purportedly reached through a silent offer is invalid. Normally, an offeror is expected to communicate actively via one of the aforementioned means.<sup>26</sup>

As the above quotation suggests, in Islamic Law an offer is effective upon dispatch. That is, as soon as an offer is made, it is legally valid. Notably, American Contract Law knows the same principle in the form of the "Mailbox Rule."

What does Islamic Law say about revocation of an offer? The general Islamic legal term for revocation, or withdrawal, is "*rujā'*." The general rule is that an offer is revocable until the moment it is accepted. At any point until acceptance, the offeror has the right to retract the offer. But, upon acceptance, a contract is concluded. At that moment, the offeror no longer has a right of *rujā'*.

A closely related query is for how long is an offer effective, i.e., valid? Professor Hussein states that as a general rule, if an offer is conveyed in writing, then it remains effective until the offeree receives the offer.<sup>27</sup> (The above quote from Professor Doi makes the same point.) Upon receipt, the offeree has a duty to reply promptly (or, in the account of Professor Doi, "immediately"). The reply takes the form of an acceptance, rejection, request for clarification, modification, or counter-offer. Presumably, if the offeror conveys the offer orally, or through non-verbal communication, then the same general rule applies. In many instances, such conveyance implies a face-to-face meeting, telephonic or e-mail link, or other real-time interaction between the parties.

Arguably, there is a sequencing problem with stating the general rule about the duration of an offer in terms of receipt, rather than acceptance, by the offeree. Receipt is followed by, not simultaneous with, acceptance. If an offeror has the right to revoke an offer up until the moment of receipt by the offeree, then an offeree might never have the opportunity to accept it. That would occur if the offeror revokes it at precisely the moment of receipt (or before). In that instance, the offeree has no time to contemplate the offer. Consequently, unless that outcome is intended, it appears better to characterize the general rule in terms of acceptance: an offer is valid until acceptance, but up until acceptance, the offeror has a right of revocation (*rujā'*).

This general rule is subject to a caveat. It is within the right of any offeror to condition the offer as to its duration (as well as other features). No offeror is required to keep an offer open in perpetuity. On the one hand, an offeror can expand the time an offeree has to reply, beyond mere receipt by the offeror. For instance, the offeror can indicate "this offer is open for 5 business days following receipt." On the other hand, the offeror could circumscribe that period, possibly giving a fixed deadline. For example, the offer could state it expires on 11 November. The offeree might get constructive receipt of the offer, but not obtain actual knowledge of it, as would be the case where the offer arrived in the mail on 10 November, but the

<sup>26</sup> There may be room for a silent offer that is legally valid if there is no such expectation, but that proposition, while intimated by Professor Doi, is not explained by him. See Doi, *supra*, at 552 (stating: "If the contracting person keeps silent while he is expected to express himself, it will be deemed and invalid contract").

<sup>27</sup> See HUSSEIN, *supra*, at 171.

offeree was on holiday until 12 November.

## [B] Acceptance (*Ḳabāl*)

Upon acceptance (*Ḳabāl*), a contract (*ʿakd*) becomes binding. The Arabic term for "binding" is "*lāzim*." At that point, both sides are legally obliged to carry out their duties under the contract.

The fact the *Sharīʿa* envisions that agreements, under certain circumstances, may be oral, intimates it is flexible as to the form of communication used during contract formation. Oral contract formation patently involves words. But, under Islamic Law, non-verbal communication also suffices to form a contract.<sup>28</sup> Like an offer (*ijāb*), an acceptance (*Ḳabāl*) may be conveyed by a variety of means. Signs, gestures, conduct, or use of a messenger — any or all of them — may be enough to communicate an acceptance, and thereby establish a contract. Simply put, the *Sharīʿa* does not impose formal requirements as to communication style, and permits both an offer (*ijāb*) and an acceptance (*Ḳabāl*) to be communicated through behavior.

An example of non-verbal communication is compliance with an order.<sup>29</sup> A written or verbal order from an offeror might be "Sell me \_\_\_\_\_." The acceptance is communicated through that means, namely a sale. In modern American Contract Law parlance, the legally cognizable communication is through performance by the offeree. This example illustrates a second basic, practical point. Unless conditioned by the offeror in the offer, the acceptance and offer need not take the same communication form.

Is acceptance required for every kind of contract? No. Certain contracts do not require one.<sup>30</sup> An example is a unilateral disposition (e.g., of an asset) with immediate legal effect. The effect could be repudiation of a contract, or release of a debtor from an obligation. The counter-party need not accept the disposition. Repudiation or release occurs automatically under the *Sharīʿa*, with no further action required.

Importantly, both offer and acceptance may be conveyed through a designated agent (*wakīl*). Indeed, use of agents in commercial matters is common in the Arab Middle East. The agents are designated as such by their principals, the contracting parties. Ideally, the designation — itself a contractual arrangement between principal and agent — will lay out carefully the scope, nature, and duration of the agency relationship, including the powers of the agent to bind the principal.

Technically, the topic of ratification (*imḍā*) of an agreement may be placed within a discussion of contract formation. However, the right to ratify (*imḍā*) a contract bears similarities to the right of rescission (*khīyār*).

<sup>28</sup> HUSSEIN, *supra*, at 171.

<sup>29</sup> See SCHACHT, *supra*, at 145.

<sup>30</sup> See SCHACHT, *supra*, at 145.

### [C] Consideration (*Badal*)

In the usual contract (*'akd*), specifically, the contract of sale (*bay'*) through which a good or property (*māl*) is exchanged for money or for a different good or property, two basic features are, or ought to be, readily apparent: price, and value. These two features are not always identical.

The price of an object is called "*thaman*" in Arabic. The price may be different from the value of the good, which is called "*kima*." Typically, price is denominated in a fungible item, like money, gold, or silver. In contrast, of course, the object may be non-fungible. The value (*kima*) of any one object is the counter-value (*'uwaḍ*) of the other object, and vice versa. For instance, in a sale of 1 kilogram of oranges for U.S. \$5, the price (*thaman*) is \$5. The value (*kima*) of the oranges is the counter-value (*'uwaḍ*) given by the buyer, namely, \$5. The value (*kima*) of the \$5 is the counter-value (*'uwaḍ*) handed over by the seller, namely, a kilo of oranges. At a metaphysical level, there always is the possibility of debate as to whether the price reflects the true value, and thus whether the reciprocal counter-values are equal.

Contemplating the price (*thaman*) and value (*kima*) associated with a contract of sale (*bay'*) leads to a topic familiar in American Contract Law, namely, consideration. It might be too strong to say that Professor Schacht (1) reports that the *Shari'a*, in contrast to American law, does not have the doctrine of consideration, and (2) suggests all that is needed to make a contract *lāzim* is *ijāb* (offer) and *kabūl* (acceptance). However, it is fair to say that he does not lay much emphasis on the doctrine of consideration, though he identifies the Arabic word for it — *badal*.<sup>31</sup> He identifies its relevance mainly, if not exclusively, in the context of amending contractual obligations. In that context, he notes that a contract, in the event of a dispute between the parties, can be amended by an amicable settlement, called "*sulh*" (as distinct from a cancellation, or "*faskh*"). The amendment may require supporting consideration, as when a creditor or other obligee waives a claim against a debtor or other obligor.

True enough, an existing obligation can be amended for *badal*. The result is a waiver of any claim arising from the original obligation that has been modified. But, consideration matters in any contractual situation. Indeed, as Professor Hussein states, it is "essential."<sup>32</sup> Other sources confirm her view. For example, Professor Doi writes:

In the *Shari'a*, a contract is made only when one party offers something to another party for some consideration and the other party accepts the offer. The offer and acceptance must be made in a free manner. The consideration must be lawful. The parties must also agree upon their rights and duties.

Consideration is an essential ingredient of a valid contract.<sup>33</sup>

<sup>31</sup> See SCHACHT, *supra*, at 144, 148, 154, 197.

<sup>32</sup> HUSSEIN, *supra*, at 171.

<sup>33</sup> DOI, *supra*, at 551, 553 (emphasis added). The fact Professor Doi cites three Islamic legal treatises

Thus, not only is consideration essential to contract formation in Islamic Law, but also it is fascinating, and humbling, to contemplate the possibility that the American Contract Law doctrine of consideration is derived, directly or indirectly, from the *Shari'a*.

As the above-quoted passage indicates, consideration must be "lawful." Legality is a separate element indispensable to contract formation. For present purposes, the quotation raises the following question: of what must consideration consist? That is, what qualifies as lawful consideration? The answer is whatever the parties agree, with the qualification their agreement does not take the form of something forbidden (*harām*).<sup>34</sup> They may agree on money, and in the vast majority of contracts, price (*thaman*) is the consideration that supports the contract. However, the theory of consideration in Islamic Contract Law tends to emphasize value more than price. Indeed, the value can be a moral one, and a moral value can constitute consideration. That is why transactions involving a gift (*al hibah*) or charitable property (*al waqf*) are considered contracts under the *Shari'a*.

But, a good (or goods), or a service (or services), also may be the form consideration takes. Any such good or service must not involve alcohol, pork, pork products, pornography, gambling, excessive risk (*gharar*), or interest (*ribā*). These prohibitions on the subject of a contract relate to the legality of purpose of a contract.

### [D] Capacity

Capacity is a familiar concept to scholars, students, and practitioners of the American legal system. Whether the context is formation of a contract, alienation of property, commission of a tort, or perpetration of a crime, a threshold question in any case is the competence of the relevant party or parties. Did that party have the ability, intelligence, understanding, sense, or judgment so it is fair to ascribe to the party legal rights and obligations? In each of these contexts, the same inquiry arises in Islamic Law.

Thus, as regards contract formation, all of the parties entering into an agreement must have the capacity to do so. As in American Contract Law, the inquiry revolves around the practical questions of age and soundness of mind. A minor does not have the legal capacity to contract, nor does a person of unsound mind. What is the precise threshold for age of majority, and what exactly are the tests for soundness of mind?

There is no single answer observed uniformly throughout the Muslim world. However, a reasonable general guide on age of majority is post-puberty.<sup>35</sup> Until the time a female has her first menstrual cycle, and until a male has experienced puberty, they are considered minors. Sexual maturity, in the biological sense of capacity to reproduce, is commonly used to delineate whether contractual maturity,

lends further support to the point that consideration is indispensable to contract formation under the *Shari'a*. See *id.*, fn. 14 at 577.

<sup>34</sup> See HUSSEIN, *supra*, at 171.

<sup>35</sup> See DOI, *supra*, at 553.



in a legal sense, exists. Until that time, a child may enter into a contract not on her own behalf, but rather only through a guardian (*wali*). The guardian, of course, bears special responsibilities not to abuse his position. Under certain circumstances, a contract entered into by the guardian to which a child, upon reaching adulthood, objects may be cancelled by the child at that time.

As for soundness of mind, the *Shari'a* sets out no single test. That also is true for American Criminal Law, with various tests for insanity having been proposed, applied, modified, and replaced over the centuries. The basic inquiry, however, is clear enough: did the party, at the time of the transaction, have sufficient mental competence to understand fully what she was doing? This inquiry involves an examination of the state of the party at the time, which may be one of permanent or long-term debilitation, or one of temporary incapacity. Some conditions obviously rule out legal capacity, such as mental retardation. Others, however, such as the alleged effects of prescription medication, may be dubious depending on the circumstances.

Importantly, under the *Shari'a*, minor age and unsound mind are not the only two factors that disqualify a party from having legal capacity to contract. There are four other factors.<sup>36</sup> First, an intoxicated person does not have capacity. Second, an insolvent person lacks capacity. *i.e.*, one who is unable to pay her debts, lacks capacity. Third, a person who is "legally declared prodigal" (in effect, recklessly wasteful, a spendthrift) is deemed not to have capacity.<sup>37</sup> Finally, anyone suffering from an illness that is terminal (*marad al-mawt*) (*i.e.*, a physical condition that leads to death) does not have capacity.

This final disqualifying factor can lead to disputes concerning the cause of death. Was it the illness that actually brought about death, or some other intervening factor? Did the illness really incapacitate the relevant party? Moreover, the longer the relevant party lives with a disease, the more arguable the point that the party lacked capacity may be. On the one hand, there is no room for argument if a party is in a coma. On the other hand, if the party lives with terminal cancer for a few years, and is not hospitalized in intensive care until the last few days of life, before which the party entered into a contract, the argument about incompetence may be joined.

### [E] Legality

The purpose of a contract must be lawful. A contract for alcohol, pork, pork products, or pornography, or a contract involving gambling, excessive risk (*gharr*), or interest (*riba*), is invalid.<sup>38</sup> That is, the contract is void — it has no legal effect, as distinct from a voidable contract, which may be voided at the option of either or both parties.

<sup>36</sup> There is a fifth such factor, namely, being a slave. See Doi, *supra*, at 553. However, as slavery is officially outlawed in all Muslim countries (even though it persists in a few of them in different manifestations), the condition is no longer relevant.

<sup>37</sup> See HUSSEIN, *supra*, at 171.

<sup>38</sup> See HUSSEIN, *supra*, at 171.

An interesting question arises if the contract of sale (*akd al-bay'*) is for grapes or dates that are to be used to make wine. Legal scholars (*fukahā'*) of the *Māliki* and *Hanbali* Schools hold such a contract is invalid. However, the extent to which knowledge and intent matter is unclear. If the seller has no knowledge of the use to which the grapes or dates will be put, or if the buyer, at the time of contracting, does not intend to use them to make wine, then is the contract still void? Insofar as the essential condition for valid contract formation is purpose, then knowledge and intent of the parties should be relevant. This issue of validity, and attendant questions, can be analogized to any contract of sale for ingredients that could be used in an alcoholic beverage. Logically speaking, all such contracts cannot be void. There are a large number of ingredients, including water, that are the subject of daily transactions in the Muslim World. Such ingredients are dual-use (to borrow a concept from Export Control Law, where the two possibilities are civilian or military use). They may be used for alcoholic or non-alcoholic purposes.

A final point about the legality of the purpose of a contract concerns law enforcement. Any contract for the sale of a weapon to a criminal or rebel is void.<sup>39</sup> That is not to say all arms sale contracts are legally invalid. A weapon can be the object of a contract, supported by money as consideration. Likewise, a contract could involve a barter of weapons. Rather, the contracting party — if it is a robber or rebel — creates the legal impediment. Once again the question of knowledge and intent could matter. The seller may not know the true nature of the buyer, or the buyer may not intend to rob or rebel at the time of contracting. These factors may alter the legal outcome as contract validity. And, to paraphrase a distinction President Ronald Reagan (1911–2004) made in the 1980s, there may be a political bias in identifying whether a buyer is a rebel or freedom fighter.

### [F] Absence of Duress (*ikrāh*)

The final indispensable constitutive element in contract formation is freedom. The contracting parties must be acting under their own free will in respect of their desire to enter into an agreement, the negotiation of the terms of the bargain, and their mutual and reciprocal acceptance of those terms. In brief, all aspects of the entry into the contract must be based on the free choice of the parties.

There are two ways to characterize this element. The first manner, freedom, is a positive or affirmative statement. The second manner is a negative, and is the mirror image of the first characterization. Like Islamic Criminal Law, Islamic Contract Law has the concept of "duress," which in Arabic is called "*ikrāh*." To require that parties enter into a contract freely is to require that they do not conclude the contract under duress. The consequence is severe if this element is missing. As Professor Hussein states, "a contract concluded under duress is null and void."<sup>40</sup>

As with the other essential ingredients for contract formation, duress (*ikrāh*) is not unfamiliar in American Contract Law. As with the other elements, too, it might be ventured that the *Shari'a* is a, if not the, direct or indirect source of what

<sup>39</sup> See Doi, *supra*, at 553.

<sup>40</sup> HUSSEIN, *supra*, at 171.

emerges in the Common Law of England centuries after the formative period of Islamic Law.

What constitutes duress (*ikrah*)? This question is of crucial practical import. The answer is that to constitute *ikrah*, there must be a threat, known in Arabic as "*tahdid*." But that answer only leads to another question, namely, how is an adjudicator to know if a threat exists? The test is two-pronged:<sup>41</sup>

- (1) The party making the threat must be in a position to carry out the threat.
- (2) The party to whom the threat is made must fear that the threat actually may be carried out.

Simply put, the threatening party must have the capacity to make good on the threat, and the threatened party must be frightened by what is a realistic prospect. If and when both prongs of the test are met, then the rationale for declaring a contract void becomes clear. Parties acting freely under their own volition declare, in one way or another, their intent (*niyya*) to conclude an agreement. But, when a party acts under duress (*ikrah*), any declaration by it of its intent is dubious as to its true, underlying aspiration. That is, duress invalidates intent (*niyya*). The legal consequence is that the duties of the threatened party under the contract are eliminated.

Depending on circumstances, if the duress is not egregious, the result may be not to declare the contract null and void, and eliminate all duties. Rather, it may be to reduce in some manner, proportionate with the adverse effects of the duress, the duties, and thereby preserve the key features of the bargain. Perhaps rather surprisingly, Professor Schacht indicates if the threat is of death, a severe beating, or a long imprisonment, then there is sufficient duress (*ikrah*) to render a declaration made by the threatened party voidable (*khiyār*), but not automatically null and void, as Professor Hussein suggests.<sup>42</sup>

What also is remarkable, which Professor Schacht observes, is even in these cases of extreme duress, there are exceptions for transactions that Islamic Law regards as desirable. He cites two instances: conversion to Islam, and the freeing of slaves.<sup>43</sup> An agreement to adopt the Islamic faith, or an agreement to free slaves, is preserved. The agreement is not rendered null and void, even though extreme duress is present. The rationale, says Professor Schacht, is that they are "desirable transactions," by which he means the outcomes are morally or ethically good from an Islamic vantage point.

However, this rationale is flawed in respect of conversion, and whether all Islamic legal and religious scholars (*fukahā'* and *ulema*, respectively) agree with the observation of Professor Schacht is dubious. A conversion made under duress hardly would be as pleasing to God as a free, loving embrace of faith. The Qur'an itself is clear that there must be no compulsion in religion:

- *Surah 2, ayah 256* states:

<sup>41</sup> SCHACHT, *supra*, at 117.

<sup>42</sup> See SCHACHT, *supra*, at 117-118.

<sup>43</sup> See SCHACHT, *supra*, 118.

*There is no compulsion in religion; true guidance has become distinct from error, so whoever rejects false gods and believes in God has grasped the firmest hand-hold, one that will never break. God is all hearing and all knowing.*<sup>44</sup>

- *Surah 10, ayat 99-100* say:

*"Had your Lord willed, all the people on earth would have believed. So can you [Prophet Muhammad] compel people to believe? <sup>100</sup>No soul can believe except by God's will, and He brings disgrace on those who do not use their reason.*"<sup>45</sup>

Finally, it may be myopic to view conversion on the level of a contract among persons, and subject to the same sorts of rules, rather than as a covenant with the Almighty, which is governed in a different paradigm.

## § 21.07 EVIDENCE AND LONGEST QUR'ĀNIC VERSE

A corollary to the emphasis on honesty and fair dealing in commercial matters concerns evidence of the terms to which parties purportedly have agreed. To minimize the likelihood of disputes, and to help resolve them efficiently and accurately when they do occur, Islamic Law strongly encourages that contracts be evidenced in writing. *Surah 2, ayah 282*, which is the longest verse in the Qur'an, states:

*You who believe, when you contract a debt for a stated term, put it down in writing: have a scribe write it down justly between you. No scribe should refuse to write: let him write as God has taught him, let the debtor dictate, and let him fear God, his Lord, and not diminish [the debt] at all. If the debtor is feeble-minded, weak, or unable to dictate, then let his guardian dictate justly. Call in two men as witnesses. If two men are not there, then call one man and two women out of those you approve as witnesses, so that if one of the two women should forget the other can remind her. Let the witnesses not refuse when they are summoned. Do not disdain to write the debt down, be it small or large, along with the time it falls due: this way is more equitable in God's eyes, more reliable as testimony, and more likely to prevent doubts arising between you. But if the merchandise is there and you hand it over, there is no blame on you if you do not write it down. Have witnesses present whenever you trade with one another, and let no harm be done to either scribe or witness, for if you did cause them harm, it would be a crime on your part. Be mindful of God, and He will teach you. He has full knowledge of everything.*<sup>46</sup>

There is a bit of irony, perhaps, in the fact that the longest verse concerns the writing down of contracts. That said, the verse is remarkable in at least four respects.

<sup>44</sup> QUR'AN, *supra*, 2:256 at 29 (emphasis added).

<sup>45</sup> QUR'AN, *supra*, 10:99-100 at 135 (emphasis added).

<sup>46</sup> QUR'AN, *supra*, 2:282 at 32 (emphasis added).



First, at first glance, *surah* 2, *ayah* 282 appears limited to debt contracts. However, it would be wrong to circumscribe the scope of the verse to loan transactions. Any contract involves mutual obligation. Each side owes a debt to the other, whether it is goods for goods, goods for money, services for goods, services for services, services for money, or some other alternative. That also is true when setting up or amending a partnership agreement. The advice in the *ayah* applies to all commercial dealings.

Second, the advice in it is not so strict as a statute of frauds in American Contract Law. The Qur'an does not mandate a contract be in writing for it to be valid. Indeed, there is an exception for spot (or on-the-spot) contracts. *Surah* 2, *ayah* 282 admonishes commercial parties to take witnesses. From this warning, it can be inferred there may be instances in which a contract is not reduced to a written document. Spot deals are an example, as suggested by the sentence "but if the merchandise is there and you hand it over, there is no blame on you if you do not write it down." Quintessential examples in everyday life are purchases of grocery items, particularly from street vendors.

Another instance is if no scribe exists to record an agreement. This situation, more common in yesteryear, is unlikely in an era of rising rates of literacy. It could occur while traveling, as *ayah* 283 indicates:

*If you are on a journey, and cannot find a scribe, something should be handed over as security, but if you decide to trust one another, then let the one who is trusted fulfill his trust; let him be mindful of God, his Lord.<sup>47</sup>*

Whenever a contract is not written down, the device to mitigate the risk of misunderstanding, and to help resolve disputes, is to rely on two male eyewitnesses. They would be available to testify orally as to the terms of an agreement and intentions of the parties. Posting collateral is a further device, which *ayah* 283 suggests for a contracting party or parties who are traveling. The text is unclear as to what, exactly, "journey" means. An expansive definition would be anytime a party is even a short distance from home. A narrower, and probably more realistic definition, would be when a party literally is en route from one destination to another, and has no access to a scribe.

Third, as to witnesses, gender matters. In the *Shari'a*, for almost all instances (the exceptions being matters pertaining distinctly to women, such as menstruation cycles and pregnancy), the witness or testimony provided by a woman has only half the evidentiary value of that of a man. Further, women are singled out as potentially being forgetful, yet in fact the problem can equally plague men. A justification occasionally given is expedience. In traditional Arabian societies (and in some contemporary ones, particularly in the Gulf region), women were largely excluded from commerce, notwithstanding, ironically, the example of Khadyja, the first wife of Muhammad. The traditional focus of women (not always by their free choice) was on family life, and men on business. When a business dispute arose, finding a witness or obtaining testimony of a man was easy, because men dominated the marketplace. In contrast, finding a female witness supposedly would be difficult, thereby delaying resolution of the dispute.

<sup>47</sup> QUR'AN, *supra*, 2:283 at 32-33 (emphasis added).

Of course, this justification is easily rebutted on three counts. First, as a practical matter, the fact that men may be easier to find does not mean women should be excluded as witnesses or testifiers. Excluding them only makes the task harder. Second, the justification is not a defense of the central problem — the lesser value of a woman's testimony. Third, the justification commits the Orientalist fallacy. That is, it attempts to defend an Islamic legal rule sourced in the Qur'an by referring to historical socioeconomic conditions. It is inconsistent to argue the Qur'an is the literal word of God (Allāh), on the one hand, but then defend some of the more controversial textual provisions on social, economic, political, or public policy grounds. God's law needs no such support, but rather is a matter to which believers are called to submit.

A second justification for the gender difference on evidentiary value concerns competence. It is ventured (episodically, and typically by a man with some embarrassment) that commerce is a sphere in which men boast distinct competence. Women, being less familiar with contractual dealings, ought not to be given the same weight when witnessing or testifying at law as to those dealings. This justification is not simply muddle-headed, but even nefarious. Khadyja, and countless devout female believers after her, are testaments to the business acumen of Muslim women in particular, and women in general. Moreover, the justification is hypocritical. On subjects that are supposedly ones in which women hold the comparative advantage (e.g., menstruation and pregnancy), the evidentiary value offered by a man is not reduced by half. That is, there is no circumstance under which the evidentiary value of a man is half that of a woman.

Fourth, and finally, the reference to "God's eyes," and the last part of *surah* 2, *ayah* 282, are clear reminders that God is omniscient. Only a fool or a knave would proclaim Allāh is unaware of an effort to cheat a counterparty in a business deal. Allāh knows all the evidence about the true terms of a contract, and the intentions of the parties. That also is clear from the last sentence of *ayah* 283:

... Do not conceal evidence: anyone who does so has a sinful heart, and God is fully aware of everything you do.<sup>48</sup>

Consequently, there is no point in not recording transactional terms accurately in writing if possible. Doing so is a deed that will be weighed positively on the Day of Judgment.

In brief, the general rule in Islamic Law may be summarized by saying that any contract should be reduced to a written document, and if that is not possible, then witnesses should be present at the time of contract formation. The emphasis on a written document should not come as a surprise. The Arabic term for a "document" is "*sakk*," and the plural (documents) is "*sukūk*." Use in the Near East of written documents for contracts obviously pre-dates Islam. It was part of pre-Islamic custom.

Thus, the emphasis is consistent with the over-arching proposition that the *law merchant* and *Shari'a* interact with one another. Consider the exception set out in *surah* 2 *ayah* 283 (quoted above) that if no scribe is available to put a contract in

<sup>48</sup> QUR'AN, *supra*, 2:283 at 33.

writing, then both parties should give security. This security, or pledge (*rahn*), serves two functions: a guarantee, and material proof of the contract. Yet, the same rule was part of pre-Islamic customary law of the Bedouins on the Arabian Peninsula. From a legal perspective, though edging toward the Orientalist fallacy, the Qur'ān endorses these practices.

The proposition holds true even in respect of the major rule, which is that a contract should be put in writing. Interestingly, though, interaction does not always translate into consistency. In support of the existence of a contract, pre-Islamic customary law held documentary evidence as valid, as does *surah* 2, *ayah* 282. In the hustle and bustle reality of markets, written contracts were — and remain — essential to ascertain clearly and transparently what has been agreed, and by whom. Yet, practice and theory diverged: in practice, merchants used written documents; in theory, Islamic religious and legal scholars (*ulema* and *fukahā'*, respectively) focused on testamentary evidence. Accordingly, the *Shar'ia* allows for valid legal proof to take the form of oral evidence from witnesses to a contract. As Professor Schacht puts it:

Theory continued to reason as if there were no documents but only the oral testimony of witnesses, possibly helped by private records of their own; practice continued to act as if the documents were almost essential and the "witnessing" only a formality to make them fully valid. . . . Finally, even strict theory deigned to recognize the existence of written documents and to admit them as valid evidence once they had been attested by qualified witnesses, the *Mālikis* to the widest extent, the *Hanāfis* and the *Hanbalis* with some hesitation, whereas the *Shāfi'is* continued to regard them strictly as accessories; but the actual use of written documents was equally extensive among the adherents of all schools.<sup>49</sup>

Significantly, in most modern Islamic states, under modern legislation or some other legal authority, written documents are considered valid proof of the existence of a contract and of its terms. But, again, witnesses will suffice.

Other than a written document or witnesses, there is a third kind of evidence of a contract accepted under Islamic Law? Acknowledgment by a party that she has created an obligation to which she is subject qualifies as evidence of a contract. In Arabic, "acknowledgment" is called "*ikrār*." However, *ikrār* is considered a weaker kind of proof than testimony, and certainly weaker than a document. That is because of an interesting link to Islamic Criminal Law. A contracting party can withdraw an acknowledgment in a criminal proceeding where the sanction for the crime charged is a *hadd* punishment.

<sup>49</sup> Schacht, *supra*, at 82.

## Chapter 22

### CONTRACT LAW: TYPES OF CONTRACTS

*To the Muslim world, we seek a new way forward, based on mutual interest and mutual respect. To those leaders around the globe who seek to sow conflict, or blame their society's ills on the West — know that your people will judge you on what you can build, not what you destroy. To those who cling to power through corruption and deceit and the silencing of dissent, know that you are on the wrong side of history; but that we will extend a hand if you are willing to unclench your fist.*

President Barack H. Obama, *Inaugural Address*, 20 January 2009, posted at <http://news.bbc.co.uk> (emphasis added)

#### SYNOPSIS

#### § 22.01 PROHIBITED (*HARĀM*) AND VOIDABLE (*FĀSID*) CONTRACTS

#### § 22.02 STANDARD TYPES OF PERMISSIBLE CONTRACTS

- [A] General Contracts of Sale (*Bay'*) for Goods or Property (*Māl*)
- [B] Prepayment (*Salam*) Contracts
- [C] Delay (*Nasi'a*) Contracts
- [D] Manufacturing Contracts (*Istisnā'*)

#### § 22.03 ADVANCED TYPES OF PERMISSIBLE CONTRACTS

- [A] Suretyship Contracts (*Kafāla*)
- [B] Hire and Lease Contracts for Goods or Services (*Ijāra*)
- [C] Cancellation (*Faskh*) of an *Ijāra* Contract
- [D] Mortgage or Pledge Contracts (*Bay' al Wafa'*)
- [E] Loan Contracts (*'Ariyya*)

#### § 22.04 UNCONSCIONABILITY AND THE PROBLEM OF SHORTAGE OR LACK (*GHABN*)

#### § 22.01 PROHIBITED (*HARĀM*) AND VOIDABLE (*FĀSID*) CONTRACTS

Religious boundaries on contracting are nowhere more evident than in respect of objects of commerce. Certain things (*aym*) are not acceptable as objects of purchase and sale. In addition to things forbidden (*harām*) as commercial objects, another class of things are permitted, but regulated, as transactional objects. A second prominent religious boundary on contracting concerns types of contracts that are strictly prohibited (*harām*). Yet a third boundary delineates contracts that are defective and thus voidable (*fāsīd*).



A general rule is that a contract concluded in violation of a prohibition is invalid. Among the two most important types of transactions prohibited, and considered forbidden (*ḥarām*) on religious and legal grounds, are ones involving (1) uncertainty (*gharar*) or (2) unjustified enrichment, or loosely, interest (*ribā*).<sup>1</sup> Issues of *gharar* and *ribā* arise in banking. The simple point for now is that Islamic *ulema* and *fukahā*<sup>2</sup> reject as *ḥarām* any contract bearing either of these elements.

The source of the general rule rendering invalid a prohibited contractual transaction is not the Qur'ān, but the *Sunnah* (traditions of the Prophet Muhammad). The Qur'ān contains almost no technical provisions about the legal consequences of failure to fulfill one or the other of the various contractual duties a Muslim might incur. Similarly, it says little about the legal ramifications of a factual predicate in which Contract Law has been breached. Several *āyat* in the Qur'ān cover the importance of honesty and integrity in commercial and non-commercial dimensions of life, but this sacred text is not, after all, a book about contractual breaches, events of default, remedies for seller's breach, or remedies for buyer's breach. Thus, the *Sunnah* is the source for legal effects of actions contrary to the Law of Obligations. In brief, the *Sunnah* provides much of the needed gap-filling where Qur'ānic legislation is incomplete.

There is the Scale of Religious and Legal Qualifications (*Al Ahkām Al Khamsa*). The vast majority of everyday contractual transactions pose no religious objection, meaning the transaction is *mubāh* (permissible). Moreover, the acts (*i.e.*, the nature of the transaction, or "*ʿaṣl*") and circumstances of the transaction (*wasf*) comport with the *Shari'a*, specifically, the Law of Obligations. Consequently, the transaction is *ṣāḥiḥ* (valid, *i.e.*, legally effective).

However, in some instances a transaction can be simultaneously *ḥarām* (forbidden) on the Scale, yet from a legal perspective only *makrūh* (reprehensible and disapproved). The latter categorization means the transaction, from a legal perspective, remains valid. There also are contracts that are reprehensible (*makrūh*), from a religious perspective, but *fāsid* (defective, voidable) from a legal perspective. One example is a contract for the sale of a good concluded at the time of the call to Friday prayers.<sup>3</sup>

In practice, what does it mean for a contract to be *fāsid*? In the context of a contract of sale (*bay'*), and specifically a sale or exchange of goods or property (*māl*), it means that the title conveyed is "bad ownership."<sup>4</sup> In Arabic, this "bad ownership" is called "*milk khabīth*." Specifically, even after the subject matter of the contract has been delivered, the new owner of that subject has "bad ownership" of it, or what American Contract Law characterizes as a "cloud on title." The practical importance of that status is that the *fāsid* sales contract could be cancelled, and the new owner would be deprived of possession of the good or property in question. The buyer herself would be unlikely to exercise the cancellation, but a third party

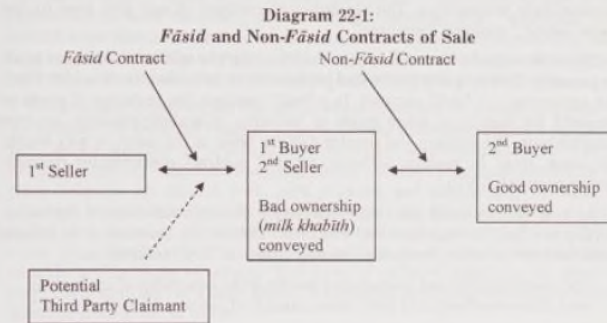
<sup>1</sup> See JOSEPH SCHACHT, AN INTRODUCTION TO ISLAMIC LAW 144 (Oxford, England: Oxford University Press (Clarendon Paperbacks) 1982). [Hereinafter, SCHACHT.]

<sup>2</sup> See SCHACHT, *supra*, at 152.

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claimant to the good or property might exist and directly, or through the seller, call for cancellation.

When would the possibility of cancellation of a *fāsid* sale end? The answer is when a contract of sale for the same article, a contract that is not *fāsid*, is completed. That is, until the subject matter is re-sold under a new, non-*fāsid* contract, the "cloud" of "bad ownership" looms. Essentially, the buyer in the second contract is treated as a bona fide purchaser acting in good faith, thus the condition that made the first contract voidable does not pass to the second buyer. Diagram 22-1 exhibits these points.



Interestingly, in December 2003, your author was party to such a transaction in the Old Souk in Riyadh, Saudi Arabia. The object of purchase was a lovely blue carpet, a Christmas present for your author's wife. As negotiations over price proceeded, the call to prayer resonated from a nearby mosque. There were two sellers assisting, one Saudi, and one Pakistani. The Saudi left for the prayer, and closed the door behind him. The Pakistani stayed to conclude the transaction. By appearances, one seller inferred the transaction must be suspended until after prayers, while the other realized the deal — though ill-advised — was not strictly *ḥarām*. At Christmas, the author's wife delighted in the carpet, and (along with the rest of the family and many friends) has so ever since. Happily, no contention of bad ownership, and no claim for cancellation, ever was raised.

## § 22.02 STANDARD TYPES OF PERMISSIBLE CONTRACTS

### [A] General Contracts of Sale (*Bay'*) for Goods or Property (*Māl*)

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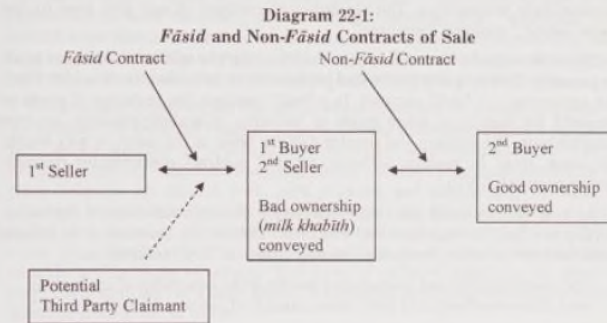
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framework is a strong but light scaffolding that supports modern economic growth. The aim of Islamic Law is to suffuse commercial transactions with moral precepts, to regulate transactions as need be from a religious perspective, but not weigh down the development of the marketplace. In brief, the Islamic Law of Obligations is not a set of rigid nay-saying rules, and many kinds of contracts are acceptable under this Law.

The most common type of contract, and the type pertaining to which the *Shari'a* is best developed in the sense of having the most detailed and precise rules, is a contract for the sale of goods. The generic term in Arabic for a sale of goods is "*bay'*." This word also covers non-monetary exchanges, that is, barter and other counter-trade transactions. The old-fashioned contract of sale also goes by the name "*shirā'*," meaning "purchase."

The most common kind of a *bay'* is a contract for the sale or exchange of goods or property. That property is of a kind permissible to be traded, i.e., it is *māl*. Thus, the agreement is a "*māl*" contract. In a "*māl*" contract, the exchange of goods or property for money, or other goods or property, is contemporaneous, or even simultaneous. The delivery and counter-delivery occur at the same, or very nearly, the same, time. In modern parlance, a "*māl*" contract contemplates delivery-versus-payment (DVP).

As long as they fulfill the basic constitutive elements for contract formation, parties are free to enter into *bay'* contracts. That is, the constraints on general sales contracts are few. Professor Hussain defines a "*bay'*" contract as:

the unconditional and immediate transfer of the ownership of an existing and determined object of legal value, capable of delivery for a fixed price.<sup>4</sup>

From this definition, four points are evident.

First, there must be no conditions on the transfer of ownership of the object of the contract. Literally, that cannot be true. There always is at least one express condition — payment of the price by the buyer. There also are implicit conditions, such as that the seller has good title to convey. The word "unconditional," however, may be understood in that the seller is not making contingent the transfer of ownership on an unrelated or speculative event, such as whether a stock market benchmark like the Hang Seng Index of the Hong Kong Stock Exchange rises by 10 percent, or whether the Turkish national soccer team wins the World Cup.

Second, the transfer of ownership is "immediate." Here, too, some explanation is needed. When, precisely, title is transferred is a topic that has a long history in American Contract Law, and generally is elided in the Uniform Commercial Code (U.C.C.). The above-definition links title transfer with payment of a price. When the seller pays for the object, the seller gets title to it. Note the word "immediate" does not mean contracts in which delivery and payment occur separately — i.e., prepayment (*salam*) and delay (*nasi'a*) agreement — are forbidden. They are permissible.

<sup>4</sup> JAMILA HUSSAIN, *ISLAMIC LAW AND SOCIETY — AN INTRODUCTION* 173 (Annandale, New South Wales, Australia: The Federation Press, 1999) (citing Nigel G. Coulson, *Commercial Law in the Gulf States* (1984)) (emphasis added). [Hereinafter, HUSSAIN.]

Third, the object must meet five parameters: it must be

- (1) in existence;
- (2) defined in the contract;
- (3) a lawful article of commerce;
- (4) have value; and
- (5) deliverable.

It is impermissible to contract for something not in existence, or not yet extant, such as an unborn camel or horse that has not been conceived. It also is not permissible to leave the object of the contract undefined (e.g., "something"), or without a specified price. That does not appear to mean the *bay'* contract, to be valid, must set out the exact price figure. Rather, a price figure not fixed in the contract, but readily ascertainable by means defined in the contract, is permissible.

For example, a contract for the sale of wheat could call for a price as quoted on the Kansas City Board of Trade at 12 noon Central Standard Time on a particular date. As for whether an article is a lawful object of commerce, there may be country-to-country variation. Assuredly, among the most prominent candidates for being forbidden are alcohol, pork, pork products, and pornography. Whether an object has "value" depends on the object. A grain of sand or leaf of a tree do not have it. Air is free, but when collected in a tank used for hospital patients or scuba divers, it has value. Graffiti might not have value to most passers by, but be considered valuable art by some observers. The form of delivery need not be physical, particularly as to land or a large fixture. A document certifying ownership would be delivered from seller to buyer.

Fourth, none of the five parameters precludes a barter or counter-trade exchange. A *bay'* contract can call for reciprocal, reverse deliveries of goods. Such deliveries must be immediate.<sup>5</sup> The logic appears to be that the condition of one or both goods might alter if the exchange is not immediate. One good, if held back, might deteriorate, degrade, or be damaged in some way, during a delay period. The risk of quality problems is especially likely if perishable products are the objects of the contract.

The parameters concerning the definition and value of an object of a contract implicitly assume that the object can be measured, weighed, or counted. These possibilities are particularly important if the contractual object is fungible. The *Shari'a* has terms for all three possibilities —

- (1) Fungible objects that can be measured are called "*makīl*." (A synonym is "*kaylī*.")
- (2) Fungible objects that can be weighted are called "*mawzān*." (A synonym is "*waznī*.")
- (3) Fungible objects that can be counted are called "*ma'dūd*." (A synonym is "*dādī*.")

<sup>5</sup> See HUSSAIN, *supra*, at 173.

Interestingly, Roman Law had a principle known in Latin as *quae pondere numero mensura constant* (meaning “[those] whose weight, number, and measure they all agree [on]”).<sup>6</sup> The concepts of *makīl*, *mauwān*, and *ma’dūd* correspond to, and even may be drawn from the Roman legal legacy.<sup>7</sup>

### [B] Prepayment (*Salam*) Contracts

A sales agreement need not involve the contemporaneous or simultaneous delivery and counter-delivery of goods or property in return for funds, or for other goods or property. In some instances, prepayment may occur, while in other cases delivery may occur first. Both arrangements depend on the context, needs, and interests of the seller and buyer. For instance, buying books from an on-line vendor like Amazon.com involves pre-payment. (Other examples, which involve services, are purchasing a ticket on an airplane, or a music concert or theater performance. An illustration that involves a mixture of goods and services is purchasing food at a fast-food chain.) Conversely, buying a meal at a restaurant (and the attendant services) — as distinct from a cafeteria or fast-food chain — entails deferred payment, namely, until the meal is over.

The *Sharī’a* permits both types of arrangements, depicted in Diagram 22-2. One common kind of sales contract (*bay’*) is called “*salam*.” It is a prepayment contract. Under it, a buyer orders goods for a later delivery, but pays the price immediately. An example is where a trader is given funds now, in exchange for future delivery of a good that the trader is to provide.<sup>8</sup> Another customary instance is where a craftsman or other manufacturer is given funds now, in exchange for future delivery of a good the craftsman or manufacturer is to make. The seller is a producer of a good, and requires up front payment, at least to buy materials and ensure the buyer is serious about taking delivery of the item. Note that a contract for the manufacture of an object is called “*istiṣnā’*.”<sup>9</sup>

Technically, there are two types of *salam* contracts. Diagram 22-2 depicts both. Each kind calls for deferred delivery of goods, but they differ in the precise payment obligations. First, under a *bay’ al-salam* contract, which sometimes is translated as “spot sale,” the buyer is obligated to pay the full purchase price immediately to the seller. That is, the buyer pays the entire price to the seller upon finalization of the contract. The connotation of a spot sale is misleading, if by “spot” the idea is delivery-versus-payment (DVP). The transaction involves immediate, full payment against a future delivery.

<sup>6</sup> “*Quae*” is the feminine or neutral, nominative or accusative case for “which” or “who.” “*Pondere*” is the neutral, singular, ablative case for “a weight.” “*Numero*” is the masculine, singular, ablative case for “a number.” “*Mensura*” is the neutral, singular, ablative case for “a measure.” “*Constant*” is the third person plural present tense verb for “they agree.”

<sup>7</sup> See SCHACHT, *supra*, at 21.

<sup>8</sup> See SCHACHT, *supra*, at 153.

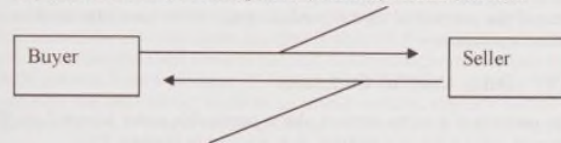
<sup>9</sup> See SCHACHT, *supra*, at 155.

### Diagram 22-2: *Salam* (Prepayment) Contracts — *Bay’ al-Salam* and *Bay’ al-Mu’ajjal* Contracts

#### *Bay’ al-Salam* Contract:

Business Day 1:

Payment of Purchase Price (e.g., U.S. \$1 million). Contract formed.



Business Day 10 (i.e., 10 business days after Business Day 1):

Delivery of merchandise purchased (e.g., specially crafted and fitted office furniture).

#### *Bay’ al-Mu’ajjal* Contract:

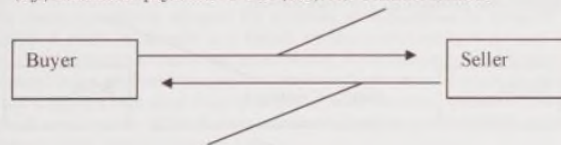
Business Day 3:

Lump Sum Payment of Purchase Price (e.g., U.S. \$1 million).

Or

Business Days 2, 4, 6, and 8:

(e.g., installment payments of U.S. \$250,000). Contract formed.



Business Day 10 (i.e., 10 business days after Business Day 1):

Delivery of merchandise purchased

(e.g., specially crafted and fitted office furniture)

Second, under a *bay’ al-mu’ajjal* contract, which means “deferred delivery,” the buyer is obliged to make a scheduled payment, but not necessarily of the full purchase price up front. The deferred delivery (*al-mu’ajjal*) refers to the price (money) to be paid for the good that is the object of the contract, not to that good itself. Accordingly, a *bay’ al-mu’ajjal* contract specifies one of two obligations:



- (1) The buyer pays that price in a lump sum at a contractually-identified later date (but one that is still before the delivery of the good); or,
- (2) The buyer pays in installments according to a schedule prescribed in the contract.

Observe that from an economic perspective, a *bay' al-mu'ajjal* contract involves two deferrals. The first one is the deferral of the delivery of the object of the contract, which renders the contract a species of *salam* contract. The second deferral is the deferral of the payment of the full purchase price, either via a later lump-sum or installment payments.

### [C] Delay (*Nasi'a*) Contracts

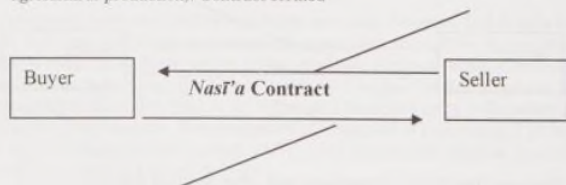
The converse of a *salam* contract also is permissible under Islamic Law. That converse is called a "*nasi'a*" contract. It is depicted in Diagram 22-3.

"*Nasi'a*" literally means "deferral" or "delay," and it often is used in the context of *ribā* (interest). The postponement refers to payment (not the good that is the object of the contract). Thus, a *nasi'a* contract calls for immediate delivery of goods, but delayed payment of the purchase price. *Ribā al-nasi'a* is forbidden. The prohibition applies in money-for-money transactions, such as loan arrangements. But, in a routine sales contract, a *nasi'a* arrangement is permissible, and is a species of such *bay'* contracts.

Diagram 22-3:  
*Nasi'a* (Delay) Contracts

Business Day 1:

Delivery of merchandise purchased (e.g., combine-harvester for use in agricultural production). Contract formed



Business Day 10 (i.e., 10 business days after Business Day 1):

Payment of Purchase Price (e.g., U.S. \$1 million).

### [D] Manufacturing Contracts (*Istisnā'*)

Another routine type of sale of goods (*bay'*) contract is known as "*istisnā'*." It is a contract for the sale of goods, where the goods have to be manufactured by the seller. As suggested earlier, insofar as it involves prepayment by the buyer, it is a

species of *salam* contracts. Professor Schacht remarks:

The contract of manufacture (*istisnā'*) . . . is merely a *salam* contract; it is valid only in so far as it is customary.<sup>10</sup>

Yet, this observation understates the distinctiveness and importance of *istisnā'* contracts.

To begin, an *istisnā'* contract, and the legality for it, are well-grounded in the Four Classical Sources of the *Shari'a*.<sup>11</sup> A wide range of objects — any kind of item to be manufactured — fall under this type of contract. For example, a transaction in which a buyer, the Cairo General Hospital, orders a magnetic resonance imaging (MRI) machine from a producer, Malaysian Medical Devices, whereby the latter must build the MRI device, would be an *istisnā'* contract. Specially crafted items, such as furniture or even artwork, qualify as objects of an *istisnā'* contract.

Moreover, an *istisnā'* contract contains at least five noteworthy features. First, both the buyer and seller have a right to revoke the contract.<sup>12</sup> That is, either side can rescind the contract. However, their right of rescission exists only up until the time the seller manufactures the goods. It appears there may be some ambiguity as to whether that time refers to the commencement or completion of production.

Second, the doctrine of change in circumstances may be incorporated or manifest in some way in an *istisnā'* contract.<sup>13</sup> For example, an alteration in the conditions of the buyer or seller may lead to modification, or even rescission, of the contract.

Third, an *istisnā'* contract stipulates that the seller-manufacturer is not personally liable for any defect in the product it produces.<sup>14</sup> The buyer does have a remedy, of course, for breach by the seller-manufacturer of its obligation to provide goods in conformity with the contractual specifications. That remedy typically is set out in a liquidated damages clause. In American Contract Law, as in Islamic Contract Law, this clause specifies in advance the measure of damages to be awarded to an aggrieved party on account of a breach by the counter-party.<sup>15</sup> As long as the liquidated damages clause is not punitive (e.g., by grossly exceeding the probable damage), is not applicable to a wide variety of defaults, some of which are minor, or is not triggered by a mere delay in payment, then American Common Law courts uphold such a clause. That pattern appears to hold true with *Shari'a* courts and arbitral panels applying Islamic Law.

<sup>10</sup> SCHACHT, *supra*, at 155.

<sup>11</sup> See MUHAMMAD AL-BASHIR MUHAMMAD AL-AMINE, *Istisnā'* (MANUFACTURING CONTRACT) IN ISLAMIC BANKING AND FINANCE — LAW & PRACTICE chs. 2-3 (Kuala Lumpur, Malaysia: A.S. Noordeen, 2001). [Hereinafter, AL-AMINE.]

<sup>12</sup> See HUSSEIN, *supra*, at 173.

<sup>13</sup> See AL-AMINE, *supra*, at ch. 7.

<sup>14</sup> See AL-AMINE, *supra*, at 46-47.

<sup>15</sup> See BRYAN A. GARNER, ED., BLACK'S LAW DICTIONARY 1015 (St. Paul, Minnesota: West, 9th ed., 2009) (entry for "liquidated-damages clause").

Fourth, parties to an *istisnā'* contract sometimes choose arbitration over litigation to resolve disputes under their contract.<sup>16</sup> That is not surprising. The contract may call for manufacture of a sophisticated product, and the parties may feel expert arbitrators are best able to understand the complexities of that product. They also may anticipate that arbitration would be a faster, less expensive process than litigation.

Finally, *istisnā'* contracts can and do play an important role in the economic growth of many Muslim countries.<sup>17</sup> That is because their object often is a manufactured item that itself helps stimulate growth. The object could be a machine tool for a factory floor, an important part of a large scale project (such as a toll booth for a toll road), or a sophisticated technological device embodying intellectual property (such as medical or scientific devices, like the MRI mentioned above).

## § 22.03 ADVANCED TYPES OF PERMISSIBLE CONTRACTS

### [A] Suretyship Contracts (*Kafāla*)

Business always has involved the giving of guarantees by one party for the performance of another party. In a general sense, the English word "surety" connotes "certainty," and for transacting parties, certainty and predictability are virtues. Sometimes, the terms "surety" and "guarantee" are used interchangeably, sometimes along with "insurance." But, in American legal parlance, such use is sloppy. Technically, in American Contract Law, they are related, but distinct, concepts:

- *Surety* —

A surety is a party (person or institution) that takes responsibility for the performance of an obligation by another party (also a person or institution). Moreover, a surety is primarily liable for the performance of the obligation of that other party (such as the beneficiary). The obligation is owed to a creditor, or other obligee (which, again, may be a person or institution). The surety receives no compensation from the beneficiary of the surety arrangement. Likewise, the surety obtains no fee from the creditor or other obligee to which the surety provides the guarantee.

- *Guarantee* —

A guarantor is secondarily liable for the performance of an obligation of the beneficiary of the guarantee, such as a debtor. That liability is owed to the creditor or other party to which the beneficiary is primarily liable. In other words, the guarantor is called upon to step in only if the beneficiary fails to satisfy its obligations. Typically, the guarantor receives compensation from the beneficiary for providing the guarantee.

- *Insurance* —

<sup>16</sup> See AL-AMINE, *supra*, at ch. 8.

<sup>17</sup> See AL-AMINE, *supra*, at ch. 10.

An insurer promises compensation to an insured party in the event a risk defined by an insurance contract materializes. The insurer receives a fee, or premium, from the beneficiary of the insurance contract.

A surety arrangement presupposes existence of an obligation or debt — some claim of an obligee (creditor) against and obligor (debtor), in other words. There must be a person or institution owing performance on some extant contract. That contract may be as simple as delivery by a seller to a buyer of merchandise. The merchandise could be fungible, such as a bulk agricultural commodity, or some particularly valuable non-fungible item (like artwork). The transaction could be a domestic one, or an import-export deal. Alternatively, the underlying contract may involve payment by a borrower to a lender of a sum of money with repayment to be made under a pre-existing loan arrangement.

Islamic Law has long recognized surety arrangements. They are called "*kafāla*." The person who is the surety is the "*kafil*," which literally translates as "guarantor." But, it also connotes "surety," hence the fine-line terminological distinction in American Contract Law is not replicated in the *Shari'a*. The party whose performance is being guaranteed is the principal debtor, called the "*asil*."

Thus, under the *Shari'a*, a *kafāla* contract creates a liability with respect to an underlying claim, and with respect to an underlying person or institution. The *Shari'a* imposes certain disciplines on this liability. First, the liability of the *kafil* (surety or guarantor) cannot exceed the liability of the *asil* (the debtor). Second, once the obligee-creditor proclaims the debtor to be "off the hook," then so too is the guarantor. Of course, the reverse is not true. The obligee-creditor could release the surety-guarantor from the *kafāla* contract, but that would not, in itself, lead to a release of the obligor-debtor. Both disciplines accord with common sense. It would be illogical for the surety to take on more of an obligation than called for in the underlying obligation, and once the obligee-creditor says "enough," there is no reason for the surety to remain relevant.

An obvious question is why the surety (*kafil*) agrees with an obligee-creditor to provide backing to the debtor (*asil*). There is no economic incentive for the surety to do so. One answer is that such arrangements may involve a close, even familial, relationship between the surety and debtor. The surety may be the father or uncle of the debtor, and is happy to provide the assurance needed for his relative to secure a loan. A second answer is that the surety may provide the assurance for charitable motives, essentially trying to help out a party in need out of the goodness of the heart of the surety. Still another possibility is there is a course of dealing between the surety and obligee, and on a separate, independent transaction, the roles are reversed.

The *Shari'a* differentiates between two kinds of suretyship arrangements: one that guarantees performance of an obligation by a person ("*kafāla bil-nafs*"), and one that guarantees a claim ("*kafāla bil-māl*") against a person. Diagrams 22-4 and 22-5 outline each type. At a general level, it is possible to collapse this distinction. An obligee fulfills an obligation (or not), and a debtor repays a debt (or not), yet in both instances the person performs an act (or not) that is the subject of the surety. However, the distinction in Islamic Law concerns the precise subject — is the



surety securing the presence of a person or the consummation of a claim? Thus, as Professor Schacht explains:

[s]tanding surety for a person means undertaking the liability for the appearance of the debtor or of his agent in a lawsuit; it is effective only if a lawsuit is possible, and not if the debtor has absented himself and his whereabouts are unknown; it is extinguished by the death of the guarantor or of the debtor; in the case of non-performance, the guarantor is imprisoned.

Suretyship for the claim can be independent or additional to suretyship for the person; if the guarantor stipulates that the debt of the principal debtor be remitted, its effect is that of the *hawāla*.<sup>18</sup>

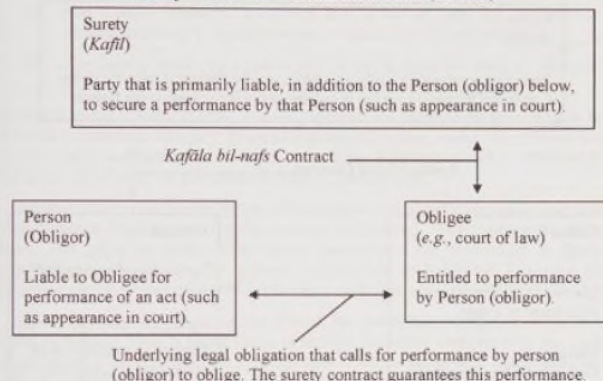
Consequently, a *kafāla* contract for a person (*kafāla bil-nafs*) could take the form of guaranteeing the presence of a defendant in a lawsuit. If the defendant does not appear in court, then the surety must appear. This suretyship arrangement is a serious contingent liability for the surety, because it could result (at least in some countries in former times) in physical confinement to jail of the surety.

In contrast, a *kafāla* contract for a claim (*kafāla bil-māl*) could involve a guarantee of payment of a debt. If the debtor fails to pay, then the claim is transferred, and the creditor presses the claim against the surety. Economically, that transfer is like a *hawāla* (transfer) arrangement. Observe that a *kafāla bil-māl* contract does not involve assumption or assignment of a debt. That is, the surety contract does not cause, or even state, that the surety takes on the debt of the original debtor, or that this debt is transferred to the surety. Rather, the contract simply but poignantly puts the surety in the place of the debtor, holding the surety liable for the payment obligation of the debtor.

A well-written *kafāla* contract should set out clearly the events for termination of the suretyship arrangement. The death of the surety is an obvious one, as the surety no longer is available to be held liable. Another obvious termination event is performance by the person, or satisfaction of the claim, at issue, because the whole point of the contract — adding additional certainty and predictability that the performance or satisfaction will occur — is fulfilled. Still another possible termination event is fraud or malfeasance by the person whose performance the contract secures, or in the underlying debt transaction that generated the claim the contract secures.

Under the *Shari'a*, a surety contract is not always permissible. First, the idea of having a surety, the identity of the surety, and the terms of the arrangement must be agreeable to the creditor in the transaction at issue. That makes sense, because it is the obligation owed to the creditor — the obligee — that is being backed by the surety.

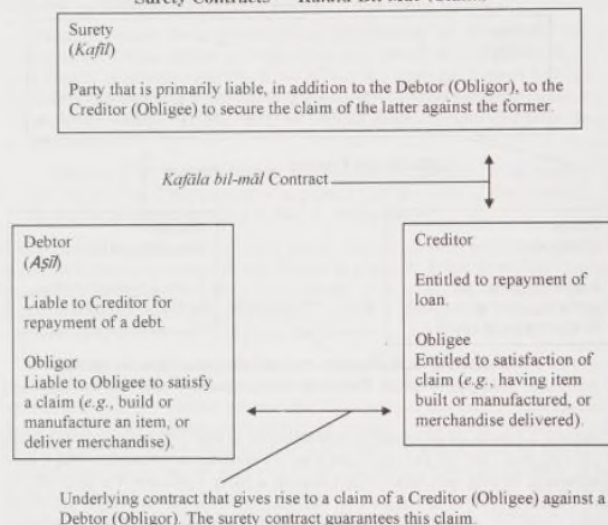
Diagram 22-4:  
Surety Contracts — *Kafāla Bil-Nafs* (Person)



Second, a surety arrangement is impermissible to deal with an obligation arising out of Criminal Law. No one can make a surety contract in connection with a *hadd* punishment, or with retaliation. For instance, a party convicted of a *hadd* offense cannot obtain a surety to ensure that the punishment is carried out, if not on the convict, then on the surety. Likewise, a victimized party entitled to exercise retaliation against a perpetrator convicted of a crime cannot require the latter to obtain a surety to ensure there is some person or some institution against whom or which to retaliate.

<sup>18</sup> SCHACHT, *supra*, at 158.

Diagram 22-5:  
Surety Contracts — *Kafāla Bil-Māl* (Claim)



### [B] Hire and Lease Contracts for Goods or Services (*Ijāra*)

Professor Schacht cites contracts for hiring and leasing as an example of transmission of concepts from Roman Law to the *Shari'a*. Early on, Islamic religious and legal scholars (*fukahā'* and *ulema*, respectively) combined three separate types of transactions into one category of contract, called "*ijāra*." An *ijāra* contract is a contract for hire and lease. This contract, he proffers, corresponds to the Roman Legal contract of *locatio conductio* (a hiring or uniting lease).<sup>19</sup> Under Roman Law, originally that contract was conceived of as three separate transactions, and likewise under Islamic Law:

- (1) The *locatio conductio rei* (i.e., a hiring lease for a thing, or a general contract to lease a good),<sup>20</sup> called "*kirā'*" in Arabic. (However, the term

<sup>19</sup> "*Locatio*" is the feminine, singular, nominative (subject) case, and translates as a lease, i.e., a contract of letting and hiring. "*Conductio*" is the feminine, singular, nominative (subject) case, and translates as a bringing together, hiring, or uniting. Together, the term "*locatio conductio*" thus means a lease contract to hire or unite.

<sup>20</sup> "*Rei*" is the feminine, singular, genitive (possessive) case, and means "of things." Thus, "*locatio conductio rei*" refers to a lease contract to hire a thing, or a general lease contract for a good.

"*kirā'*" is rarely used, and refers to a sale.)

- (2) The *locatio conductio operarum* (i.e., a hiring lease for services, or a general contract to lease services),<sup>21</sup> called the "*ijāra*" proper.
- (3) The *locatio conductio operis* (i.e., a hiring lease for work or labor, or a general contract to lease labor),<sup>22</sup> called the "*ju'f*" in Arabic.

As the Romans did, the *fukahā'* and *ulema* combined these three transactions into a single contractual category. Thus, as a practical matter, under the *Shari'a*, there is really only one distinction made as to the type of *ijāra* contract — whether it is for a period of time, or for accomplishing a specific task.

Islamic Law rules governing an *ijāra* contract are straightforward. Only three requirements must be met for the contract to be valid. They concern the object, time, and price at stake. That these parameters are minimalist is further supporting evidence for the general proposition that Islamic Contract Law provides an infrastructure in which modern capitalist economic growth can occur.

First, virtually any object can be leased, but the nature of what is being leased must be defined. Thus, a broad range of objects, including real property, can be the object of an *ijāra* contract and thereby leased. There are special terms associated with leasing two types of real property. In particular:

- Lease of agricultural land (i.e., a field) is a "*muzāra'a*" contract, including the leasing of a plantation of fruit trees (or vines).
- A contract for irrigation, or hiring an individual or firm to provide irrigation services, is a "*musāqāh*" contract.<sup>23</sup>

Notably, most *ulema* agree the rental price may consist of a specific percentage of the produce from the land or trees. In other words, both kinds of agricultural leases can involve sharecropping, whereby the tenant farmer shares some of the crop output with the landowner in exchange for the right to farm the land. The key is that the percentage of crop to be shared is defined in the contract. Likewise, livestock can be leased. Indeed, there is no distinction between hiring property and chattel.<sup>24</sup>

The example of leasing farmland also carries with it some special rules. For example, suppose farmland is leased for a period, but when that period expires, the crop still has not been harvested. Then, the lease automatically is extended under the *Shari'a*, until the crop ripens. After all, the purpose of the *ijāra* contract under which the land is leased is to obtain a yield. Under normal conditions, it is to the benefit of the tenant farmer to stay until that yield is realized. Thus, by operation

<sup>21</sup> "*Operarum*" is the feminine, plural, genitive (possessive) case and means "of services." Thus, "*locatio conductio operarum*" refers to a lease contract for services, or a general lease contract for services.

<sup>22</sup> "*Operis*" is the neuter, singular, genitive (possessive) case and means "of work, of labor." Thus, "*locatio conductio operis*" connotes a lease contract for the hiring or uniting of work, that is, a lease contract for work or labor.

<sup>23</sup> The account by Professor Schacht confuses these two terms. See SCHACHT, *supra*, at 119, 115-116.

<sup>24</sup> See HUSAIN, *supra*, at 173.



of law, an automatic extension provision is implied in the contract. The fair rental price still is applicable during the extended period — that is what the landowner charges the tenant farmer.

Conceivably, economic or environmental conditions could change in a way that cause the tenant farmer or landowner to prefer not to see the contract extended. For example, the land price could rise or plummet dramatically, or a drought could strike. In these circumstances, the tenant-farmer has the right to continue, or quit, the lease. Certain other rules are premised on the prohibition on *ribā*.

Moreover, the hiring of services falls under the category of an *ijāra* contract. That is, a contract of service also falls under the category of “*ijāra*.” Thus, an employment arrangement — such as a contract to hire a dentist for a clinic, consultant for a project, music band to play at a wedding, secretary for an office, teacher for a school, worker on a building project — would be an *ijāra* agreement. In all instances, the object of the contract must be explicitly identified in the contract.

Significantly, under an *ijāra* services agreement, it is not possible to delegate duties. Rather, duties incurred under the contract must be performed by the service provider called for in the contract. To put the point in American Contract Law terms, an *ijāra* service contract calls for specific performance. The logic is clear in both legal systems: what is being bargained for is skill and talent unique to a service provider, such as an artist, athlete, craftsman, doctor, financier, singer, teacher, or writer. As in cases for the hire or renting of an object, a contract to hire a service can be for a definite period, or for a specific job.

Second, if an *ijāra* contract is for a period of time, then that time must be definite. It is not possible to rent an object for a specified amount per unit of time (e.g., \$100 per month), without also specifying the number of months. A contract to rent the object for an indefinite period would be invalid. However, it may be permissible to state a knowable period, which is defined by an objective measure, as long as that measure can yield a specific date. For example, an *ijāra* contract that calls for leasing equipment “until the earlier of completion of the building project, or 90 days,” would be permissible.

In contrast, consider a different scenario, in which the length of the period is not known. For example, suppose a new securities broker-dealer firm may seek to lease a Bloomberg News computer terminal, to obtain world financial market data, “until the firm has underwritten U.S. \$1 billion worth of initial public offerings (IPOs) of financial instruments.” At that point, the firm forecasts it will have generated underwriting fees sufficient to buy its own terminals from Bloomberg. The measure of \$1 billion worth of IPOs is objective, but when the firm will cross that benchmark is unclear. Nevertheless, this *ijāra* contract should be valid, because it is for the accomplishment of a specific task — underwriting \$1 billion in securities.

Third, the price at which the object or services are hired or leased must be defined. If an object is involved, then the rental amount for it must be explicit. If the hiring of a service is involved, then the wages or salary to be paid to the service provider must be clear. In both instances, the amount must be fixed. Presumably,

an *ijāra* contract in which an exact figure is not specified, but is ascertainable through a mechanism that is defined in the contract, is permissible.

For example, a contract to lease for one year a grain storage elevator, for the purpose of storing wheat, at the a rental amount of U.S. \$100 per cubic meter of storage space used, would be permissible. It is not clear how much wheat might be stored, and thus the final storage price is unclear. Yet, once the volume of wheat is known, simply multiplying by a \$100 per cubic meter yields the final tally. Similarly, rental fees based on other objective measures, like an index of market prices, may be acceptable. But, there are limits to this flexibility. It might not be permissible to hire a service provider at a wage rate that is defined merely as the “prevailing wage rate for similar workers.” That might inject uncertainty (*gharar*) into the contract. The solution for the employer and employee would be to negotiate a series of short-term *ijāra* contracts, so that they can revise the wage rate as market conditions change as soon as one contract expires.

Consider the following example. In April 2009, the Camel Reproduction Centre in Dubai, United Arab Emirates (UAE) announced it had cloned successfully a female, one-humped camel named “Injaz,” which means “achievement.”<sup>25</sup> The cloning program is designed to preserve the genetics of elite racing or milk-producing camels. Scientists at the Centre produced the clone by taking DNA from a cell in the ovary of an adult camel (which was killed in 2005 for meat), and putting that DNA into an egg from a surrogate mother. Injaz was genetically identical to the camel from which the cells were taken.

Setting aside ethical questions surrounding animal (not to mention human) cloning, suppose Dubai signs an *ijāra* contract with a famous veterinarian, Dr. Camelstein. The contract indicates its purpose is to hire him for his cloning services for a period of 1 year. The contract indicates he will be paid a fee of U.S. \$1 million for each camel he clones. (Note the object of the contract is not the cloned camels. They do not yet exist, so contracting for them would be impermissible under the *Shari’a*. Rather, the object is veterinary services.) It is not clear how many camels Dr. Camelstein will be able to clone, or even if any that are cloned are attributable directly to his efforts. In turn, there is no precision as to the service fee: it could range from zero to a large number.

Is the use of *qiyās* (analogical reasoning) helpful? First, is there an analogy to a sharecropping contract (*muzāra’a*), in which the percentage of crop to be handed over to the landowner is defined? The contract of Dr. Camelstein does identify a figure. But, it is a fixed sum, not a percentage. That difference suggests the analogy is weak.

Second, might there be an analogy to a *ja’alah* arrangement (i.e., a services fee)? Suppose an owner who has lost her camel, car, or wallet hires a private investigator to find the lost item. Under the deal, the owner pays the investigator nothing unless the investigator finds the lost object. If the investigator does recover the object, then the *ja’alah* arrangement calls for a flat fee (e.g., U.S. \$100,000). Dr. Camelstein gets a fee for producing via cloning a camel, which is akin to finding a missing object. Yet, in respect of the *ja’alah* arrangement, the Four Schools are not

<sup>25</sup> See “First Camel Clone” Born in Dubai, BBC News, 14 April 2009, posted at news.bbc.co.uk.



unanimous on the outcome. (The *Hanafi* School finds this arrangement forbidden (*haram*), because of concerns of *gharar*.) Finally, consider the case of the *ijāra* contract stating Dr. Camelstein is to receive a wage of \$100,000 per month for one year, plus a bonus of \$1,000 per camel he clones. Would the result differ?

### [C] Cancellation (*Faskh*) of an *Ijāra* Contract

Suppose after the *ijāra* contract has been entered into (concluded), the party that is hiring or renting the good or service (i.e., the lessee) discovers a defect in that good or service. Given that the agreement has been concluded, what recourse does this party have? The answer is straightforward: cancellation, known in Arabic as "*faskh*."

Note carefully that *faskh* is a right to cancel, and it is not linked solely to *ijāra* agreements. Rather, cancellation is a possibility in respect of any type of contract under the *Shari'a*. Critically, *faskh* is not synonymous with *khiyar*, which is a right of rescission. For present purposes, it suffices to appreciate that either right produces the same economic effect: the bargain is over. But, the right of *faskh* is held by one party, as in the context of an *ijāra* deal — the hirer or renter. In contrast, the right of *khiyar* is held by both contracting parties. Moreover, the precise grounds for cancellation by one side, versus rescission by either party, are not identical. Finally, as a technical legal matter, the causal steps are different. When a contract is cancelled through a declaration of *faskh*, the immediate effect is as if the agreement never existed. Rescission is one step before cancellation. Rescission leads to cancellation, which in turn produces the effect that the agreement is expunged.

In respect of *faskh*, the hiring or leasing party can notify its counter-party (i.e., the lessor) that the deal is off owing to the defect. That remedy is logical enough, given that an *ijāra* contract embodies an expectation that the good or service rented is of sufficient quantity and quality to fulfill the purpose for which it is being leased. In the event of cancellation, the hirer or renter is liable for payment to the counter-party to cover any use made of the good or service rendered.

Cancellation is possible in a second circumstance. Suppose, again after conclusion of an *ijāra* contract, the party that hired or rented the good or service seeks to cancel the deal based on a good excuse. For instance, the purpose of the *ijāra* agreement has been prevented from reaching fulfillment. That could occur where the need to rent a wrecker is obviated, because the building on which the wrecker was to be used collapsed. In that case, the lessee of the wrecker could cancel the contract. A broad range of purposes may serve as a legitimate reason for cancellation.<sup>26</sup> Illustrations range from death of one of the parties to the contract, to change in a journey (in the instance of hiring a saddle mount).

There is a limitation on the right to exercise *faskh*.<sup>27</sup> The defect must be sufficient to prevent or reduce the possibility of use of the good or service. For example, if the object is a house or apartment, and it is being rented pursuant to an

*ijāra* contract, then the collapse of the house or apartment building clearly would suffice to allow cancellation of a rental contract. Similarly, a severe case of laryngitis afflicting an opera singer would be grounds to cancel a music deal.

Of course, in practice the contracting parties may prefer to renegotiate the *ijāra* arrangement, for instance, by substituting other comparable living quarters, or re-scheduling the performance. In other words, as is true under American Contract Law, nothing in the *Shari'a* compels a party hiring a good or service to the extreme remedy of *faskh*. Rather, Islamic Law flexibly supports alternative commercial arrangements.

The *Shari'a* scheme for *faskh* raises an important practical question about judgment. Who judges whether a good or service is defective, and sufficiently so to be a basis for cancellation? Likewise, who judges whether the hirer or renter is liable for any payment, on account of consuming a portion of the good or service, and for how much? If the hirer or renter is the judge, then that is akin to the fox guarding the chicken coop. As for cancellation based on a good excuse, who judges whether the purpose of the contract has been vitiated by a supervening or subsequent event?

If the provider of the good or service is the judge of these matters, then that is akin to chickens guarding themselves. Ideally, both parties ought to act reasonably, and the defect should be evident to both of them. That may occur if they are known to each other, trust one another, and look forward to a future transactional relationship (i.e., being "repeat players"). In reality, sharp disagreements do occur. The best judge is a *bona fide* commercial law judge who understands when and how invocation of *faskh* is rightful.

### [D] Mortgage or Pledge Contracts (*Bay' al Wafa*)

In the sale of an object, it is possible for the seller to retain a right of redemption in respect of that object. Real property is a classic example. In this scenario, the seller sells the property to a buyer. But, the seller has a right to reclaim or regain ownership and possession of the property. The seller would do so if the buyer defaults on the purchase contract, such as by failing to pay some or all of the purchase price for the property.

For example, suppose the seller of a parcel of real property is a bank. The buyer is supposed to pay the bank a set purchase price for that property. The *bay' al wafa* contract contains a right of redemption in favor of the bank-seller. This right ensures the bank-seller may get back the property from the buyer. To exercise this right, the bank-seller would pay the buyer back the purchase price, in installments, which the buyer previously paid to the bank-seller — if any. Accordingly, Professor Hussain comments that

[t]his [*bay' al wafa* contract] is really a type of mortgage transaction, designed to avoid the prohibition on *riba* (interest, or excess).<sup>28</sup>

<sup>26</sup> See SCHACHT, *supra*, at 154.

<sup>27</sup> See SCHACHT, *supra*, at 154.

<sup>28</sup> HUSSAIN, *supra*, at 173.



She also comments that some *Shari'a* scholars argue that a *bay' al wafo* transaction is best classified as a pledge arrangement (*rahn*).

That is because of the underlying economic reality of the transaction. In the above hypothetical scenario, the real property effectively is pledged to the bank-seller to secure the underlying indebtedness of the buyer to the bank-seller when the purchaser buys the property. The right of redemption is the legal device that has the economic effect of a pledge. The buyer promises that the bank-seller can have the property back if need be. Hence, the property secures the indebtedness of the buyer to the bank-seller. If the buyer does not make good on its obligation to pay some or all of the purchase price, then the bank essentially refunds in installments any money the buyer did pay, and takes back the property from the buyer. Note this contractual arrangement is another particular illustration of the general proposition that the *Shari'a* is a flexible legal apparatus that supports modern capitalist economic growth.

### [E] Loan Contracts ('*Āriyya*)

An *ijāra* contract is related to, but distinct from, a transaction known in Arabic as "*āriyya*." On the one hand, an *ijāra* contract contemplates payment of rent in exchange for the object that is loaned. On the other hand, an '*āriyya*' arrangement involves a loan of a non-fungible object (as distinct from a loan of a fungible item like money) by its owner, with no conditions attached to the deal. Critically, an '*āriyya*' arrangement does not involve a rental payment. Still, it qualifies as a species of contract.<sup>29</sup>

In brief, under an '*āriyya*' contract, the owner of a non-fungible object temporarily grants possessory rights in that object to another person for free. The object, being non-fungible, is particular and identifiable. For instance, an owner of a farm implement, machine tool, or other capital good could lend a piece of equipment to a farmer or industrialist for the latter party to use for a special purpose. As another example, parents of a groom might borrow tables, chairs, and a party tent to host a wedding reception.

Why does the owner grant temporary possessory rights for "free"? The owner is motivated (ideally, at any rate) to be beneficent in the purest sense. Additionally, there is a legal incentive for such motivation. The owner foregoes a payment to avoid being unjustly enriched, and thereby running afoul of the rule against *ribā*.

There are two basic, general obligations in an '*āriyya*' contact, one incumbent on the owner, and the other on the party to whom the object is loaned:

- *Concerning the obligations of the owner:*

The owner must take care not to make a premature demand for the return (called *rujā'*) of the property lent. Otherwise, the owner might be held liable to the borrower for damages. Thus, for example, suppose an owner of agricultural land gratuitously allows a tenant farmer to plant crops on the owner's land. Subsequently, but prematurely, the owner demands return of

the farmland. Then, the owner may be held liable to the tenant farmer for damages.

- *Concerning the obligations of the borrower:*

The borrower is entitled to possession and use of the thing lent. But, the borrower must not hire it out, or pledge it as security.

An '*āriyya*' contract may, or may not, have conditions on the lender or borrower, beyond the basic obligations outlined above. That said, the fact that the loan transaction does not involve a charge does not mean the arrangement is largely unstructured.

At a minimum, as indicated, the borrower does not have a usufruct interest in perpetuity. Rather, the borrowing period is defined in the contract in some way. Moreover, the arrangement calls for explicitly, or assumes implicitly, that aside from ordinary wear and tear from the use of the object, the borrower will not damage the object. Likewise, an '*āriyya*' contract contemplates use of the object by the party temporarily in possession of it. But, that use will not result in complete consumption of the object. Finally, under Islamic Family Law, the right of a father, grandfather, or other lawful guardian of a child concerning the property of the child does not include the unilateral engagement of a disadvantageous transaction. Specifically, the guardian cannot lend out the property of the child via an '*āriyya*' contract.<sup>30</sup>

For non-Muslim lawyers, perhaps the most odd feature of an '*āriyya*' contract is the lack of financial consideration to support it. That an owner grants a temporary possessory right for "free" likely would be classified as a gift, not a loan contract, in American Contract Law. Professor Schacht defines an '*āriyya*' contract as "the gratuitous transfer of usufruct . . ."<sup>31</sup> By this he means the purpose of the contract is to transfer from the owner to the borrower the right to possess and use the object of the contract, i.e., the thing that is being loaned, and enjoy the fruits of that possession and use. That transfer is, of course, limited in duration. Professor Schacht explains:

'*Āriyya*' is defined as putting another temporarily and gratuitously in possession of the use of a thing, the substance of which is not consumed by its use. It is distinguished as a separate contract from the loan of money and of other fungible objects which are intended to be consumed (this is the *kard, mutuum*). The borrower may, generally speaking, lend the borrowed thing to a third party, but he must not hire it out or give it as a security. The owner may at any time demand the return (*rujā'*) of the thing which he has lent, but he may become liable for damages, for instance, if he prematurely demands the return of a field which he has lent for a long period and the borrower has planted on it.<sup>32</sup>

<sup>30</sup> SCHACHT, *supra*, at 168.

<sup>31</sup> See SCHACHT, *supra*, at 134.

<sup>32</sup> SCHACHT, *supra*, at 157 (footnote omitted).

<sup>29</sup> See HUBBARD, *supra*, at 174.

The key point is the loan is "gratuitous," meaning that no charge is imposed by the lender on the borrower. Professor Schacht observes that "[a]ny stipulated reward would be unjustified enrichment."<sup>33</sup> As suggested earlier, that would appear to indicate that *ribā*, which is forbidden, could be involved.

Unfortunately, what neither he nor Professor Hussain points out is the motivation for the lender. In the American Contract Law paradigm, why would an owner lend out valuable non-fungible property, except to make a profit? From the Islamic legal perspective, however, the motive is (or ought to be) clear: charity. If the owner of an asset seeks a financial reward by lending that asset, then the owner does not use an *'ariyya* contract. Rather, the proper device for the owner and borrower is a hire or lease (*ijāra*) contract. In an *'ariyya* contract, the owner and borrower have a relationship of special trust and friendship, and the former seeks to do a good deed toward the latter. In so doing, and insofar as the borrower puts the loaned asset to productive use, the transaction adds to the overall economic development of the community. Thus, an *'ariyya* contract nicely illustrates the spirit of Islamic Contract Law, namely, to support market-based growth, but more importantly to do so in a morally upstanding manner.

To be sure, the owner-lender may gain some kind of benefit from an *'ariyya* contract. For instance, your author loaned out — for free — many of his Islamic Law books to his hard-working Research Assistants. They used these books to help them prepare background memoranda. In turn, the memoranda formed the basis of some sections in the present text. All of these loan arrangements technically were *'ariyya* contracts.

## § 22.04 UNCONSCIONABILITY AND THE PROBLEM OF SHORTAGE OR LACK (GHABN)

There is no doctrine of unconscionability in Islamic Contract Law.<sup>34</sup> At first glance, the lack of this doctrine is a sharp distinction from American Contract Law. In the United States, the doctrine is well-enshrined in the U.C.C. Article 2, which deals with sales of goods. Section 2-302, entitled "Unconscionable contract or Term," states:

- (1) If the court as a matter of law finds the contract or any term of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable term, or it may so limit the application of any unconscionable term as to avoid any unconscionable result.
- (2) If it is claimed or appears to the court that the contract or any term thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial

setting, purpose, and effect to aid the court in making the determination.<sup>35</sup>

Article 2A of the U.C.C., which covers lease contracts, contains a similar provision on unconscionability in Section 2A-108 (with one difference being it, but not Section 2-302, allows for the awarding of attorney's fees).

Likewise, Section 208 of the *Restatement (Second) of Contracts*, entitled "Unconscionable Contract or Term," says:

If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.<sup>36</sup>

The commentary to this Section states:

- a. *Scope.* Like the obligation of good faith and fair dealing (§ 205), the policy against unconscionable contracts or terms applies to a wide variety of types of conduct. The determination that a contract or term is or is not unconscionable is made in the light of its setting, purpose and effect. Relevant factors include weaknesses in the contracting process like those involved in more specific rules as to contractual capacity, fraud, and other invalidating causes; the policy also overlaps with rules which render particular bargains or terms unenforceable on grounds of public policy. Policing against unconscionable contracts or terms has sometimes been accomplished "by adverse construction of language, by manipulation of the rules of offer and acceptance or by determinations that the clause is contrary to public policy or to the dominant purpose of the contract." Uniform Commercial Code § 2-302 Comment 1. Particularly in the case of standardized agreements, the rule of this Section permits the court to pass directly on the unconscionability of the contract or clause rather than to avoid unconscionable results by interpretation. Compare § 211.
- b. *Historic standards.* Traditionally, a bargain was said to be unconscionable in an action at law if it was "such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other;" damages were then limited to those to which the aggrieved party was "equitably" entitled. *Hume v. United States*, 132 U.S. 406 (1889), quoting *Earl of Chesterfield v. Janssen*, 2 Ves. Sen. 125, 155, 28 Eng. Rep. 82, 100 (Ch. 1750). Even though a contract was fully enforceable in an action for damages, equitable remedies such as specific performance were

<sup>33</sup> SCHACHT, *supra*, fn. 1 at 157.

<sup>34</sup> This discussion draws on a paper presented in May 2009 in *Advanced International Trade Law* at the University of Kansas School of Law by Mr. Sattam Saleh Alhomay of Riyadh, Saudi Arabia, S.J.D. Candidate, entitled "Unconscionability Doctrine: International Trade Law Application."

<sup>35</sup> All American states, except Louisiana, have adopted the 1962 Official Text of the U.C.C., though with some variations. All adopting jurisdictions, save for California, adopted Section 2-302. California has an unconscionability rule that is broader than this provision in Section 1670.5 of its Civil Code.

<sup>36</sup> RESTATEMENT OF THE LAW, SECOND, CONTRACTS § 208 (American Law Institute, 1981).



refused where "the sum total of its provisions drives too hard a bargain for a court of conscience to assist." *Campbell Soup Co. v. Wentz*, 172 F.2d 80, 84 (3d Cir. 1948). Modern procedural reforms have blurred the distinction between remedies at law and in equity. For contracts for the sale of goods, Uniform Commercial Code § 2-302 states the rule of this Section without distinction between law and equity. Comment 1 to that section adds, "The principle is one of the prevention of oppression and unfair surprise (Cf. *Campbell Soup Co. v. Wentz*, . . .) and not of disturbance of allocation of risks because of superior bargaining power."

- c. *Overall imbalance.* Inadequacy of consideration does not of itself invalidate a bargain, but gross disparity in the values exchanged may be an important factor in a determination that a contract is unconscionable and may be sufficient ground, without more, for denying specific performance. See §§ 79, 364. Such a disparity may also corroborate indications of defects in the bargaining process, or may affect the remedy to be granted when there is a violation of a more specific rule. Theoretically it is possible for a contract to be oppressive taken as a whole, even though there is no weakness in the bargaining process and no single term which is in itself unconscionable. Ordinarily, however, an unconscionable contract involves other factors as well as overall imbalance.

- d. *Weakness in the bargaining process.* A bargain is not unconscionable merely because the parties to it are unequal in bargaining position, nor even because the inequality results in an allocation of risks to the weaker party. But gross inequality of bargaining power, together with terms unreasonably favorable to the stronger party, may confirm indications that the transaction involved elements of deception or compulsion, or may show that the weaker party had no meaningful choice, no real alternative, or did not in fact assent or appear to assent to the unfair terms. Factors which may contribute to a finding of unconscionability in the bargaining process include the following: belief by the stronger party that there is no reasonable probability that the weaker party will fully perform the contract; knowledge of the stronger party that the weaker party will be unable to receive substantial benefits from the contract; knowledge of the stronger party that the weaker party is unable reasonably to protect his interests by reason of physical or mental infirmities, ignorance, illiteracy or inability to understand the language of the agreement, or similar factors. See Uniform Consumer Credit Code § 6.111.

- e. *Unconscionable terms.* Particular terms may be unconscionable whether or not the contract as a whole is unconscionable. Some types of terms are not enforced, regardless of context; examples are

provisions for unreasonably large liquidated damages, or limitations on a debtor's right to redeem collateral. See Uniform Commercial Code §§ 2-718, 9-501(3). Other terms may be unconscionable in some contexts but not in others. Overall imbalance and weaknesses in the bargaining process are then important.

- f. *Law and fact.* A determination that a contract or term is unconscionable is made by the court in the light of all the material facts. Under Uniform Commercial Code § 2-302, the determination is made "as a matter of law," but the parties are to be afforded an opportunity to present evidence as to commercial setting, purpose and effect to aid the court in its determination. Incidental findings of fact are made by the court rather than by a jury, but are accorded the usual weight given to such findings of fact in appellate review. An appellate court will also consider whether proper standards were applied.

- g. *Remedies.* Perhaps the simplest application of the policy against unconscionable agreements is the denial of specific performance where the contract as a whole was unconscionable when made. If such a contract is entirely executory, denial of money damages may also be appropriate. But the policy is not penal: unless the parties can be restored to their pre-contract positions, the offending party will ordinarily be awarded at least the reasonable value of performance rendered by him. Where a term rather than the entire contract is unconscionable, the appropriate remedy is ordinarily to deny effect to the unconscionable term. In such cases as that of an exculpatory term, the effect may be to enlarge the liability of the offending party.

This commentary is valuable in laying out the nature and meaning of "unconscionability," and remedies for it.

Interestingly, that the *Shari'a* lacks the unconscionability doctrine is not a point of contrast with international contract law. The 1980 United Nations *Convention on Contracts for the International Sale of Goods (CISG)* does not have a provision on unconscionability that is directly analogous to U.C.C. Section 2-302 or *Restatement* Section 208. Rather, the *CISG*, in Article 79, exempts a party from performance on account of an unforeseeable impediment. This Article states:

- (1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.
- (2) If the party's failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if:

- (a) he is exempt under the preceding paragraph; and
  - (b) the person whom he has so engaged would be so exempt if the provisions of that paragraph were applied to him.
- (3) The exemption provided by this article has effect for the period during which the impediment exists.
- (4) The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such non-receipt.
- (5) Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention.<sup>37</sup>

On close inspection, then, is Islamic Law as different from these other regimes as it first appears?

Perhaps not. The *Shari'a* contains a principle known as "*ghabn*." This Arabic term literally means "shortage," or "lack." But, in the context of Islamic Contract Law, the connotation is broader than the literal meaning. That is because the term covers any agreement that is not the result of bargaining between parties that had freedom of choice and understood what they were negotiating. In other words, the term refers to a situation in which the contract formation process did not occur in a reasonable manner.

Islamic Law identifies what may be dubbed three types of "*ghabn* contracts." All three types, which are contracts of sale (*bay'*), render a contract voidable:

• *Najash* —

A *bay' al najash* contract is one in which a seller artificially inflates the price of the good it seeks to sell by arranging staged bidding. A *hadith* makes clear this practice is *haram*:

[The Messenger of Allāh] . . . has forbidden bidding up the price [dishonestly, not intending to purchase].<sup>38</sup>

This *hadith* is compiled not only by *Imām* Bukhārī, but also by *Imām* Muslim, Ibn Māja, and An-Nasā'ī.

In a *najash* transaction, a seller schemes with another person (or persons) to bid on the item for sale. The confederate has no intention to buy the good. Rather, the confederate seeks to induce others to bid on the item — outbidding the confederate,

<sup>37</sup> CISG Article 79, posted at Pace Law School (New York) Institute of International Commercial Law, [www.cisg.law.pace.edu/cisg/text/treaty.html](http://www.cisg.law.pace.edu/cisg/text/treaty.html).

<sup>38</sup> Quoted in 'AND AL-RAHMAN I. DOI, *SHARI'AH: ISLAMIC LAW* 563 (London, England: Ta-Ha Publishers Ltd., 2nd rev'd ed., 2008) (quoting from the compilation of *Imām* Bukhari). (The author's name is commonly transliterated as in the text above, and used on the copyright page and back of the treatise. But, the transliteration in this citation is more precise, and set out on the cover and title page of the treatise.) [Hereinafter, *DOI*.]

of course — and thereby raise its price. Ultimately, one buyer (not the confederate) emerges, and the dishonest seller garners a higher price than would have been the case but for the ruse.

• *Talāqī Rukbān* —

"*Talāqī rukbān*," or "forestalling," occurs when a buyer purchases a good from foreign merchants before those vendors get to the city market of the buyer. Another *hadith* states this practice, too, is *haram*:

The Messenger of Allāh . . . said, "Do not go out to meet the caravan [in order to buy from them or sell to them]. . . ."<sup>39</sup>

Professor Doi elaborates on this *hadith*:

This sort of trade can lead to fraudulent practices such as buying things at a very cheap rate in order to sell at an exorbitant price since the people of the town would not be able to discover the actual price, or buying up and hoarding in order to be able to dictate the price. It might also be to deceive the caravan traders by offering them a low price before they come to the town and discover that they have been cheated.

Similarly, during famine, the traders might go out to caravans to buy foodstuffs from them at a nominal price without telling them the current market price in the town.<sup>40</sup>

In essence, the problem arises because the foreign merchants do not have the opportunity to offer their goods to other prospective buyers. Likewise, they do not have the chance to compare the prices, availability, or quality of other products that might be like, directly competitive, or substitutable for their good.

• *Mustarsil* —

A *bay' al mustarsil* contract is one in which one of the parties is not fully competent to negotiate. The party in question has some defect in its ability. But, the party is not insane.

There is a common denominator among all three transactions. In each of them, there is a serious defect in contract negotiations, which results in advantage being taken of one party. That defect is imperfect information that arises from a lack of transparency. With a *bay' al najash* contract, the buyer is unaware of the concocted bidding, and thus winds up over-paying for the good. In a *talāqī rukbān* transaction, the outside seller is unaware of local market conditions, and thereby under-prices the good, with the follow-on possibility of price gauging, where the buyer re-sells the good (possibly after hoarding it) at an unreasonable price. In a *bay' al mustarsil*, one party simply lacks the faculties to negotiate adequately. The party may be the buyer or seller, depending on the case. Hence, the result may be the party over-pays for, or under-prices, the good.

<sup>39</sup> Quoted in Doi, *supra*, at 563 (quoting from the compilation of *Imām* Bukhari).

<sup>40</sup> Doi, *supra*, at 563-564.



Consequently, the *Shari'a* treats all three instances as ones of shortage or lacking, that is, of *ghabn*.<sup>41</sup> The result is not automatically a voiding of the contract. Rather, a *ghabn* contract is voidable. The right to render the contract invalid lies with the victimized party, such as a buyer that paid a super-normal price. The right must be exercised within a reasonable period of time from when the victimized party discovered the unfairness of the transaction.

There is a puzzle here. On the one hand, there are *hadith* (quoted above) clarifying that the controversial practices are *haram*. On the other hand, engaging in them does not inexorably result in a void contract. The solution to the puzzle lies in an appreciation of degree — just how egregious was the behavior at issue? In other words, as in disputes about unconscionability, in cases of *ghabn*, the facts matter greatly. Only gross *ghabn* is enough to invalidate a contract. That is, the victimized party bears some burden in showing that what was lacking in the contract negotiations was egregious enough to justify voiding the contract. What, then, is “gross” *ghabn*?

There are at least two approaches to this question. Under the first one, a bright-line test is established. A numerical threshold of one-third delineates “gross” *ghabn*. Any price paid in a *bay' al najash* or *bay' al mustarsil* contract exceeding the fair price by one-third or more is deemed gross. Likewise, for a *talāqī rukbān* or *bay' al mustarsil* transaction, any sale below the fair price by one-third is gross. Of course, some benchmark for the “fair” price must be established, perhaps by an independent expert. The second approach calls for case-by-case assessment of a *ghabn* contract. This review may refer to local customs. It also may involve an independent expert to opine on the fair value of the good and ascertain the degree of deviance from this value. Instead of strict adherence to a one-third rule, the second approach weighs the various factors.

From the above discussion, it should be evident that the *Shari'a* does not condone fraud in contractual relations. Moreover, honesty and fair dealing are not only cherished, but expected of Muslims. That said, fraud occurs, as in any legal system. Professor Doi observes with respect to *talāqī rukbān*:

Unfortunately, this prohibition has long since been subverted in the East and the West, and this practice has become a standard of modern commercial life.<sup>42</sup>

The term relevant to fraudulent transactions is “*ghabn fāhish*.” This term connotes a grave deception. Such fraud renders a contract void (*bātil*) on the Scale of Validity.

<sup>41</sup> See *AL-MAWSI'AH AL-FIQHIYAH* 115 (1997).

<sup>42</sup> Doi, *supra*, at 564.

## Chapter 23

### CONTRACT LAW: PERFORMANCE, TERMS, AND REMEDIES

My idea of an agreeable person is a person who agrees with me.

Benjamin Disraeli  
(1804-81, Prime Minister of Britain, 1868 and 1874-1880)

#### SYNOPSIS

- § 23.01 PERFORMANCE AND FULFILLMENT (*ĪFĀ'*)
- § 23.02 ASSIGNMENT (*ḤAWĀ' LA*)
- § 23.03 IMPLIED TERMS AND CONDITIONS
  - [A] Implied Term in the Sense of Waiting Period (*Ajal*)
  - [B] Other Implied Conditions
- § 23.04 LIMITS ON EXPRESS TERMS AND CONDITIONS
- § 23.05 LIABILITY (*DAMĀ'N*)
- § 23.06 REMEDIES
  - [A] Termination
  - [B] Rescission (*Khiyār*) and Cancellation (*Faskh*)
  - [C] Damages
  - [D] Performance
  - [E] Imprisonment (*Habs*)
- § 23.07 RATIFICATION (*IMPĀ'*)
- § 23.08 AMICABLE SETTLEMENT (*ṢULḤ*)

#### § 23.01 PERFORMANCE AND FULFILLMENT (*ĪFĀ'*)

As under American Contract Law, under the *Shari'a*, a contract is fulfilled when the obligations it calls for are performed. The usual case is, indeed, fulfillment, which in Arabic is called “*ifā'*.” For example, paying off (or setting off) a debt, or completing a sale, are among the usual cases. A contract of sale (*bay'*) for goods or property (*māl*) is complete when each party takes possession of that to which it is entitled under the bargain. In a simple deal, that may be the buyer getting dates, and seller receiving funds.

When a contract of sale is finished, i.e., not only formed, but also performed, it is said to be “*tāmm*,” which means “complete.” The reciprocal taking of possession that results in *tāmm* is called “*taḥābud*.” Likewise, in the event of a donation (*hiba*),

the donation is complete (*tāmm*) when the donee takes possession (to the extent possible under the donative arrangement) of the item donated. Note that a pure charitable donation, where no counter-value whatsoever is required in exchange for the donation, is called a "*sadaka*." This kind of donation cannot be revoked, i.e., *rujā'* is not possible. Effectively, the transaction is complete (*tāmm*) with the provision of *sadaka*.

Suppose a donor gives an object or property, yet on the condition a counter-value is given first. For example, a donor gives Islamic calligraphy to the University of Kansas School of Law, with the stipulation the Law School name a classroom after the donor. The sign goes up first outside the room, then there is a ceremony at which the donor hands over the art. Under the *Sharī'a*, this arrangement is a sale following counter-value. The donation may be revoked — *rujā'* is possible — up to the time the donee takes possession (which, in the example, presumably would mean until the sign is affixed). Once the donee has possession, the donor ought not to try to re-possess the object or property. To do so would be reprehensible (*makrūh*) from a religious point of view. It is likely to be unsuccessful as a legal matter, as the donor initially received counter-value.

### § 23.02 ASSIGNMENT (ḤAWĀLA)

Generally, the *Sharī'a* permits transfer of rights and obligations arising from a contract, as does American Contract Law. "Transfer" in Arabic is "*hawāla*." The legal effect of a transfer is an assignment of rights or obligations from an original contracting party, the assignor, to a third party, the assignee. No longer does the right or obligation lie in the original party. No longer can a claim under the assigned right be made by the original party. No longer can a claim arise under the assigned obligation against that party. Rather, the right or obligation is with the third party, the assignee. Hence, it is for the assignee to assert any claim, and against the assignee to bring any claim.

For example, suppose the original contracting parties are Nawazish and Zakir. Under the contract, Nawazish has the right to collect money from Zakir. Also under the contract, Nawazish is obligated to deliver wheat to Zakir. Nawazish can assign the right and/or the obligation to Faiza. To assign the right to Faiza means Faiza can collect the money from Zakir. To assign the obligation to Faiza means Faiza must deliver the wheat.

For a *hawāla* to occur, there is no requirement that there be a pre-existing relationship between the third party and the original contracting party that makes the transfer. For example, it could be the case that Nawazish owes money to Faiza, and thus the assignment of the right to collect from Zakir will extinguish the debt owed by Nawazish to Faiza. But, this prior course of dealing need not exist. The assignor and assignee can be complete strangers. If there is no pre-existing liability of Nawazish to Faiza, then the assignment simply creates a right of collection under the contract for Faiza, and extinguishes that right for Nawazish. The concomitant obligations of Zakir to Nawazish and Faiza are extinguished and created, respectively.

However, a critical qualification to the general proposition articulated above must be understood. The *Sharī'a* permits assignment in a narrower scope of circumstances than does American Contract Law, and the Four Schools do not entirely agree on the circumstances in which *hawāla* is acceptable.<sup>1</sup> The "bottom line" is only some contracts are assignable, depending on the nature of the contract and School jurisdiction.

All Four Schools — *Hanafi*, *Māliki*, *Shāfi'i*, and *Hanbali* — agree that assignment is permissible in two cases:

- One claimant, A, holding a claim against B, can sell her claim to anyone the claimant, A, wishes.
- One claimant, A, holding a claim against B, can make a gift of the claim to anyone the claimant, A, wishes, other than to the debtor, B.

The Schools do not all agree on the permissibility of assigning a debt contract, that is, the rights and obligations arising out of a loan agreement.

Consider a simple triangular loan contract.<sup>2</sup> Diagram 23-1 outlines the transaction. One lender, A, lends money to B, the debtor. Is it permissible for A to contract with B and a third party, C, to transfer to C the claim A has against B? That is, can A arrange for B to repay the money to C, rather than to A as initially planned? One reason for the transfer may be that C is a creditor of A (i.e., A owes money to C), and A is trying to repay the debt to C simply by channeling the necessary funds from B straight to C. This transfer, or assignment, would be a *hawāla*.

<sup>1</sup> See JAMILA HUSSAIN, *ISLAMIC LAW AND SOCIETY — AN INTRODUCTION* 172-173 (Annandale, New South Wales, Australia: The Federation Press, 1999). [Hereinafter, Hussain.]

<sup>2</sup> See HUSSAIN, *supra*, at 173; 'ABD AL-RAHMAN I. DOI, *SHAR'AH: ISLAMIC LAW* 554-555 (London, England: Ta-Ha Publishers Ltd., 2nd rev'd ed., 2008) (the author's name is commonly transliterated as in the text above, and used on the copyright page and back of the treatise. But, the transliteration in this citation is more precise, and set out on the cover and title page of the treatise). [Hereinafter, Doi.]





### [B] Other Implied Conditions

These exceptions aside, in every day commerce, many contractual arrangements to which the *Shari'a* applies bear implied conditions. An example is a condition about taking an oath. A condition or prerequisite, in the general sense, is called "*shart*." The condition must occur for the transaction at issue to be legally valid. As with terms on waiting periods (*ajal*), the question is whether a condition may be implied in a contract.

As with such terms, the answer generally is "yes." Here, too, there are exceptions.<sup>6</sup> One is a typical contract of sale (*bay'*) for the immediate transfer of ownership (*tamlīk fil-hāl*). Neither a term nor a condition may be implied. Similarly, a condition may not be implied in a contract for the exchange or division of monetary assets ("*mu'āwada māliyya*"). Nor can a condition be implied in a contract for hire or lease (*ijāra*), though a term (*ajal*) can be implied in these contracts. Thus, parties to any one of these types of contracts must render explicit the conditions on which they agree.

### § 23.04 LIMITS ON EXPRESS TERMS AND CONDITIONS

Every contract will have terms and conditions expressly set forth in it. To what extent are these explicit expressions legally valid? In contracts for the sale (*bay'*) of goods (*māl*), the principal limitation is on a stipulation that

- (1) advantages or disadvantages one of the parties, and, at the same time,
- (2) is extraneous to the purpose of the contract.<sup>7</sup>

An example would be a contract for the sale of leather, where there is a condition from the seller that the buyer makes the leather into shoes.

This kind of stipulation is invalid. Moreover, it renders the contract defective, and makes the contract voidable (*fāsīd*). Interestingly, the source of Islamic Law for this conclusion is not any one of the conventional four sources — the Qur'an, *Sunnah*, *ijma'* (consensus), or *qiyās* (analogical reasoning). It is a result of *istihsān* (discretionary reasoning that does not use *qiyās*).<sup>8</sup>

### § 23.05 LIABILITY (ḌAMĀN)

Obviously, not every completed contract is performed perfectly, leaving the buyers blissfully satisfied. Problems arise after contract formation, disputes erupt, parties accuse each other of failing to live up to their obligations, and they seek to hold each other liable for an actual or perceived breach. In Arabic, liability is called "*ḍamān*." To be "liable" is "*dāmin*."

How does liability arise in contractual relations? As in the American legal system, under the *Shari'a*, the answer is failure (by one or more parties) to perform an

obligation required by the contract. Liability also can arise from committing a transgression, in effect, a civil wrong, or tort, associated with the contractual relationship. In Arabic, "transgression" is "*ta'addi*." In Roman and Civil Law, the concept is "delict." And, a case could arise because of both non-performance of a duty and tortious behavior.

Thus, the *Shari'a* — like American Contract Law — distinguishes between two sources of liability:

- (1) Liability resulting from failure to perform an obligation called for in a contract.
- (2) Liability resulting from the effect of a wrongful act.

The first kind of liability results from behavior contrary to the contract, i.e., a breach. The second kind results from the effect of a tort. Either source of liability triggers a remedy.

### § 23.06 REMEDIES

#### [A] Termination

One straightforward way to deal with a dispute is for contracting parties to terminate their arrangement by mutual agreement. A contract that is well-thought out in advance will contain termination provisions. Those provisions will address key questions such as:

##### • Termination Date —

By what date does the agreement end?

##### • Notice Requirements —

By what means does the agreement normally terminate, i.e., must one or both sides give notice, and if so, how and by when? Or, does the agreement terminate automatically?

##### • Termination Events —

What events, which if any one of them occurs after the contract is completed, would give rise to termination?

In at least five key instances, termination is a remedy exercisable unilaterally. Depending on the case, no judicial intervention is needed to support or give effect to the termination.

First, duress (*ikrāh*) is a ground for unilateral termination. A party compelled to make a bargain can end the deal as soon as it is in a position to do so.

Second, undue influence is a basis for unilateral termination. This basis is somewhat amorphous, and its distinction from duress is not altogether clear. The gist seems to be excessive pressure from a person, or possibly from circumstances.

Third, fraud — as in all legal systems — is a reason to terminate a deal. Fraud can take the form of misrepresentation, through an act or omission of words or

<sup>6</sup> See SCHACHT, *supra*, at 119.

<sup>7</sup> See SCHACHT, *supra*, at 152.

<sup>8</sup> See SCHACHT, *supra*, at 152.



deeds, as to some non-trivial aspect of the contract. Note the importance of a standard to weed out insignificant issues from topics where inaccuracy truly matters.

Fourth, frustration is a reason for termination of a contract. Events that occur after completion of a contract may frustrate the purpose of that contract. Closely related to frustration are impracticability and impossibility. The international contract cases arising out of the 1956 Suez Canal Crisis provide marvelous pedagogy on these doctrines, albeit under American and International Contract Law.

Fifth, undue burden may justify termination. A substantial and material change in circumstances might occur after completion of a contract, and that occurrence may render performance by one party unduly burdensome. In such an instance, the unduly burdened party may end the contract. The threshold for delineating what constitutes an undue burden is important. It cannot be a mere inconvenience.

### [B] Rescission (*Khiyār*) and Cancellation (*Faskh*)

It is not uncommon for contracting parties, having reached an agreement, to seek to unwind their deal before full performance of the obligations specified in the contract has been performed by either or both sides. That is true regardless of the nature and purpose of the contract. In colloquial parlance, the situation is one of either or both parties seeking to "back out" or "call off" the deal. Simply put, rescission is an important remedy for a breach of contract, and this remedy does not require judicial intervention.

Contract Law, be it American or Islamic, would be counter-productively and mercilessly wooden if it did not have doctrines to permit parties to terminate their arrangement after its formation but before completion. Realistic but unforeseen may arise to render continuation of a planned transaction purposeless. Conversely, American and Islamic Contract Law would be counter-productively and mindlessly elastic if they allowed a party to get out of a deal for the slightest of pretexts. Bargains must mean something for there to be certainty and predictability in commercial relations, which in turn are hallmarks of the rule of law and indispensable to economic growth.

Not surprisingly, both legal systems contain the requisite doctrines. Embedded in them is a balancing act between "pulling the trigger" on a deal too easily, and forcing through a deal too strictly. In American Contract Law, these doctrines take the form of rights, such as a right of rescission, and a right of cancellation. Events that allow for the exercise of such a right may include impossibility, impracticability, and frustration. (As mentioned earlier, the international contract cases arising out of the 1956 Suez Canal Crisis are instructive.) Similarly, the *Shari'a* contains rights of rescission and cancellation, known as "*khiyār*" and "*faskh*," respectively. Once again, it might ventured Islamic Law was a source for the reincarnation into the Common Law of these rights.

The right of rescission (*khiyār*) is what was known in Roman Law as *optio*. This Latin term gives a strong clue as to the English meaning of "*khiyār*." It means "option," in the sense of an option to void or rescind. Rescission (*khiyār*) is a

unilateral right, and a unilateral act. It is one side, not both sides, which rescinds a contract. The result of rescission is that the contract is cancelled. Cancellation (*faskh*) is, therefore, technically distinct from rescission (*khiyār*). True, the expressions "right of rescission" and "right of cancellation" (or, "rescission" and "cancellation") sometimes are used inter-changeably. But, to be precise, cancellation is the result of assertion of the right of rescission, i.e., the unilateral act of rescission brings about cancellation. In turn, if and when a contract is cancelled, the legal status of the contract is it never existed. The contract is expunged.

The right of rescission (*khiyār*) cannot exist indeterminately. Otherwise, there would be a lack of certainty and predictability. Contracting parties would not know whether the "other side" might "pull the plug" on a deal at any point up until performance of the final obligation called for in the agreement. Thus, the *Shari'a* requires that *khiyār* be exercised (if at all) within a stipulated time period. If this right is not exercised within the set time frame, the result is a concluded contract of sale that is complete (*tāmm*).

What is that time frame? The general rule cannot be the same as that for the right to withdraw an offer (*rujū'a*). Suppose that as with *rujū'a*, a contracting party (specifically, the offeror) could rescind up until the moment the offer is accepted. In other words, suppose *khiyār* were permitted only until the moment of *kabūl*. The result would be illogical, in that a contract could be rescinded before it is formed. Rescission of a contract would be indistinguishable from withdrawal of an offer, and thus have no meaning.

Accordingly, the time frame for exercising the right to rescind a contract depends on the practical needs of the contracting parties. Consider a contract of sale transaction (*bay'*), specifically a contract for the sale or exchange of goods or property (*māl*). A buyer needs to be able to rescind a contract once she has seen the goods she is buying. The right does her little help in the abstract, because she is unlikely to be aware of a defect until she inspects the goods. It is that defect that will cause her to want to rescind. Thus, under the *Shari'a*, a defect in quality creates a right of rescission. A buyer has a right to rescission at the time she sees the object she has bought.

The illustration of *khiyār* in the context of a contract for the sale of goods or property intimates there are different kinds of rescission. That, indeed, is so. Professor Hussain identifies five kinds of options to withdraw from a concluded contract:<sup>9</sup>

#### (1) *Khiyār al Shart*

In their contract, parties can set forth the parameters of *khiyār*. To be sure, the existence of the option to withdraw from a completed contract is guaranteed by law, i.e., the right is part of Islamic Contract Law, regardless of whether the parties mention it expressly in their document. But, as per agreement of the parties, that existence also can be guaranteed in a contract, which can elaborate the key terms — most notably, the length of time a party has to exercise *khiyār*,

<sup>9</sup> See HUSSAIN, *supra*, at 172.

after which point the right lapses. Stipulating an agreed period of time in which the option to rescind may be exercised is known in Arabic as "*khiyār al shart*." (The word "*shart*" means a condition or prerequisite.)

## (2) *Khiyār al 'Aib*

This form of option to rescind a contract is relevant when there is a contract for the sale of goods or services, and a fault in those goods or services exists at the time the contract is completed. To be sure, the *Shari'a* obligates a seller to make a full, honest, and timely disclosure of the true nature of the goods or services being sold. This disclosure should cover any defects. If the seller fails to do so, and thereby tries to conceal the problematic nature of the goods or services, then the buyer may exercise the option of rescission.

Presumably, the defect must be non-trivial. A minor and insignificant matter ought not to trigger *khiyār al 'aib*. Depending on the circumstances, the correct standard for defectiveness, and its application, may be the source of controversy between buyer and seller. Nevertheless, the point is (as discussed further below) that a prospective buyer need not be wary of being "stuck" with the sub-par goods or services that an unscrupulous seller is trying to pawn off on an unwitting purchaser.

## (3) *Khiyār al Majlis*

The Arabic term "*majlis*" may be translated as "meeting" or "session." One circumstance in which the option to withdraw from a completed contract exists is when the contracting parties are face-to-face. As long as the parties are still in the physical presence of one another, either one may pull out of the bargain.

The purpose of *khiyār al majlis* "is to ensure that the parties are as sure as they can be about the transaction."<sup>10</sup> They can take time with one another to get the parameters of their agreement right, conclude an accord, yet withdraw from it if they decide — while still in each other's presence — those parameters are inappropriate. In effect, the doctrine gives legal effect to second thoughts, thus creating room for maneuver even after a contract is formed. This flexibility may induce parties to bargain in the first instance. It is redolent of the famous "Escape Clause" (also known as safeguards) in the field of international trade law, which allows a country to make trade-liberalizing commitments with knowledge it can put up protectionist measures at variance with those commitments later on, if they face a surge of imports that adversely affects a domestic industry.

The doctrine of *khiyār al-majlis* is sourced in a *hadith* that is reported by Abū Barzāh al-Aslamī and compiled by Ibn Mājah (who lived from 824-886 A.D., 209-295 A.H.):

Each of the parties to a contract of sale has the option against the other party as long as they have not separated.<sup>11</sup>

<sup>10</sup> See HUSAIN, *supra*, at 172.

<sup>11</sup> Quoted in Doi, *supra*, at 560.

Professor Kamali also explains that in respect of the doctrine of *khiyār al-majlis*, a *hadith* allows for the option to cancel completed contracts as long as the parties have "not separated — nor left the

Professor Doi observes that *Imām Mālik* wrote about this *hadith* in his classic treatise, the *Muwatta'*:

This *hadith* of the Prophet . . . expresses the doctrine known as *khiyār al-majlis*, which gives the parties to a contract, duly completed by offer and acceptance, the right to repudiate the agreement during the session (*majlis*) of the bargain.

*Imām Mālik* comments on this *hadith* in the following words:

With us [the People of Madinah] there is no well known definition in this case nor any matter which is acted upon. (*Muwatta'*, Book 31, Number 31:37-80.)

He [*Imām Mālik*] meant there is no definition of what constitutes their separating, and no established practice with respect to that.<sup>12</sup>

Does the above-quoted observation mean that the doctrine is legally valid? The question is a reasonable one, because Professor Doi also reports:

As far as *khiyār al-majlis* is concerned, other schools of law have contested its validity.<sup>13</sup>

These "other schools of law" would be the *Hanafi*, *Shafi'i*, and *Hanbali* Schools. Unfortunately, the Professor does not elaborate on the breadth or depth of skepticism about the doctrine in them.

There are at least two compelling reasons to critique the legal validity of the doctrine *khiyār al-majlis*. First, whether the practice of the people of Medina (*amal ahl al-Madinah*) is consistent with the *hadith* has been a matter of scholarly debate. On the one hand, Professor Kamali writes that the prevailing Madinese practice was to regard a contract as final upon agreement, whether or not the parties remained together or separated.<sup>14</sup> That would suggest a true conflict with

meeting of the contract." MUHAMMAD HASHIM KAMALI, *SHARI'AH LAW: AN INTRODUCTION* 74 (2008). (Hereinafter, KAMALI.)

<sup>12</sup> Doi, *supra*, at 560 (emphasis added).

Professor Doi contests the view of Professor Coulson in respect of this *hadith* and *Imām Mālik's* view of it. In *A History of Islamic Law* (1971), a highly regarded work in its own right, Professor Coulson dubs this *hadith* an "alleged statement of the Prophet." *Id.* at 560 (quoting *A History of Islamic Law* (1971), at p. 46). Professor Doi counters:

Professor Coulson falls into the error of assuming that *Imām Mālik* was in the habit of rejecting Prophetic traditions and the authority of the precepts of the Prophet . . . expressing Islamic Law.

*Id.* In truth, urges Professor Doi, the *Muwatta'* of *Imām Mālik* is widely respected by scholars throughout the Muslim world, and the *Māliki* School relies heavily on the practice of the People of Medina (*amal ahl al-Madinah*) because it believes that Practice accurately reflects the *Sunnah* of the Prophet. See *id.* at 560-561.

<sup>13</sup> Doi, *supra*, at 561 (emphasis added).

<sup>14</sup> KAMALI, *supra*, at 74. Two other examples where a Madinese consensus prevailed as a preeminent source of law are as follows: First, the testimony of children in cases of injury amongst only children is acceptable when no one has left the scene of the incident. *Id.*, at 75. Second, the wife of a missing person



the *ḥadīth*. If, as is the *Mālikī* School approach, priority were given to practice, then the doctrine would be invalid.

On the other hand, the italicized language in the above-quoted observation from Professor Doi indicates a different view of what *Imām* Mālik thought of the practice in Medina.<sup>15</sup> There was, says Professor Doi, no definition of what constitutes separation, nor any set practice as to it. Moreover, as is characteristic of the *Mālikī* School, the practice of the people of Medina legitimates the doctrine:

There were scholars like Ibn Hajar, who were of the opinion that the doctrine *does not contradict* the *ʿamal* of the People of Madinah, because it had been the view of Ibn ʿUmar [the Caliph], Saʿid ibn al-Musayyab, az-Zuhri, and Ibn Abi Dhiʿb, who were eminent leaders in their eras in Madinah.<sup>16</sup>

Second, there is an obvious consequentialist argument against the doctrine of *khiyār al-majlis*. If parties can pull out of a contract that has been formed as long as they remain face-to-face, then how final are their words or writings? They can look each other in the eye, and even shake hands on a deal, and yet not be able to rely on what each has to say as being definitive. Put simply, it is not unreasonable to claim that *khiyār al-majlis* can undermine certainty among contracting parties. As a follow-on point, it might be added that this consequence also undermines a more elemental goal of Islamic Contract Law — the promotion of honesty and fair dealing. That is because ease of withdrawal from completed bargains may facilitate unscrupulous behavior.

The “bottom line” is that there appear to be two views on the doctrine of *khiyār al-majlis*. At least some jurists (*fukahāʾ*) of the *Mālikī* School, as well as other Schools, question the validity of the doctrine. But, overall, including in the majority of the *Mālikī* School, the doctrine is acceptable, with no criticism, as the account of Professor Hussain reflects.

As a practical matter, where the doctrine of *khiyār al-majlis* is accepted, there is no time limit to the *majlis*. The situation may be one of a quickly arranged spot deal, or hours upon hours of negotiations that culminate in a contract. But as soon as either party leaves, the option to exercise this type of *khiyār* ends. Presumably, “leaving,” in this sense, would not mean a temporary break for water or to use a restroom, but rather a permanent cessation of the meeting.

#### (4) *Khiyār al Ruʿya*

In many transactions, goods are sold sight unseen, meaning a buyer purchases them without seeing them. Internet purchases through vendors like Amazon and LL Bean are common examples. There is no opportunity at the moment of contracting for the buyer to inspect the goods. Only when the goods are delivered or otherwise obtained by the buyer, the buyer has the chance to examine them. If there were no option (*khiyār*) to withdraw for this circumstance, then an unscrupulous

may seek judicial separation after completing a four-year waiting period, as well as seek divorce on the ground of injurious treatment by the husband. *Id.*, at 76.

<sup>15</sup> See Doi, *supra*, at 560-561.

<sup>16</sup> Doi, *supra*, at 561.

pulous seller could ship defective goods to the buyer with impunity. To avoid this risk for the buyer, the *Sharīʿa* recognizes another form of *khiyār*, namely, the option to withdraw from a completed contract where goods are sold sight unseen. Under it, *khiyār al ruʿya*, the buyer has the right to reject the goods upon sight, and thereby withdraw from the contract.

#### (5) *Khiyār al Wasf*

It is commonplace for parties to place in their contract a precise description of the goods or services that are the subject of the contract. Either side may provide the description. For instance, in a manufacturing (*istisnāʾ*) contract, a buyer may list technical specifications for a sophisticated item, such as medical or surgical devices, or scientific research equipment. Conversely, a seller may lay out the exact parameters of an item, so as to differentiate it from other similar goods, as in the case, for example, of different types of steel ball bearings.

Unfortunately, goods or services do not always meet the precise contractual description. Sometimes, through no deliberate malfeasance by the seller or manufacturer, the goods do not live up to the standard envisioned by the contract. In such cases, the buyer needs the option to rescind the agreement. That option is *khiyār al wasf*. Presumably, however, the derogation of the goods or services from what was agreed upon is substantial, or material. A trivial departure from the description should not trigger *khiyār al wasf*. The correct standard to distinguish major from minor problems, and how that standard applies in specific cases, may be a source of controversy between buyer and seller.

With respect to each of the above types of withdrawal, it must be exercised, if at all, within a reasonable period of time. As for *khiyār al shart*, the contractual specification of the period must be reasonable.

The significance of the existence of the option to withdraw from a concluded contract (*khiyār*) cannot be overstated. The option, while held by either party, is — as Professor Hussain comments — “for the benefit of the buyer and preclude the common law idea of *caveat emptor*.”<sup>17</sup> Because of *khiyār*, there is no “buyer beware” principle in Islamic Law. An important corollary point is that none of the forms of *khiyār* can be excluded by contract. Thus, for instance, a seller cannot compel a buyer to agree to surrender the option of withdrawal.

#### [C] Damages

Monetary damages are an important contractual remedy in both the American and Islamic legal system. A threshold distinction exists in both systems: damages that an aggrieved party obtains without judicial intervention, and damages that can be had only through an adjudicatory order.

In the first category are money damage remedies like a buyer withholding payment from a seller because of non-performance by a seller, or a buyer exercising a right of set-off (*i.e.*, deducting a payment owed to the seller by an appropriate amount to reflect a counter-obligation not performed by the seller).

<sup>17</sup> See HUSSAIN, *supra*, at 172.

Also in the first category is the exercise of a damages provision in a contract, such as a liquidated damages clause.

"Liquidated" means "[t]o settle (an obligation) by payment or other adjustment; to extinguish a debt . . .," by agreement or litigation.<sup>18</sup> The typical result is the reduction or conversion of an asset (such as a legal right) into cash. A liquidated damages clause, therefore, determines *a priori* (before performance of the contract) what the measure of damages will be if one party breaches the contract.<sup>19</sup> Under the *Shari'a*, as in American Contract Law, parties may identify the events for such exercise — that is, the events of default. The clause indicates the amount of the damages.

There is a large corpus of American jurisprudence on distinguishing between liquidated damages, on the one hand, and a penalty, on the other hand. Under three circumstances, American courts will not uphold a liquidated damages clause:

- (1) the damage amount grossly exceeds the probably damages upon breach,
- (2) the same damage amount applies to a range of breaches, some of which are material, and others trivial, or
- (3) the events of default triggering liquidated damages include a mere delay in payment.<sup>20</sup>

The *Shari'a* embodies similar constraints. But, the extent to which it does is not apparent.

Withholding payment is not an absolute right exercisable in all circumstances. Professor Hussain correctly identifies "withholding payment or performance or set-off" as a remedy "available to the injured party without judicial sanction," as distinct from the option (*khiyār*) of withdrawal. However, in a contract for the sale (*bay'*) of property (*māl*), Professor Schacht posits the question of whether a buyer has the right to pay less to the seller, or to withhold payment (what he calls "abatement") in the event of a defect in the goods?<sup>21</sup> He responds by saying the general answer is "no." In this circumstance, the buyer's remedy is to rescind the contract (*khiyār*), which means he must return the goods, and receive back the payment. Of course, there are sure to be instances when a buyer cannot return the goods. Maybe the goods have been lost. Maybe the goods have been used, in which case they could have been depreciated, or alternatively their value might have increased (as in the example of dyeing of cloth). In such cases, a buyer can pay the correct amount, that is, an amount that proportionally reflects the defective state of the goods.<sup>22</sup> In brief, at least according to Professor Schacht, in a *bay'* contract, withholding payment or exercising set-off are to be used only if return of the *māl* in an unaltered state, coupled with rescission, is not possible.

<sup>18</sup> BRYAN A. GARNER, ED., BLACK'S LAW DICTIONARY 1014 (St. Paul, Minnesota: West, 9th ed. 2009) (entry for "liquidate"). [Hereinafter, BLACK'S LAW DICTIONARY.]

<sup>19</sup> See BLACK'S LAW DICTIONARY, *supra*, at 1015 (entry for "liquidated-damages clause").

<sup>20</sup> BLACK'S LAW DICTIONARY, *supra*, at 1015 (entry for "liquidated-damages clause").

<sup>21</sup> See SCHACHT, *supra*, at 153.

<sup>22</sup> See SCHACHT, *supra*, at 153.

When contracting parties cannot agree on the amount of monetary damages, or even whether damages ought to be awarded (i.e., whether one side is liable to the other), then the second category is relevant. They are unable to reach an amicable settlement (*sulh*). Thus, the parties go to court (or arbitration), plead their cases to a judge (or arbitrator), and obtain a formal decision and order.

## [D] Performance

Still another remedy available to contracting parties under the *Shari'a*, as in American Contract Law, concerns performance. The threshold distinction noted earlier, between remedies that do not need adjudicatory intervention, and those that do, is relevant. A party may withhold performance on account of a breach by the other party. Ideally, the parties will set out in their agreement the terms for withholding performance (and for holding back payment), including the precise conditions that justify this remedy.

If and when contracting parties dispute the point, and cannot reach an amicable settlement (*sulh*), then they must turn to a court (or arbitrator). The aggrieved party may seek specific performance. Monetary damages are a form of compensation to an aggrieved party for the non-execution of a contract. Specific performance is the opposite: it is an insistence the parties execute the agreement. The essence of the meaning of "specific performance" appears similar in American and Islamic Contract Law, namely:

The rendering, as nearly as practicable, of a promised performance through a judgment or decree; specifically, a court-ordered remedy that requires precise fulfillment of a legal or contractual obligation when monetary damages are inappropriate or inadequate, as when the sale of real estate or a rare article is involved.<sup>23</sup>

As this definition indicates, specific performance is an alternative to monetary damages when an adjudicator finds that the latter remedy will not work. One reason may be damages are difficult or impossible to calculate. Another rationale may be that damages, though quantifiable, will not properly compensate the aggrieved party. Either way, the remedy is backed by a court (or perhaps arbitral) order, and these reasons intimate a general hesitancy to intervene heavily and compel performance unless truly justified.

## [E] Imprisonment (*Habs*)

Imprisonment is a contractual remedy that obviously needs judicial intervention. Under American Contract Law, potentially this remedy can arise if a party fails to heed a court order of specific performance. Not executing a contract as ordered by a judge may be treated as contempt of court, triggering the possibility of jail until the non-performing party agrees to render performance.<sup>24</sup>

<sup>23</sup> BLACK'S LAW DICTIONARY, *supra*, at 1529 (entry for "specific performance").

<sup>24</sup> See BLACK'S LAW DICTIONARY, *supra*, at 1529 (entry for "specific performance," quoting G.W. Keeton, *An Introduction to Equity* 304 (5th ed. 1961)).



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Under the *Shar'ia*, imprisonment is among the remedies in cases involving contractual obligations or property. The penalty of imprisonment is called "*habs*." However, it appears this remedy is more common, and less of a mere theoretical possibility, than under American Contract Law. In particular, a debtor can be imprisoned until that debtor pays his debt.

The obvious question is what happens if the debtor is (or claims to be) too poor to pay back the debt? Raising this question, which implies that it is both counter-productive and degrading to human dignity to imprison debtors, helped end the use of infamous "debtor's prisons" in the American legal system. As for Islamic Law, Professor Schacht explains that a debtor is put in jail only if the debt arose from a transaction that involved payment of consideration (*badal*), namely:

- sale of a good,
- loan of funds,
- suretyship, or
- *mahr*, i.e., the nuptial gift, and specifically the portion that is due immediately.<sup>25</sup>

For all other debts (i.e., those that do not imply payment of a consideration), a poor person is jailed only if his or her creditors prove he or she has the means to pay the debts. As for the legal nature of any confinement, as Professor Hussain writes, it is "civil imprisonment," meaning that the jailed party is not incarcerated for a criminal offence.<sup>26</sup>

Under the *Shar'ia*, for how long does a poor debtor remain incarcerated? Precisely because the debtor is impecunious, the logical response must depend on willingness, not ability, to pay. Not surprisingly, then, the answer under the *Shar'ia* is the debtor remains in jail until the relevant judge (*qādi*) is convinced the debtor would pay if the debtor could do so. In practice, that period tends to be about two to three months, by which time the debtor has learned that trying to pay off the debt is preferable to sitting behind bars, and has convinced the *qādi* of a change of heart. Note that at any point, a *qādi* will release the debtor if the debtor falls ill.

Do these rules concerning the remedy of imprisonment apply only to cases of debtors in the context of loan agreements? The answer is no. A *qādi* will apply the same rules to a person who usurps the object of another (i.e., a usurper, or *ghaṣīb*), and then claims that object has been destroyed or no longer exists.<sup>27</sup> How broadly beyond cases of debt defaults and usurpation (*ghaṣb*) the remedy of imprisonment is available varies from one Muslim country to another. However, in no country does it appear to be either the preferred or frequently applied commercial remedy.

In the case of indebtedness, suppose a *qādi* orders the release of an imprisoned debtor based on the willingness of that debtor to repay a debt. After the release, however, the debtor remains unable to pay the relevant debt. Is the debtor sent

<sup>25</sup> See SCHACHT, *supra*, at 197.

<sup>26</sup> HUSSAIN, *supra*, at 173.

<sup>27</sup> See SCHACHT, *supra*, at 197.

back to prison? Absent fraud, the general answer is "no." Rather, the *qādi* declares a released debtor, who has proven unable pay the debts, bankrupt — "*muflis*." Does this declaration cause the debtor to be discharged from his debts (as is possible under the United States Bankruptcy Code)? Islamic legal scholars (*fukahā*) do not agree on the answer. Some say all debts of the debtor are wiped out. Others, however, argue creditors can resort to self-help by observing the debtor, and taking any of surplus earnings of the debtor. This argument clearly implies the debts are not extinguished via a declaration of bankruptcy.

## § 23.07 RATIFICATION (İMDÂ')

Technically, it may be appropriate to place the topic of ratification (*imḍā'*) within a discussion of contract formation. However, the right to ratify a contract (*imḍā'*) bears similarities to the right of rescission (*khiyār*).

To begin, parties to an agreement have a right to ratify their contract. Ratification is known as "*imḍā'*" in Arabic. It exists for a stipulated period of time. As in American Contract Law, ratification is adoption of an already-completed act, where the act was originally done in a way that that did not create a binding legal obligation, or was done by a third-party that did not have the authority to act as the agent for the relevant contracting party.<sup>28</sup> Simply put, ratification is a *post hoc* confirmation that renders legally valid and enforceable the agreement based on the prior act that is ratified.

Ratification can occur through express words, which may be written or oral depending on the circumstances of the contract. The words are either a new promise (e.g., as to performance), or to the effect of "I ratify and confirm . . ." Importantly, the words must be more substantive than a mere acknowledgment that an agreement was reached but not performed.<sup>29</sup> The words must clearly convey confirmation of the contract.

As to the similarities between the ratification (*imḍā'*) and rescission (*khiyār*), there are three. First, both are unilateral rights. Second, both must be exercised within a stipulated time period. If the right is not exercised in a timely fashion, then completion (*tāmm*) of the contract of sale results. Third, both rights can be set forth in the contract itself, based on the agreement of the parties, and/or they can be guaranteed by law.

## § 23.08 AMICABLE SETTLEMENT (ŞULH)

It is important to distinguish the exercise of the option to withdraw from a contract, and consequent cancellation of a contract, from the settlement of obligations arising from a contract. That distinction is important in respect of any contractual remedy. Simply put, parties always are free to settle their dispute

<sup>28</sup> See BLACK'S LAW DICTIONARY, *supra*, at 1376.

<sup>29</sup> See WILLIAM R. ANDERSON, PRINCIPLES OF THE LAW OF CONTRACT 179-180 (Arthur L. Corbin ed., 3d American ed. 1919), quoted in BLACK'S LAW DICTIONARY, *supra*, at 1376.

amicably. Indeed, the spirit, if not the letter, of Islamic Law encourages them to do so.

An amicable settlement is called "*ṣulḥ*." One way it can occur is through an amendment to the existing contract that is the subject of the dispute. Rather than cancellation (*faskh*) of the contract, preservation occurs. That is, the essential elements of that contract are retained, and the contract remains in force. Settlement, after all, is friendly, but cancellation may not be. Of course, the necessary mutually agreed upon change or changes are made to it, with supporting consideration (*badal*). The result is the elimination of any dispute, which might not be the case with a cancellation.

## Chapter 24

### BUSINESS ASSOCIATIONS LAW: TRADITIONAL TYPES OF PARTNERSHIP

So do not be disturbed at the sight of wicked men possessing great wealth while the servants of God suffer want. We, my brothers and sisters, must have faith. Competing as we are in the arena of the living God, we are receiving the training in this present life that will make us worthy to be crowned in the life to come. *No honest man becomes rich overnight*; he has to wait for the reward of his labors. If God gave virtue an immediate recompense, we should straightaway find ourselves engaging in commerce, instead of perfecting ourselves in His service.

From a *Homily* written in the 2nd century A.D., *quoted in* THE DIVINE OFFICE, THE LITURGY OF THE HOURS ACCORDING TO THE ROMAN RITE, vol. IV, Ordinary Time Weeks 18-34, Thirty Second Week in Ordinary Time, Second Reading, pp. 529-530 (New York: Catholic Book Publishing Company, 1975) (emphasis added)

#### SYNOPSIS

##### § 24.01 INTRODUCTION

- [A] Importance of Partnership
- [B] Historical Origins of Partnership

##### § 24.02 GENERAL TERM FOR PARTNERSHIP

- [A] Contract-based Partnerships (*Sharikah al-'Aqd*)
- [B] Common Rights of Acquisition (*Sharikah al-Ibāḥah*)
- [C] Co-ownership (*Sharikah al-Milk*)

##### § 24.03 FIVE TRADITIONAL TYPES OF SHARIKAH AL-'AQD

- [A] *Sharikah al-Inān* (Limited Liability Company)
- [B] *Sharikah al-Mufāwadah* (Unlimited Mercantile Partnership)
- [C] *Sharikah al-Abdān* (Skill-based Partnership)
- [D] *Sharikah al-Wujāh* (Credit Cooperative)
- [E] *Sharikah al-Muḍārabah* (Sleeping Partnership)



## § 24.01 INTRODUCTION

### [A] Importance of Partnership

Partnership is the most important topic in Islamic law on business associations. It is only a modest overstatement to equate the terms "partnership" and "business association." The concept of a corporation as an independent legal personality, which can sue or be sued, and which is so well known to Common and Civil Law Systems, is unknown to the *Sharī'a*. Therefore, to do business in accordance with Islamic Law is to establish, or work with an existing, form of association that is a partnership. Given the central significance of partnership in the *Sharī'a*, it should not be surprising that across the centuries, Islamic legal and religious scholars, coupled with merchant practice, have developed many specific kinds of partnership entities. In turn, the relevance of partnership transcends the legal realm. Members of a community can, and do, become involved in one or another kind of partnership, thereby enabling them to engage in economic transactions beyond what might be possible on an individual basis.

### [B] Historical Origins of Partnership

Partnership has a long history in Islamic legal and religious thinking. The general word in Arabic for a "partnership" is "*sharikah*." Sometimes, the term is transliterated as "*sharikat*." The two words are equivalent, with "*sharikah*" more commonly used in Arabic-speaking countries, and "*sharikat*" typically found in Urdu-speaking countries (most notably, Pakistan).

Substantively, all four *Sunni* Schools of the *Sharī'a* adopt the same definition of "*sharikah*." The equivalence is apparent from a review of what each School states:<sup>1</sup>

- The *Hanafi* School says "*sharikah*" is "the exclusive right of two or more persons to a single subject-matter."<sup>2</sup>
- The *Māliki* School defines "*sharikah*" as "a permission from each of the participants to the others for transactions in his wealth and on their own behalf, while retaining the right to transact personally (in such wealth)."<sup>3</sup>
- The *Shāfi'i* School explains "*sharikah*" is "in its literal meaning is mixing and technically it is an established undivided right in a single thing or it is a contract implying this."<sup>4</sup>

<sup>1</sup> Definitions, interpretations, and perspectives of the *Sunni* Schools are listed in chronological order, that is, in the order in which the School developed historically, with the earliest (*Hanafi*) first and latest (*Hanbali*) last.

<sup>2</sup> IMRAN AHSAN KHAN NYAZEE, *ISLAMIC LAW OF BUSINESS ORGANIZATIONS — PARTNERSHIPS* 15 (Selangor, Malaysia: The Other Press, Malaysian ed. 2002) (quoting 'ABD AL-'AZIZ AL-KHAYYAT, *AL-SHARIKAT*, 2 vols. (Amman: Wizārat al-Awqāf, 1971), vol. 1 at 33). [Hereinafter, NYAZEE and AL-KHAYYAT, respectively.]

<sup>3</sup> NYAZEE, *supra*, at 18 (quoting AL-KHAYYAT, *supra*, vol. 1, at 42, in turn quoting KHALIL, *Al-Mukhtasar (The Summary)* [Hereinafter, KHALIL].)

<sup>4</sup> NYAZEE, *supra*, at 19 (quoting SHAMS AL-DIN MUHAMMAD IBN ABU AL-'ABBAS SHIHAB AL-DIN AHMAD IBN

- The *Hanbali* School teaches that "*sharikah*" is "[j]oint right of ownership or transaction."<sup>5</sup> Similarly, Ibn Qudamah<sup>6</sup> defines partnership as "participation of two or more persons in transactions."<sup>7</sup>

Consequently, all countries in which the *Sharī'a* predominates share the same concept of what a "partnership." A lawyer need not fear that different Islamic countries take fundamentally different approaches to this business association.

However, the broad conceptual similarity masks differences in specific types of partnerships. That is, the *fukahā'* (jurists, *i.e.*, Islamic religious scholars specializing in law) in particular, and *ulamā'* (Islamic religious scholars) generally, have established and refined a variety of specific kinds of partnership to serve commercial needs. Significantly, much of this work occurred during the *Umayyad* and *Abbasid* Caliphates, in which non-Muslims and Muslims alike played prominent roles in commerce, finance, investment, and trade. Accordingly, some of the types of *sharikah* reflect not just Islamic precepts, but also an ecumenical marketplace.

## § 24.02 GENERAL TERM FOR PARTNERSHIP

### [A] Contract-based Partnerships (*Sharikah al-'Aqd*)

The Arabic term "*aqd*" means "contract." Thus, the phrase "*sharikah al-'aqd*" connotes that a partnership is formed by a contract. Stated equivalently, "*sharikah al-'aqd*" means

a partnership created through contract as opposed to co-ownership that may be the result of a joint purchases or agreement or it may result from inheritance or from some other legal situation.<sup>8</sup>

It is expected that the contract be written. Conceivably, a partnership may be created through an unwritten agreement, but only in the presence of two witnesses. However, as a practical matter, under the *Sharī'a*, such an event would be rare and viewed unfavorably.

AHMAD IBN HAMEZ AL-RAMLI, *NIHAYAT AL-MURTADJ [END FOR THE NEEDY]* (Cairo, 1967) vol. 5 at 3 [Hereinafter, AL-RAMLI].

<sup>5</sup> NYAZEE, *supra*, at 15 (quoting AL-KHAYYAT, *AL-SHARIKAT*, *supra*, vol. 1 at 3).

<sup>6</sup> Ibn Qudamah was considered the *Imām* of the *Hanbali* School following the death of *Imām* Ahmed Ibn Hanbal in 855 (241 A.H.) especially in Damascus. Ibn Qudamah was born in Palestine in 1147 (541 A.H.) and died in 1226 (629 A.H.). Living roughly 3 centuries after Ibn Hanbal, and thus obviously not his personal student, Ibn Qudamah rose to become the most outstanding scholar of the *Hanbali* School. Indeed, after *Imām* Ahmed Ibn Hanbal himself, Ibn Qudamah is the principal figure in the *Hanbali* School. His full name is 'Abdullah Ibn Ahmad Ibn Muhammad Ibn Qudamah Ibn Muqdam Ibn Nasr Ibn Abdullah Al-Maqdisi. Typically, he is referred to as "Ibn Qudamah Al-Maqdisi," or "Ibn Qudama Al-Dimashqi." The latter name reflects the fact he moved to Damascus. See *Ibn Qudamah*, WIKIPEDIA, posted at [http://en.wikipedia.org/wiki/Ibn\\_Qudamah](http://en.wikipedia.org/wiki/Ibn_Qudamah).

<sup>7</sup> NYAZEE, *supra*, at 19 (quoting Ibn Qudamah, *Al-Mughni [The Fulfillment]* vol. 5 at 3 [Hereinafter, IBN QUDAMAH].)

<sup>8</sup> NYAZEE, *supra*, at 339.

Because nearly all partnerships are formed by a contract, the phrase "*sharikah al-'aqd*" represents the general term for partnership. That is, the phrase encompasses almost all specific forms of partnership, in Islamic Law, because almost all of the forms are established by a contract. The exceptions, *i.e.*, the only particular forms of partnership not included within the ambit of the term "*sharikah al-'aqd*," are the common right to acquire ownership (called *sharikah al-ibāḥah*), and co-ownership (called *sharikah al-milk*).

Unsurprisingly, as "*sharikah al-'aqd*" is a generic term, all Four Schools agree on what it means. In particular:

- The *Hanafi* School says "*sharikah al-'aqd*" is, "an agreement between two or more persons for common participation in capital and profits."<sup>9</sup>
- The *Māliki* School defines "*sharikah al-'aqd*" as "a permission from each of the participants to the others for transactions in his wealth and on their own behalf, while retaining the right to transact personally (in such wealth)."<sup>10</sup>
- The *Shāfi'i* School explains "*sharikah al-'aqd*" that "in its literal meaning is mixing and technically it is an established undivided right in a single thing or it is a contract implying this."<sup>11</sup>
- The *Hanbali* School teaches "*sharikah al-'aqd*" is "participation of two or more persons in transactions."<sup>12</sup>

Under all Four Schools, the partners in any specific type of *sharikah al-'aqd* can — and, for practical reasons, do — hire employees as non-partners to work on the affairs of the partnership. The employment relationships created by the partners is readily apparent from observing the operations of many businesses in the Islamic World.

Critically, however, agreement ends at this level of generality. That is because there are two different broad categories under *sharikah al-'aqd*. The first category, which is the older one historically, consists of five specific types of partnership:

- (1) *sharikah al-'inān* (limited liability company),
- (2) *sharikah al-mufāwadah* (unlimited mercantile partnership),
- (3) *sharikah al-'abdān* (skill-based partnership),
- (4) *sharikah al-wujūh* (credit cooperative), and
- (5) *sharikah al-mudārabah* (sleeping partnership).

All five types, and the perspectives of the Four Schools on them, are discussed below. The second category, which is the modern one, and on which there is

<sup>9</sup> NYAZEE, *supra*, at 17-18 (quoting Majallah, § 1329 [Hereinafter, MAJALLAH]).

<sup>10</sup> NYAZEE, *supra*, at 18 (Selangor, Malaysia: The Other Press, Malaysian ed., 2002) (quoting the definition from *Al-Mukhtasar* [The Summary] by Khalil, quoted in AL KHAYYAT, *supra*, vol. 1 at 42. A similar definition is in Al-Khiraṣi, *Sharh Al-Mukhtasar*, vol. 6 at 35).

<sup>11</sup> NYAZEE, *supra*, at 19 (quoting AL RAMLI, *supra*, vol. 5, at 3).

<sup>12</sup> IRHAN AHMAN KHAN NYAZEE, ISLAMIC LAW OF BUSINESS ORGANIZATIONS — PARTNERSHIPS 19 (Selangor, Malaysia: The Other Press, Malaysian ed., 2002) (quoting IBN QUDAMAH, *supra*, vol. 5 at 3).

considerable variation from one Muslim country to another, is comprised of a further four different types. They are:

- (1) *sharikah musāmahah* (stock market partnership),
- (2) *sharikah al-taḍamun* (trading partnership),
- (3) *sharikah al-tawsi'ah* (two-tiered partnership), and
- (4) *sharikah al-mohass'ah* (informal partnership).

## [B] Common Rights of Acquisition (*Sharikah al-Ibāḥah*)

There are two categories of partnership in which the association among individuals is not based on a written contract. These associations are not within the ambit of *sharikah al-'aqd*. The first category of non-contract based partnerships is common rights of association, known in Arabic as "*sharikah al-ibāḥah*." As suggested, the English meaning of "*sharikah al-ibāḥah*" is a common right to acquire ownership.

The *Mejelle*, the Civil Code of the Ottoman Caliphate from 1877 to 1926, which codifies part of the *Hanafi fiqh*, defines "*sharikah al-ibāḥah*" as:

the existence of a mutual possession by the public, of a share in the right to acquire possession, by taking things which are free to the public, that is to say, things, like water, which are not the property of the public, originally.<sup>13</sup>

In other words, a *sharikah al-ibāḥah* is a common right of people to own, through gathering and acquisition, a thing that satisfies two criteria.

First, the thing is *mubāh*, meaning it is both free and legal. That is, it is permissible to acquire and own that thing, because that thing is free, and because acquisition and ownership of that thing is not forbidden by an Islamic precept. Second, the thing is not originally owned by anyone. Rather, the thing has been in the public domain, a part of the commons.<sup>14</sup> Accordingly, anything not owned by individuals could be shared among people. The second criterion follows logically from the first one. If the thing were owned by someone, then other people could not acquire and own it freely (unless it were gifted to them), or lawfully (as theft is illegal). Quintessential examples of things that satisfy both criteria are air, firewood, and water. They can be freely and legally shared among people.

The mutual acquisition and ownership of such things brings people into a non-contract based nexus. That nexus is precisely *sharikah al-ibāḥah*, and it is created automatically, without any legal formalities. In fact, the partnership over air, firewood, and water always exists, among all people, Muslim and non-Muslim, and across all boundaries of time and space. This remarkable cross-cultural,

<sup>13</sup> THE MEJELLE — BEING AN ENGLISH TRANSLATION OF MAJALLAH EL-AHKAM-I-ADLIYA AND A COMPLETE CODE OF ISLAMIC CIVIL LAW § 1045 at 166 (Petaling Jaya, Malaysia: The Other Press, January 2001) (C.R. Tyser, B.A.L., D.G. Demetriades & Ismail Haqqi Effendi, trans.). [Hereinafter, MEJELLE.]

<sup>14</sup> IRHAN AHMAN KHAN NYAZEE, ISLAMIC LAW OF BUSINESS ORGANIZATIONS — PARTNERSHIPS 16 (Selangor, Malaysia: The Other Press, Malaysian ed., 2002) (quoting MAJALLAH, *supra*, at § 1045).



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- The *Shāfi'i* School explains "*sharikah al-'aqd*" that "in its literal meaning is mixing and technically it is an established undivided right in a single thing or it is a contract implying this."<sup>11</sup>
- The *Hanbali* School teaches "*sharikah al-'aqd*" is "participation of two or more persons in transactions."<sup>12</sup>

Under all Four Schools, the partners in any specific type of *sharikah al-'aqd* can — and, for practical reasons, do — hire employees as non-partners to work on the affairs of the partnership. The employment relationships created by the partners is readily apparent from observing the operations of many businesses in the Islamic World.

Critically, however, agreement ends at this level of generality. That is because there are two different broad categories under *sharikah al-'aqd*. The first category, which is the older one historically, consists of five specific types of partnership:

- (1) *sharikah al-'inān* (limited liability company),
- (2) *sharikah al-mufāwadah* (unlimited mercantile partnership),
- (3) *sharikah al-'abdān* (skill-based partnership),
- (4) *sharikah al-wujūh* (credit cooperative), and
- (5) *sharikah al-mudārabah* (sleeping partnership).

All five types, and the perspectives of the Four Schools on them, are discussed below. The second category, which is the modern one, and on which there is

<sup>9</sup> NYAZEE, *supra*, at 17-18 (quoting Majallah, § 1329 [Hereinafter, MAJALLAH]).

<sup>10</sup> NYAZEE, *supra*, at 18 (Selangor, Malaysia: The Other Press, Malaysian ed., 2002) (quoting the definition from *Al-Mukhtasar* [The Summary] by Khalil, quoted in AL KHAYAT, *supra*, vol. 1 at 42. A similar definition is in Al-Khiraṣi, *Sharh Al-Mukhtasar*, vol. 6 at 35).

<sup>11</sup> NYAZEE, *supra*, at 19 (quoting AL RAMLI, *supra*, vol. 5, at 3).

<sup>12</sup> IRHAN AHMAN KHAN NYAZEE, ISLAMIC LAW OF BUSINESS ORGANIZATIONS — PARTNERSHIPS 19 (Selangor, Malaysia: The Other Press, Malaysian ed., 2002) (quoting IBN QUDAMA, *supra*, vol. 5 at 3).

considerable variation from one Muslim country to another, is comprised of a further four different types. They are:

- (1) *sharikah musāmahah* (stock market partnership),
- (2) *sharikah al-taḍamun* (trading partnership),
- (3) *sharikah al-tawsi'ah* (two-tiered partnership), and
- (4) *sharikah al-mohass'ah* (informal partnership).

## [B] Common Rights of Acquisition (*Sharikah al-Ibāhah*)

There are two categories of partnership in which the association among individuals is not based on a written contract. These associations are not within the ambit of *sharikah al-'aqd*. The first category of non-contract based partnerships is common rights of association, known in Arabic as "*sharikah al-ibāhah*." As suggested, the English meaning of "*sharikah al-ibāhah*" is a common right to acquire ownership.

The *Mejelle*, the Civil Code of the Ottoman Caliphate from 1877 to 1926, which codifies part of the *Hanafi fiqh*, defines "*sharikah al-ibāhah*" as:

the existence of a mutual possession by the public, of a share in the right to acquire possession, by taking things which are free to the public, that is to say, things, like water, which are not the property of the public, originally.<sup>13</sup>

In other words, a *sharikah al-ibāhah* is a common right of people to own, through gathering and acquisition, a thing that satisfies two criteria.

First, the thing is *mubāh*, meaning it is both free and legal. That is, it is permissible to acquire and own that thing, because that thing is free, and because acquisition and ownership of that thing is not forbidden by an Islamic precept. Second, the thing is not originally owned by anyone. Rather, the thing has been in the public domain, a part of the commons.<sup>14</sup> Accordingly, anything not owned by individuals could be shared among people. The second criterion follows logically from the first one. If the thing were owned by someone, then other people could not acquire and own it freely (unless it were gifted to them), or lawfully (as theft is illegal). Quintessential examples of things that satisfy both criteria are air, firewood, and water. They can be freely and legally shared among people.

The mutual acquisition and ownership of such things brings people into a non-contract based nexus. That nexus is precisely *sharikah al-ibāhah*, and it is created automatically, without any legal formalities. In fact, the partnership over air, firewood, and water always exists, among all people, Muslim and non-Muslim, and across all boundaries of time and space. This remarkable cross-cultural,

<sup>13</sup> THE MEJELLE — BEING AN ENGLISH TRANSLATION OF MAJALLAH EL-AHKAM-I-ADLIYA AND A COMPLETE CODE OF ISLAMIC CIVIL LAW § 1045 at 166 (Petaling Jaya, Malaysia: The Other Press, January 2001) (C.R. Tyser, B.A.L., D.G. Demetriades & Ismail Haqqi Effendi, trans.). [Hereinafter, MEJELLE.]

<sup>14</sup> IRHAN AHMAN KHAN NYAZEE, ISLAMIC LAW OF BUSINESS ORGANIZATIONS — PARTNERSHIPS 16 (Selangor, Malaysia: The Other Press, Malaysian ed., 2002) (quoting MAJALLAH, *supra*, at § 1045).

inter-faith, inter-generational partnership emanates from a *ḥadīth* of the Prophet Muhammad recorded by Al Shawkānī, which states:

People are partners in three things: water, grass and fire.<sup>15</sup>

From an ethical and religious perspective, this form of partnership underscores the fact all people are common stewards of many things, especially things found in the environment. Further, there seems an obvious similarity to the Catholic Christian social justice teaching concerning protecting and advancing the common good in respect of the environment.

Practically speaking, the *sharikah al-ibāḥah* is a method of teaching people that they have a legal obligation to safeguard the things their partnership owns. Conversely, an individual violates this bond by abusing the common thing, for instance, by using water so excessively that the individual depletes the supply for others, or by emitting pollution into the air or water. That individual is liable for this abuse, typically through a *ta'zīr* (discretionary) punishment determined by the *qāḍī* (Islamic judge). Beyond threat or fear of punishment, however, there is a more profound basis for the obligation to protect the things in an *ibāḥah*. Those things — the assets of the partnership — are gifts to the partners from God (Allāh).

### [C] Co-ownership (*Sharikah al-Milk*)

The Arabic meaning of "*sharikah al-milk*" is co-ownership. It is the second category of a partnership that is not within the ambit of *sharikah al-aqd*. The Ottoman *Mejelle* defines "*sharikah al-milk*" as:

a thing's being common to more persons than one, that is to say, a thing's being special to them, by a cause which is one of the causes of acquiring ownership, like purchase, and the receipt of a gift, and the acceptance of a bequest and inheritance, or by the mixing of properties (*māḥ*), that is to say, by causing properties to mix with one another in a way that they cannot be separated, or by the mixing of properties with one another in that way.<sup>16</sup>

The *Mejelle* definition is rather contorted. One Islamic legal scholar, Ibn 'Ābidīn, a *Hanafi* scholar, explains:<sup>17</sup>

*Sharikat al-milk* is ownership by a number of persons of an '*ayn*' (ascertained property) or *dayn* (debt not ascertained by weight or measure or other means) arising through inheritance or through exchange (*bay'*) or through other means.<sup>18</sup>

What does this clarification mean?

<sup>15</sup> AL-SHAWKĀNĪ, *NAYL AL-AWTĀK*, vol. V at 303, quoted in MUHAMMAD HASSIM KAMALI, *THE RIGHT TO LIFE, SECURITY, PRIVACY AND OWNERSHIP IN ISLAM* 253 (Cambridge, England: Islamic Texts Society, 2008).

<sup>16</sup> *MEJELLE*, *supra*, § 1060 at 167.

<sup>17</sup> The full name of Ibn 'Ābidīn is "Zīnē El-Ābidīn Bin 'Ābidīn Ibn Ibrāhīm Ibn Najīm." He was a *Hanafi* School scholar from Egypt, and died in 1563 (970 A.H.). He wrote *Al-Tuhfat Al-Mardiḥiyya Fi Al-Awḍā' Al-Masriyya* (Masterpiece of the Egyptian Territory).

<sup>18</sup> NVAJEE, *supra*, at 35 (quoting Ibn 'Ābidīn, *Hāshiyah [Margin Notes]*, vol. 4 at 301).

First, co-ownership is the essence of a *sharikah al-milk*. Indeed, Islamic legal scholars tend to refer to *sharikah al-milk* as co-ownership rather than partnership. Second, there are actually two species of *sharikah al-milk*. First, there is a *sharikah al-milk* the assets of which are an '*ayn*', which means tangible (but not intellectual) property that is identified. Second, there is a *sharikah al-milk* in which the assets are a *dayn*, that is, the debt of another or other non-partners. In this second type, the partnership is a creditor.

There is an important distinction (explained more fully below) approval, in the sense of acceptance that a type of partnership exists, and approval, in the sense of recognizing the moral worthiness of a type of partnership. This distinction is relevant to *sharikah al-milk*. That is because not all *fukahā'* agree on all aspects of this type of partnership. To be sure, all *fukahā'* agree on both the existence and moral worthiness of a *sharikah al-milk*, the assets of which are an '*ayn*' (tangible property). They also all agree a *sharikah al-milk* based on *dayn* (debt) exists. However, there is disagreement among the *fukahā'* over the moral acceptability of a *sharikah al-milk* constructed from a *dayn*. The majority of the *fukahā'* in the *Hanafi* School approves of the permissibility of this type. But, a significant minority in this School does not recognize it, viewing as morally unacceptable a partnership based on debt.<sup>19</sup>

In both species of *sharikah al-milk*, the asset may be acquired by inheritance by the partners, purchase by the partners, or some other lawful means such as commingling. The *Mejelle* helpfully gives the following examples:

If two persons have purchased a property, or someone has made a gift or bequest to them and they have accepted it, or a property is inherited by two persons, that property becomes common between them. And every one of those, who are share-holders in that property, participates with the others in it.

Likewise, if two persons mix together their stores of corn, or, in some way, like there being holes in the sacks, the stores of corn of two persons mix together, the mixed or compounded store of corn becomes common property between the two of them.<sup>20</sup>

The first example indicates that a *sharikah al-milk* can be formed through an action that operates on two or more people, even an action they may not have foreseen, such as the death of a person from whom they inherit property.

The second example suggests a *sharikah al-milk* may be formed without the intent of the partners, but in fact by an accident, such as hole in a sack containing a fungible commodity. As to the second example, whether the assets of a *sharikah al-milk* are an '*ayn*' or *dayn*, the key point is the property or debt, respectively, are mixed. That is, to create a *sharikah al-milk*, all partners must mix their '*ayn*' or *dayn* in a way to render them indistinguishable.

<sup>19</sup> The perspectives of other *Sunni* Schools on this issue are not readily apparent from English language sources.

<sup>20</sup> *MEJELLE*, *supra*, § 1060 at 167.



Following from the two illustrations, a *sharikah al-milk* partnership can be formed through manifestation of intent to do so, such as by joint purchase of tangible property. However, as distinct from a *sharikah al-ibāhah*, a *sharikah al-milk* is not automatically in existence at all times, across all peoples and boundaries. Rather, some action must occur for a *sharikah al-milk* to be established. That said, a *sharikah al-milk* may consist of Muslim and non-Muslim partners.

What are the basic legal rights and obligations of partnerships in a *sharikah al-milk*? First, little if any distinction is made between the share of each partner in a *sharikah al-milk* and the share of each of them in assets of the partnership. In effect, co-ownership in the partnership corresponds with, and is concomitant with, co-ownership in the assets. Thus, for instance, in a two-person *sharikah al-milk* comprised of commingled assets, 60 percent from Ayesha and 40 percent from Hashim, then their respective shares in the partnership are 60 and 40 percent.

Second, neither co-owner can sale her share — in the partnership, or equivalently, in the assets — without the prior permission of the other partner. The reason for this requirement is no new or amended partnership should be created with strangers without this prior permission. For instance, if Hashim sought to sell 20 percent of his stake to Abdullah, then the latter would become a partner in the *sharikah al-milk*. It would be unfair to Ayesha to force a new partner into the business venture without her prior approval.

Third, each partner in a *sharikah al-milk* is like a stranger with respect to the share (of the *'ayn* or *dayn*) of the other partner. Therefore, one co-owner cannot alienate (i.e., sell, buy, use, transfer, or otherwise dispose of) the share of the other partner without prior consent. The partners are co-owners in the assets of the partnership. Hence, each needs the permission of the other to act upon the share of the other.

Fourth, there is a distinction in the distribution of revenues and liability. All partners in a *sharikah al-milk*, the assets of which are *'ayn*, share jointly any revenue generated by that property. Yet, the right to recover debt in a *sharikah al-milk* based on *dayn* belongs to each co-owner jointly and severally. Thus, for instance, suppose revenues in a 60-40 percent partnership of Ayesha and Hashim, derived from *'ayn*, are U.S. \$100,000. They are co-owners of this revenue, and would divide it in accordance with their shares.

Conversely, suppose their partnership is a *sharikah al-milk* based on *dayn*, and the debt is U.S. \$100,000. Each is a co-owner, i.e., a creditor, in the full amount of the debt, and has the right to demand recovery of the full amount of that debt. It is critical here to differentiate the legal right to call, or collect, the debt, from the distribution of proceeds from the debt once it is repaid. Either Ayesha or Hashim has the full legal power to collect the \$100,000 debt owed to the partnership. That collection is on behalf of the partnership. However, once the debt is paid, how would the money be distributed between Ayesha and Hashim? For example, if the debtor repaid the loan in response to a demand from Ayesha, then is Ayesha entitled automatically to keep the full \$100,000? The answer is no, because Ayesha's call is made on behalf of herself and her partner. The proper sharing of the repaid funds would be in accordance with shares in the partnership, meaning Ayesha would keep

\$60,000 and Hashim would obtain \$40,000.

## § 24.03 FIVE TRADITIONAL TYPES OF SHARIKAH AL-'AQD

To appreciate points of consensus and divergence among the Four *Sunni* Schools, as to the types of partnership, it is essential to distinguish between agreement, on the one hand, and approval, or recognition, on the other hand. *Fukahā'* from all of the Schools agree there are five major different types of *sharikah*. They are: (1) *sharikah al-'inān*, (2) *sharikah al-mufāwadah*, (3) *sharikah al-'abdān*, (4) *sharikah al-wujūh*, and (5) *sharikah al-mudārabah*. Their agreement, in a theoretical and practical sense, means these five types exist under the *Shari'a*.

One reason for their mutual agreement, in the sense of recognizing the existence of the five types, is their twin concern that entrepreneurs have the flexibility to engage in business ventures, and their ventures ultimately provide a helpful good or service to the community. Suppose the Schools stubbornly reject the approval of each other, and insist on imposing its terms and conditions. This flexibility could be compromised, and prospective customers and clients of a would-be partnership could suffer from lost opportunities. Thus, *Imām* Mālik, founder of the *Māliki* School, author of the great treatise *Al-Muwāḍḍa* and principal *Imām* to the fifth *Abbasid* Caliph Harūn Al Rashīd (reigning from 786-809 A.D.), responded to a question from the Caliph:

O Abū Abdullah [i.e., the Caliph refers to the *Imām* in a respectful manner as "Father of Abdullah," with Abdullah being the eldest son of *Imām* Mālik], if you wish, we could write this book and hold people to use it. *Imām* Mālik said, "O Emir of All Believers, the difference in the perspectives [views] among the *ulema* [and *fukahā'*] is a mercy for the nation [the Caliphate] from Allāh — the Almighty — everyone follows the right he or she has and they all follow the right path to Allāh."<sup>21</sup>

In other words, *Imām* Mālik resists the temptation of opposing one view as a tyranny on all people in the Caliphate. To the contrary, he champions a diversity of views among religious and legal scholars, going so far to say as this heterogeneity is a gift from God.

However, the agreement among the *Sunni* Schools on matters of business association, and the positive spirit of respect for diverse views, does not mean they all agree these five types ought to be recognized as compatible with Islamic ethical

<sup>21</sup> Quoted from an article written by Dr. Abdullah Mahfoudh Beyh (former Minister of Justice of Mauritania), posted on [www.islamtoday.com](http://www.islamtoday.com) (2 August 2004, 1425 166 A.H.) (translated from Arabic by Mr. Ahmed Alyousef). The exact date of this conversation is not available. However, it occurred during the time of the *Abbasid* Caliphate. The Caliph who talked to *Imām* Mālik was Harūn Al Rashīd, who was the fifth and most famous *Abbasid* Caliph. Harūn Al-Rashīd ruled from 786-809 A.D. He was known for his interest in scientific, cultural, and religious matters. Thanks to the collection and translation of manuscripts from foreign lands by the Caliph Harūn (and by his predecessor, the second *Abbasid* Caliph, Al Mansūr, who reigned from 754-775), and owing to the considerable support of the son of Harūn, the Caliph Al-Ma'mun (who reigned from 813-833), the famous library of Baghdad — the "*Bayt Al-Hikmah*" or "House of Wisdom" — was established.

teachings. In particular, *Hanafi* School *fukahā'* approve all five types. In contrast, *Shāfi'i* School jurists approve of only one (or at most two) of these five types, denying recognition to the other four (or three) types. *Māliki* School *fukahā'* approve two (or as many as three) types, whereas *Hanbali* School jurists approve four of the five types. In sum, the distinction between approval, in the sense of acceptance of the existence of a type of partnership, and approval, in the sense of recognizing the moral worthiness of a type of partnership, must be kept in mind.

To make matters a bit more complicated, the aforementioned five types of partnership are not the only ones in existence under the *Shari'a*. Modern Islamic jurists from some of the Schools have approved — that is, established and elaborated on — still more types of *sharikah*. Yet jurists from certain other Schools do not accept, and even do not approve, of these newer types.

### [A] *Sharikah al-'Inān* (Limited Liability Company)

*Sharikah al-'inān* is akin to a limited liability company (LLC) in American business association law.<sup>22</sup> Generally defined, "*sharikah al-'inān*" is "a basic contract of partnership based on agency in which participation may either be on the basis of wealth or labour or credit-worthiness, and in which equality of contribution or legal capacity is not necessary."<sup>23</sup> Note this definition references a contract, or partnership agreement, by which the *sharikah al-'inān* is established, and according to which it operates. Note, too, that literally, the Arabic term "*'inān*" means reins, as in the reins (which are part of the bridle, or head gear) of a horse. The connotation of "*'inān*" is that just as there are reins to govern the direction of the horse, there are rules to help manage the partnership and control the rights and obligations of the partners.

Thus, for example, a *sharikah al-'inān* could consist of five partners, each with a 20 percent share, or each with entirely different shareholdings — even 70 percent by the first partner, 9 percent by the second partner, 8 percent by the third partner, 7 percent by the fourth partner, and 6 percent by the fifth partner. In an American-style LLC, the liability of each shareholder is limited in some way (e.g., by the amount invested by the shareholder), management is by designated members of the LLC, and there are restrictions on transferring shares in the LLC.<sup>24</sup> A *sharikah al-'inān* similarly replicates this pattern. Indeed, the only case in an *'inān* of unlimited personal liability is if one partner abuses the authority

<sup>22</sup> The difference between an LLC and Limited Liability Partnership (LLP) is worth reviewing. An LLC and LLP are quite similar in effect: each is an unincorporated business organization that affords limited liability to its owners. In that sense, they are redundant. But, an LLP is a true partnership in every respect (like a general partnership), except for limited liability, and the governing statute is the *Revised Uniform Partnership Act (RUPA)*. The LLP structure is used most often by professional firms of accountants or lawyers, which in the past were organized as general partnerships. An LLC is governed under a separate statute, which varies somewhat from one American state to another. Typically, an LLC is a hybrid that has both corporate and partnership characteristics. The LLC structure is used by businesses that otherwise would be incorporated, but which seek flow-through (i.e., pass-through) income tax treatment in which the business entity is not a separate taxpayer.

<sup>23</sup> NYAZER, *supra*, at 339.

<sup>24</sup> See BRYAN A. GARNER, ED., *BLACK'S LAW DICTIONARY* 319 (St. Paul, Minnesota: West, 9th ed. 2009) (definition of "limited-liability company"). [Hereinafter, *BLACK'S LAW DICTIONARY*.]

granted to her under the rules of the partnership. But, the unlimited liability is for the abusive partner only. The liability of the other partners remains restricted to their shares, and they are not liable for debts arising from unlawful transactions in which the abusive partner engaged.

The Four *Sunni* Schools agree *sharikah al-'inān* is one of the major types of *sharikah*. Further, these Schools approve of an *'inān*, though there are differences among them in respect of the conditions they require for this approval. That is, the Schools exhibit differences on the criteria for establishing and operating a valid *'inān*.

As for termination, the *Hanafi* School explains that a *sharikah al-'inān* could be terminated in four different ways. The other Schools generally agree on these termination events. First, the partners could agree to its termination, and their consent will end the *'inān*. Second, an intentional violation by a partner of a rule in the partnership agreement that created an *'inān* will trigger its termination. Third, if one partner moves to a different place where it is impossible for other partners to contact her, thereby precluding the normal operation of the *'inān*, termination will occur. Finally, and perhaps most obviously an *'inān* could terminate simply because it loses money. Specifically, if the loss wipes out the initial capital contributions of the partners, then the partnership will cease.

#### • *Hanafi* School:

The *Hanafi* School does not give a specific definition of *sharikah al-'inān*. Yet, certain individual *Hanafi* jurists define "*sharikah al-'inān*" as the:

participation of two or more persons, with the permissibility of stipulating equality, through their work on their wealth, or through their work on the wealth, or through their work on the wealth of another, or through their credit-worthiness without wealth, so that the profit can be shared by them as agreed.<sup>25</sup>

Three features of an *'inān* are implied by this *Hanafi* definition.

First, each partner is considered to be an agent of all other partners. For example, in a *sharikah al-'inān* of 5 partners, each partner is an agent to the 4 other partners, meaning there are 4 bilateral reciprocal principal-agent relationships. Second, no partner is a surety (i.e., guarantor) for any other partner. Third, properties — specifically, tangible and (presumably) intangible assets of the partnership — are shared and managed according to rules established by the partners for their partnership.

The *Hanafi* School requires satisfaction of nine conditions to set up and operate as a *sharikah al-'inān*. All nine conditions must be specified in a written contract by which the partnership is created.

#### (1) Legal Capacity (Capability) —

<sup>25</sup> NYAZER, *supra*, at 102 (Selangor, Malaysia: The Other Press, Malaysian ed., 2002), quoting this definition. The author of *Al-'Inān* [The Cave] says participation through work on the wealth of another is the partnership of artisans, while not in the wealth of another means *sharikat al-'uṣūl*. *AL-'INĀN* ON THE MARGIN OF *IBN AL-HUMAM*, FATH AL-QADIR, vol. 7 at 5.



First, each partner must have legal capacity, or "*ahliyah*." For the *Hanafi* School, *ahliyah* means a partner is *hurr* (free of slavery), *bāligh* (of adult-legal age), and *rasheed* (mature). This condition exists because each partner requires the ability to enter into contracts on behalf of the partnership, and as agent for the other partners, commensurate with her capital contributions.

"*Hurr*" means no partner is a slave. Could a partner be a slave owner (setting aside the likelihood that slavery is illegal under other applicable law) and be a partner in a *sharikah al-'inān*? The answer is yes. "*Bāligh*" means that no partner is a child. There is no specific age threshold, but is generally taken to mean each partner, whether male or female, has reached puberty. "*Rasheed*" is a broader concept than mental concept, that is, it demands more than that each partner not be mentally incompetent (e.g., insane or retarded). Additionally, "*rasheed*" connotes that each partner is a normal functioning person who can make rational decisions.

(2) Right to Do Business —

Second, each partner must have the right to do business in proportion with her share in the partnership, and as an agent for the other partners' share. For example, if a partner holds a 25 percent stake in a *sharikah al-'inān*, then that partner must have the right to commit up to 25 percent of the assets of the partnership in one or more transactions. In so doing, that partner acts as an agent of all the other partners in the '*inān*. That is, each partner acts as a principal with respect to her share, and as an agent for the shares of other partners.

(3) Initial Capital Contributions —

Third, each partner in a *sharikah al-'inān* must present her capital contribution at the time the contract to create the partnership is signed. In effect, the total capital contributions of the partners must be known at the moment of inception. That is because the purpose of an '*inān* is to achieve a profit. It begins to generate profits on the basis of initial capital contributions. Conversely, the absence of funding at the inception of the partnership is incongruous with this purpose. In return for a capital contribution, of course, a partner receives a share interest in the partnership corresponding to that contribution. For instance, if a partner in an '*inān* contributes U.S. \$250,000 to an overall capital pool of \$1 million, then that partner obtains a 25 percent share in the partnership.

Accordingly, suppose an agreement among five partners permits one of them to contribute her capital of U.S. \$1 million in the future, or permits one of them to contribute capital derived from anticipated future earnings of the partnership. That agreement is void, and the *sharikah al-'inān* never takes legal effect. All partners must have the requisite funding at the time of the contract — there is no such thing as a "no money down" or "deferred capital contribution" '*inān*. This result holds true even if the agreement identifies a date certain in the future when the \$1 million is due, and even if that date is just a day after the agreement is consummated.

Does this result mean that a partner is permitted to invest only her own funds? In other words, could a partner invest funds borrowed from a family member, friend, or even a bank? The answer is yes. The condition on capital contributions does not restrict partners to any particular source of funds. That said, the *fukahā'* of the Four *Sunni* Schools agree on an over-arching principle: that which is built

on something void is itself void. Consequently, if a partner contributes money to a *sharikah al-'inān* that is derived from forbidden activities, such as trafficking in alcohol, narcotics, pork products, or pornography, then the partnership would be void. This fact has an important implication for a non-Muslim partner in an '*inān*. There is no restriction against the participation of non-Muslims in this form of partnership. However, a non-Muslim partner should be scrupulous to ensure the source of her capital contribution in an '*inān* is an activity consistent with the *Shari'a*.

Moreover, the general freedom to make capital contributions from any legitimate source of funds extends to assets under joint ownership. If, for example, two partners have a joint interest in a crop of wheat, which they have stored in a grain elevator, then they may contribute that crop, even though it is under their joint ownership. To be sure, there is a risk that one partner might claim a share of profits in the partnership in excess of her share of ownership in the jointly owned wheat she contributed to the partnership. But, this risk — in effect, the risk of greed by one partner — exists in the normal case of capital contributions of individually owned property.

Finally, the power and control of each partner in a *sharikah al-'inān* is directly based on her wealth invested in the partnership, i.e., her capital contribution. As a result, an '*inān* might be comprised of partners of vastly different net worth. But, their net worth is not relevant to their power and control in the '*inān*. To take an extreme example, suppose an '*inān* consists of two partners, Maryam, whose net worth is U.S. \$100,000, and King Abdullah, whose net worth is U.S. \$1 billion. Maryam invests \$30,000 in the partnership, and the King invests \$10,000. Even though the King is vastly more wealthy than Maryam, she holds a 75 percent stake, and concomitant 75 percent power and control over, the partnership, simply and solely because of her investment contribution.

(4) Same Asset Category for Capital Contributions —

Fourth, all partners must contribute assets to the capital of the partnership. But, the nature (that is, the type, or category) of those assets must be the same. For example, if one partner contributes cash, a second partner puts in non-cash financial instruments (e.g., stocks or bonds), and a third partner provides real property, then the *sharikah al-'inān* is void. The *Hanafi* School requires all three partners to agree on a single asset class for their capital contributions. If the partners insist on making capital contributions through distinctive types of assets, then they must find a different form of partnership structure. As a corollary condition, the School does not allow one partner to offer an asset, but another to contribute her own labor or services. Work is not an acceptable form of capital contribution for an '*inān*. (Rather, the relevant partnership form would be *sharikah al-muqārabah*.)

There are two obvious questions created by this condition. First, what kinds of assets are the same? Is a stock in an industrial manufacturing company the same as a stock in an intellectual property or high-technology firm? Is beach-front real estate property the same as downtown office space? There is no easy answer to this question. Ideally, if in doubt, the prospective partners would consult a *fukahā'*.

Second, what purpose does this condition serve? The answer, which comes from the *Hanbali* School, is that different types of capital contributions create *gharar*, or uncertainty. The uncertainty lies in the valuation of the capital contributions, both as an initial matter and into the future. For example, suppose one partner contributes a house, while another contributes stocks. Suppose also that soon after the partnership commences operation, but before its first transaction, the value of the house tumbles. The second partner might contend she has put in a greater capital contribution than the first. Conversely, if the house price skyrockets, the first partner may make that claim. Disputes might ensue as to entitlement to profits. Moreover, changes in the value of one asset category relative to another could lead to uncertainty as to liability for losses.

One way to handle changes in relative valuation would be to permit different asset categories as capital contributions, but value each contribution under generally accepted accounting principles as of the date the partnership agreement is signed, and disregard any subsequent valuation changes. As a practical matter, however, the partners may well examine the current (or market value) of their contributed capital, and try to mark to market the assets. The result could be conflict among the partners. Not surprisingly, then, the *Hanbali* School insists that the only acceptable asset category in which to make a capital contribution is cash (or, in older times, specie, such as gold or silver). Indeed, the funds should be in the same currency (e.g., U.S. dollars), and not an admixture of currencies.

The condition that assets contributed to the capital of a *sharikah al-'inān* be of the same category, if and when adhered to strictly, is rigid. Typically, partners do not come to the proverbial negotiating table with an identical kind of assets. To relax the condition, *Hanafi* School jurists — most notably, Muhammad Al Shaybānī, devised a *hīlah* (legal device, or solution). The *hīlah* essentially is to promote co-ownership of assets. Shaybānī writes of the case of real property with different valuations:

I said, "What is the solution if in the case of two persons one of whom has property worth 5000 *dirhams*, while the other has property worth 1000 *dirhams*, and they wish to form a partnership with this property." He Said: "A partnership with goods is not permitted." I said: "What then is the *hīlah* for them so that they become partners with the property that they have." He said: "The owner of property worth 5000 *dirhams* [sic] is to buy five-sixths of the property of the other with one-sixths of his own property. When they do this, they are co-owners in the same ratio as the property they own. The person who had property worth 1000 *dirhams* now owns a sixth of the entire property, while the other owns five-sixths."<sup>26</sup>

Another example, from Al Kāsānī, concerns the combination of currency (*dirhams*) and property:

The *hīlah* for permitting this is that the owner of the property should sell half his property for half the *dirhams* of his companion. They should

exchange them and mix them both so that the *dirhams* and the property are jointly owned by them. Thereafter, they should conclude the partnership contract, which is then permissible.<sup>27</sup>

The essential teaching from these examples is as follows:

Their [the jurists] main goal is to create an actual co-ownership. Once co-ownership is actually and physically established, the rules of liability and those of sharing of profits can be applied in a very clean manner. The basic principles . . . are two. The first requires the creation of joint ownership or co-ownership. Once this is done, the principle of joint liability follows from it. Not only is joint liability created, but the requirements of the principle, *al-kharāj bi al-damān* ["*kharāj*"] is a land tax, or revenue derived from land, and "*damān*" means liability or compensation, but the entire phrase refers to a principle based on a tradition, and is used in several fields of the *Shari'a* are satisfied and the partner as agent is enabled to share profits in whatever ratio that is agreed upon. In addition to this, all disputes that may arise as a result of the fluctuation of prices or value of the property prior to transactions in the joint capital can be resolved on the basis of the co-ownership established, without causing any ill-feeling or injustice. This appears important as partnership is a terminable contract and the partner seeing the emergence of profit in his capital may be tempted to terminate the contract and rescind it. This option would be lost to him once the properties are inseparably mixed. Further, the act of actual physical mixing helps avoid many likely disputes when the partnership becomes vitiated prior to transactions.<sup>28</sup>

It is worth remarking that the *hīlah* of co-ownership not only facilitates formation of a *sharikah al-'inān* against an otherwise tight condition on asset categories, but also performs an ethical function. As the foregoing passages intimate, the partners become committed to one another more deeply, and are more likely to engage with each through their partnership as a community, by virtue of their shared ownership over assets they have contributed as capital.

#### (5) Known Profit Division —

Fifth, the profits of a *sharikah al-'inān* must be known to each partner. That is, the contract by which an *'inān* is established must lay out a rule about the division of profits earned by the partnership. If the division of profits is not known or ascertainable from the contract, then the *'inān* is void, i.e., the partnership never entered into legal force.

#### (6) Division of Profits on Percentage Terms —

Sixth, profits are divided only by percentage, not by absolute value thresholds. For instance, a specification in a partnership agreement that a partner holding a 25 percent interest is to receive 25 percent of any profits is valid. But, a specification that this partner is to garner U.S. \$250,000 is invalid. Indeed, if any partner were

<sup>26</sup> NYAZEE, *supra*, at 131 (quoting Al-Shaybānī, *Al-Makḥarāj Fi Al-Hiyol*, at 59. (The third sentence of the original text should be translated as 5000 *dirhams*, not 5000 *dirhams*.)

<sup>27</sup> NYAZEE, *supra*, at 131 (Selangor, Malaysia: The Other Press, Malaysian ed., 2002) (quoting Al-Kāsānī, *Baḍā'ī Al-Sanā'ī* [Beauty of the Work], vol. 7 at 3538).

<sup>28</sup> NYAZEE, *supra*, at 131-132.



to ask for a specific sum of money from the profits, the partnership agreement would be void. Therefore, a *sharikah al-'inān* agreement should stipulate not only how to distribute profits among the partners in the *sharikah*, but also be defined in percentage terms, not as lump sum amounts.

Two practical questions arise. First, can partners in a *sharikah al-'inān* agree to distribute profits in a way that differs from their percentage share interests in the partnership? "Yes" is the answer, and for an obvious reason. The partners might decide at the outset that one (or more) of them will perform more work than the others. That one partner might contribute just 10 percent to the start-up capital of the partnership, but engage in over half of the work. Accordingly, the partners might agree the enterprising partner should get 55 percent of any profits.

Second, is it permissible for a partnership contract to allocate profits on the basis of a return on invested capital? The answer is no. The agreement should not allocate profits by rate of return on capital contributions by the partners. Thus, an agreement that says a partner must obtain a 10 percent rate of return on the money she contributed to the partnership would be invalid, and render the *sharikah al-'inān* void. The reason for this result lies in the purpose of an *'inān*, which is to make profits based on the work of the partners. Dividing profits according to initial capital contributions would reward the partners for their starting positions, when the partnership was created, not for their work subsequent to its creation.

#### (7) Division of Profits at the Outset —

Seventh, the determination of profits cannot be postponed until after profits are obtained. Rather, the scheme for division must be set at the time of signing the contract to create the *sharikah al-'inān*. Leaving the matter vague would vitiate the partnership.

The rationale for this condition is avoidance of future conflict among the partners. In a year in which the partnership is highly successful, partners still will be held to their initial agreement on profit distribution. That contract — in theory, at least — forecloses a claim at the end of the year by a partner that she is entitled to a larger chunk of the profits.

#### (8) Liability for Losses —

Eighth, partners are liable for losses incurred by the *sharikah al-'inān* in proportion to their shares in the partnership. Thus, in an *'inān* that incurs a U.S. \$1 million loss, a partner holding a 25 percent share would be allocated U.S. \$250,000 of that loss. Notably, there is no need to stipulate the rule that the bearing of loss follows the *pro rata* share in the capital contribution. That rule is an automatic, or default, one, following from the logic of limited liability, with the limit set by the initial capital contribution.

However, it is possible to deviate from the default rule, but only via a provision set out in the partnership agreement. For instance, a partner holding a 25 percent share could agree in the contract to a disproportionate liability for loss — such as 15 or 35 percent. That stipulation must be in the contract, because it is a deviation from the normal limited liability regime in which losses follow capital contributions.

#### (9) Loss and Work Input —

The ninth condition is closely related to the eighth condition. The amount, nature, or terms under which a partner performed work for a *sharikah al-'inān* are irrelevant in distributing any losses incurred by the partnership. Losses are divided among the partners according to their capital, regardless of how, when, how much, how well, to what end they worked.

This condition has two important practical implications for assumption of liability. First, partners in a *sharikah al-'inān* may not agree *a priori* that one (or a subset) of them will assume the complete liability of the entire partnership. Second, none of them may agree *a priori* to assume the liability of any one partner. These two implications effectively prevent what in modern parlance is known as "free riding." Going into an *'inān*, no partner can take a lachadaisical approach to liability sharing, because each technically is "on the hook."

It should not go unremarked that the *hadith* on which the seventh condition is based may not be authentic. In the chain of transmission from the Prophet, i.e., in the *isnād*, there are some unknown persons, that is, persons the reliability of whom is unclear. Consequently, this *hadith* does not appear in the prominent compilations by *Imāms* Bukhari or Muslim. Occasionally, scholars rely on a *hadith* to buttress their own views on a particular matter. That may be the case here with *Hanafi* School jurists, and even some *Hanafi* sources indicate this *hadith* is weak. Notably, no other School mentions this *hadith* in respect of conditions on *sharikah al-'inān*.

However, *post hoc* (i.e., after a partnership has incurred a loss), the partners may agree to assume liability. One (or a subset) of them could agree voluntarily to take on all the losses of the partnership, or the losses of any one partner. This possibility of a consensual change to the basic condition obviously helps prevent a harsh result, for example, where one or more partners could not bear the loss for which she is technically liable without becoming destitute.

#### • *Māliki* School:

The *Māliki* School defines a "*sharikah al-'inān*" in nearly metaphorical terms:

*Sharikah al-'inān* . . . means *sharikah al-'inān* is valid and is derived from the reins of an animal, that is, each one of the partners has stipulated for the other that he should act on his own in any matter pertaining to the *sharikah*, except with the permission of his partner and with his knowledge. It is as if he has taken hold of his rein, that is, by his fore-lock, so that he does not do anything without his permission."<sup>29</sup>

This definition does not come directly from *Imām* Mālik, the founder of the *Māliki* School, and indeed *Māliki* jurists in the Hejaz during his time did not lay out a precise definition. Rather, it is proposed by a subsequent *Māliki* jurist, Al Khirashī.<sup>30</sup> That fact, however, does not mean the *Māliki* School accepts the *sharikah al-'inān* (i.e., finds it morally acceptable). Rather, like the other Schools, the *Māliki* School simply agrees this type of partnership does exist.

<sup>29</sup> NVAZEE, *supra*, at 182 (quoting AL-KHIRASHI, *SHARAH AL-MUKHTASAR*, vol. 6 at 49). See also MUHAMMAD 'ULAYSH, *Taqrib 'Ala* AL-SHAH AL-KASHI, on the margin of AL-DARUQ, *HABIBAH*, vol. 3 at 359.

<sup>30</sup> The full name of *Imām* Al Khirashī is "Mohammed Ibn Ibrahim Ibn Othman Ibn Sa'id Ibn Al-Shaimi Al Khirashī." He was a *Māliki* School scholar from Egypt, and died in 1443 (847 A.H.).

From the definition of by Al Khirashī, six requirements must be satisfied in a partnership agreement to create a valid *sharikah al-'inān*. The *Mālikī* School embraces these criteria.<sup>31</sup>

(1) Legal Capacity (Capability) —

The *ahliyah* condition for the *Mālikī* School is the same as that for the *Hanafi* School.

(2) Evidence —

Second, an agreement to establish and operate a *sharikah al-'inān* must be confirmed by a written contract, or an oral agreement that is witnessed by two persons. The fact the *Mālikī* School adopts this requirement seems odd, in that an *'inān* is a species of *sharikah al-'aqd*. In other words, there is redundancy in listing evidence as a requirement. Perhaps it may be justified as providing clarity and certainty to prospective business partners, leaving them no doubt that if they expect acceptance and recognition of their *'inān* by the *Mālikī* School, then they had better be solicitous as to its form.

(3) Same Asset Category for Capital Contributions —

Third, as with the condition specified by the *Hanafi* School, all partners must contribute the same type of assets to the capital of the partnership.

(4) Agency —

Fourth, each partner must have the right to act as an agent for all other partners. This condition is the same as the agency feature implied by the definition of *sharikah al-'inān* provided by certain individual *Hanafi* jurists.

(5) Known Profit Division —

Fifth, as with the analogous condition in the *Hanafi* School, the profits of a *sharikah al-'inān* must be known to each partner.

(6) Division of Profits on Percentage Terms —

As to this condition, the *Mālikī* School departs from the *Hanafi* School. To be sure, in all Schools, profits must be divided according to percentages. For instance, in a three-partner *sharikah al-'inān*, one partner might be entitled to 20 percent of the profits, the second partner to 30 percent, and the third partner to 50 percent. Establishing profit entitlements based on absolute numbers, or rates of return, is not permissible.

The divergence among the Schools concerns whether these percentages must match the relative initial capital contributions. In the hypothesized three-person *sharikah al-'inān*, if the first partner contributed 20 percent of the capital, then there is no debate among the Schools, i.e., the first partner is entitled to a 20 percent share of the profits. But, suppose she contributes just 10 percent to the initial capital pool, then the debate is joined — would that partner be entitled to a 20 percent share of the profit, perhaps on the grounds that this partner contributes a disproportionate amount of work to the partnership? The *Hanafi* School allows

<sup>31</sup> The criteria discussed below are synthesized from a variety of books in Arabic.

profits percentage distributions that are not in proportion with capital contributions. But, the *Mālikī* School takes a different approach. The *Mālikī* School says that profit percentage distributions depend on the share of capital each partner contributes: if the partners contribute an equal amount of capital, then the profits must be divided equally between or among them.<sup>32</sup>

• The *Shāfi'i* School:

On business associations law, the *Shāfi'i* School is the most restrictive — that is, least flexible and open to innovative ways of conducting commerce — of the Four Schools. This feature is evident from the definition of *sharikah al-'inān*, articulated by *Imām Shāfi'i* himself:

It is valid, that is, *'inān*, by *ijmā'* (consensus), because it is free from all kinds of *gharar* (uncertainty). The meaning is derived from the reins of an animal due to this equality in transactions and other things, like the equality of the two reins or in each one preventing the other in whatever he likes, and this too is like pulling the reins of the animal.<sup>33</sup>

This definition reflects the *Shāfi'i* School attitude toward partnership. Uncertainty is to be avoided, hence the reason the School approves of *sharikah al-'inān* is that it creates no uncertainty. In turn, the certainty exists because — as the italicized language suggests — each partner can constrain the other. The School holds that no partner may act without the permission of the other, and overall views an *'inān* as a method to constrain commercial behavior of partners, rather than as a vehicle for them to engage in creative and profitable entrepreneurship.

The *Shāfi'i* School sets out six conditions, all of which must be specified in a partnership contract, for the creation of a valid *sharikah al-'inān*. They are as follows:

(1) Legal Capacity (Capability) —

The *ahliyah* condition specified by the *Hanafi* and *Mālikī* Schools are the same for *Shāfi'i* School.

(2) Authorization —

Second, according to most *Shāfi'i* jurists, each partner must give all other partners clear permission for the other partners to act on her behalf. That is, each partner must authorize the other to act as her agent. It is not enough for the partners to say simply they are performing the partnership. Authorization has to be precise. However, a minority of *Shāfi'i* jurists approve of a *sharikah al-'inān* based on general permission to perform the partnership.

(3) Same Asset Category for Capital Contributions —

Third, as with the condition specified by the *Hanafi* and *Mālikī* Schools (discussed above), all partners must contribute the same type of assets to the capital of the partnership.

<sup>32</sup> See NYAZEK, *supra*, at 194 (stating: "We see the same principle operating in the division of profits, and profits are always shared in proportion to the contribution capitals").

<sup>33</sup> NYAZEK, *supra*, at 203 (quoting AL RAMEL, *supra*, vol. 5 at 4) (emphasis original).



## (4) Initial Capital Contributions —

This condition is the same as that established by the *Ḥanafī* School.

## (5) Division of Profits on Percentage Terms —

Fifth, like the *Mālikī* School, and unlike the *Ḥanafī* School (discussed above), the School insists that profits be divided among the partners on a percentage basis that match relative initial capital contributions.

## (6) Liability for Loss —

This condition is the same as that established by the *Ḥanafī* School.

• *Ḥanbalī* School:

The *Ḥanbalī* explains *sharikah al-'inan* as follows:

The meaning of this partnership is that two persons should participate with their wealth and work on the condition that the generated profits will be shared by them. The meaning is derived from the example of a man driving two horses when he gives equal rein to both. It is also said to be derived, according to al-Farrā', from matching each other equally in all things<sup>34</sup>

As with the other Schools, the *Ḥanbalī* School requires seven conditions to establish a valid *sharikah al-'inan* and operate it in a lawful manner.

## (1) Legal Capacity (Capability)

The *Ḥanbalī* School adopts the same *ahliyah* condition specified by the *Ḥanafī*, *Mālikī*, and *Shāfi'ī* Schools.

## (2) Authorization —

This condition is the same the *Shāfi'ī* School lays down. Without proper authorizations for the partners, the *sharikah al-'inan* is void. But, the *Ḥanbalī* School permits authorization in the form of a general permission to a partner to enter into any type of commercial transactions, or a permission to engage in only specific types of partnership transactions.

## (3) Initial Capital Contributions —

This condition is the same as set out by the *Ḥanafī* School. Likewise, there is no obligation on partners to contribute an equal amount of wealth to the capital of the partnership. Subject to their own agreement, each is free to contribute an appropriate amount, whether or not it matches the figures from the other partners.

## (4) Asset Category for Capital Contributions —

Obviously, partners must make initial capital contributions to the *sharikah al-'inan*. Whether the form of those contributions is restricted to currency, or may be any kind of asset, is a matter of debate within the *Ḥanbalī* School.

One view holds that any kind of *sharikah*, including not only *sharikah al-'inan*, but also *mudārabah*, may be formed through contributions of property in general.

<sup>34</sup> NYAZEE, *supra*, at 217 (quoting AL-RAMLI, *supra*, vol. 3 at 496; IES QUDAMAH, *supra*, vol. 5 at 16).

Such property is valued at the time of the contract. Does this view mean the *Ḥanbalī* School accepts the *Ḥanafī* School condition concerning the same asset category for capital contributions, as well as the *hilah* device to mitigate that condition and allow co-ownership in mixed asset situations? The answer is not clear.

What is clear is the *Ḥanbalī* School appears to deal with the risk of disputes among partners by using historical accounting principles. (Thus, in the example above about properties valued at 5,000 *dinārs* and 1,000 *dirhams*, the *Ḥanbalī* School would not re-value those properties, and avoid the questions of co-mingling of the properties and joint ownership over them.) In effect, *Ḥanbalī* School permits the partners to contribute any kind of asset they wish to the capital of the partnership, and then requires them to value their contributions immediately, at the time the partnership contract is signed. The partners must stick with this value in perpetuity. In other words, the *Ḥanbalī* School applies historical accounting values for capital contributions.

The other view in the *Ḥanbalī* School is that a *sharikah al-'inan* formed by capital contributions other than currency is void. This view expressly adopts the *Ḥanafī* School condition demanding capital contributions of the same asset category, but does not agree with the *hilah* device to circumvent the condition. Clearly, the second view is the polar opposite of the first, in that it adopts the rigid condition without the flexible mitigating device.

## (5) Division of Profits on Percentage Terms —

Fifth, like the *Ḥanafī* School (discussed above), the *Ḥanbalī* School is flexible on profit distribution. Partners must divide profits on percentage terms among them, otherwise the *sharikah al-'inan* is void. But, they are free to equate their profit percentage draws with their relative capital contributions, or to derogate from this equivalence and permit some partners (e.g., particularly hard-working ones) to garner a larger percentage of the profits. Manifestly, this condition is different from the *Mālikī* and *Shāfi'ī* Schools, which do not permit the division of profits on percentage terms that are different from relative initial capital contributions.

## (6) Liability for Losses

Sixth, the *Ḥanbalī* School establishes a condition for a valid *sharikah al-'inan* that differs from that of the *Ḥanafī* School. The *Ḥanafī* School limits liability of an individual partner for losses or debts caused by that partner to that partner. No other partner can be sued for losses or debts attributable to the dealing partner. The *Ḥanbalī* School takes a different approach, which amounts to joint and several liability among the partners, meaning that each partner is responsible individually for the entire obligation in question, in the event liability is not apportioned among the partners.<sup>35</sup> Under this School, the partnership contract would specify that all other partners are potentially liable for the losses or debts caused by the dealing partner.

However, there are two exceptions to joint and several liability under *Ḥanbalī* School doctrine. First, suppose a partner intentionally violates a rule in the partnership agreement, thereby causing the loss. That partner is solely and wholly

<sup>35</sup> See BLACK'S LAW DICTIONARY, *supra*, at 907 (definition of "joint and several liability").

liable for the loss. No other partner can be sued. Second, suppose one partner borrows a sum of money beyond the total capital of the partnership. The borrowing partner is personally liable for the overage, and no other partner can be sued to recover it. That is true even if the borrowing partner took the loan with no intent to violate the rules of the partnership contract. To make the distinction between the two exceptions clear, consider a case in which one partner in a *sharikah al-'inan* borrows U.S. \$1.5 million, but the capital of the partnership is \$1 million, and all the money is lost by the partnership. Is the partner liable for the entire \$1.5 million, or just the excess over the capital amount, i.e., \$500,000? The answer depends on the intent of the partner. If the partner intentionally ignored the capital ceiling of \$1 million, then she is liable for the full \$1.5 million debt. Conversely, if the partner did not mean to exceed the \$1 million threshold, then she is liable for \$500,000.

The difference in liability rules reflects dramatically different perspectives on the *sharikah al-'inan*. For the *Hanafi* School, the partnership is a vehicle through which individuals do business and limit their liability. For the *Hanbali* School, the *'inan* is a communal enterprise, with partners bearing a heightened legal obligation, and concomitantly (in theory, at least), emotional commitment, to one another.

#### (7) Commingling of Assets —

Seventh, the *Hanbali* School forbids partners from mixing their own wealth with the assets of their *sharikah al-'inan*. The clear line between personal and partnership property helps preclude disputes among partners over what property was used by the partnership to generate profits, and thus also what profits are owed to each partner. A partnership contract lacking this clear delineation would render the *'inan* void (*bātil*) on the Scale of Validity.

In conclusion, two points are worth emphasizing. First, each of the Four Schools requires that the conditions it specifies for a valid *sharikah al-'inan* be put into the partnership agreement. Failure to do so renders the *'inan* void. Stated differently, enormous importance is placed on "getting it right" in the partnership contract, so as to minimize the number of potential future disputes, and the risk of such disputes arising.

Second, the partners are free to alter their contract later, after they have commenced operation, to account for changed business conditions and individual preferences. But, they may not alter the basic conditions for a *sharikah al-'inan* established by the School under which their partnership operates. Those conditions are not amendable.

Third, approval by all Four Schools of *sharikah al-'inan* as a type of partnership helps deal with a practical problem: some people are unwilling or unable to enter into commercial transactions on an individual basis (i.e., as sole proprietors), perhaps because they lack the capital or experience to compete effectively with extant businesses. The Four Schools empower such persons by allowing them to transact through an *'inan*, thereby pooling capital and experience, and reducing and spreading risks. The overall socioeconomic effect (in theory, at least) is to increase opportunity for and participation by individuals in commerce, and thereby broaden, deepen, and strengthen the market. In sum, the support of the *Shari'a* for the

device of the *'inan* contributes (or ought to do so) to market growth and development.

### [B] *Sharikah al-Mufawadah* (Unlimited Mercantile Partnership)

*Sharikah al-mufawadah* is akin to a general partnership in American business association law. Generally defined, it is an unlimited mercantile partnership. Like a *sharikah al-'inan*, a *sharikah al-mufawadah* is formed by a contract, or partnership agreement, which sets out rules for its operation. Literally, the Arabic term "*mufawadah*" means "negotiation."

Notably, each partner in a *sharikah al-mufawadah* holds an equal share, has full power to direct the affairs of the partnership, and is fully liable for the affairs of all other partners. That is, joint and several liability exists. Moreover, all of the property of each partner, except for their own food and clothing, and that of their families, must be engaged in the *mufawadah*. (To be sure, the partners and their families are responsible for procuring their own food and clothing.) That is, all purchases each partner makes are presumed to be for their joint partnership and intended for commercial transactions of the *mufawadah*, except any purchases for personal consumption and use. Significantly, each partner in a *sharikah al-mufawadah* must be Muslim.

Three of the Four *Sunni* Schools agree *sharikah al-mufawadah* is one of the major types of *sharikah*. The *Shāfi'i* School completely rejects this form of partnership. Within the other Schools that accept the *mufawadah*, there are differences in the conditions they set for creation and maintenance of a valid partnership. As with a *sharikah al-'inan* agreement, if these conditions are not set out in a contract for a *mufawadah*, then the partnership is void (*bātil*).

As for termination, the events that lead to the end of a *sharikah al-mufawadah* are the same as for terminating a *sharikah al-'inan*. The *Hanafi*, *Māliki*, and *Hanbali* Schools broadly agree a *mufawadah* could be terminated in four different ways. First, the partners could agree to its termination, and their consent ends the *mufawadah*. Interestingly, the partners are free to convert the *mufawadah*, which they are terminating, into an *'inan*. Second, as is true for an *'inan*, an intentional violation by a partner of a rule in the partnership agreement that creates a *mufawadah* triggers its termination. Third, if one partner moves to a different place where it is impossible for other partners to contact her, thereby preventing normal operation of the *mufawadah*, termination occurs. Finally, a *mufawadah* could terminate because it loses money. If the loss wipes out the initial capital contributions of the partners, then the partnership ceases.

#### • *Hanafi* School:

The *Hanafi* School defines "*sharikah al-mufawadah*" as a:

contract of participation between two or more persons, with the stipulation of complete equality with respect to capital, profit and status, for working



with their own wealth, or with labour in another's wealth, or on the basis of their credit-worthiness, so that each partner is a surety for the other.<sup>36</sup>

The *Hanafi* School sets out eight conditions for a valid *sharikah al-mufawadah*. The first four conditions are identical to four of the conditions for a valid *sharikah al-'inān*. Those same conditions are

- (1) *Ahliyah* Partners (legal capacity or capability).
- (2) Right to Do Business.
- (3) Initial Capital Contributions.
- (4) Asset Category for Capital Contributions.

However, for a valid *mufawadah*, the *Hanafi* School explains the following additional four requirements must be met in the partnership contract:

- (5) Specification —

The fifth condition outlined by the *Hanafi* School is rather technical in comparison to the equality and status conditions. Basically, all the partners in a *sharikah al-mufawadah* must specify in their agreement to establish the partnership that they are, indeed, creating this kind of *sharikah*. Their contract must be explicit that a *mufawadah* is intended.

- (6) Equality of Profit and Loss Division —

Any and all profits earned by a *sharikah al-mufawadah* must be divided equally among the partners. That also is true for losses. Thus, for example, in a *mufawadah* with five partners and a profit (loss) of U.S. \$500,000, each partner would receive a \$100,000 distribution (or be liable for \$100,000 of loss). This illustration raises the question of whether profits and losses must be divided on percentage terms. The answer is yes, but rather obviously so. In a five *mufawadah*, because of the equality condition, the partners each have a 20 percent profit (loss) stake. If the number of partners were three, or ten, the division would change accordingly, to 33.3 percent and 10 percent, respectively.

The equality condition is notable from an ethical perspective. The *Hanafi* School *fukahā*, in setting this condition, essentially are saying there ought to be at least one kind of partnership treating all members equally, not only in terms of opportunity to transact, but also in terms of economic result. This egalitarianism encourages all partners to work together for a common good. They are to disregard the fact their business talents are distinct. One may be good at sales and marketing, another at information technology, a third at research and product development, a fourth at logistics, and a fifth at finance. They are not to bicker about whose talents are more valued, and demand larger profit draws based on their sense of self-importance. Rather, they are to respect the individual skills and abilities each partner brings to the *sharikah al-mufawadah*, and manifest that respect in the most tangible of ways: equal profit and loss sharing.

<sup>36</sup> NAYEE, *supra*, at 160-161 (quoting MAJALLAH, *supra*, at § 1311).

At the risk of a hyperbolic metaphor, the equality condition is redolent of the leveling effect before Allāh of the *Ramadan* fast, in which all Muslims (who are physically able) are called to participate, and the *Hajj*, in which all Muslims (who are physically and financially able to undertake the Pilgrimage) dress in essentially the same traditional religious garb, *ihram* (with distinctions only along gender lines). Note, however, the ostensibly appealing metaphor — that a *sharikah al-mufawadah* — is akin to a communist enterprise is false. That is for two reasons. First, there is nothing atheistic about a *mufawadah*, whereas Marxist-Leninist doctrine is adamant in its atheism. Second, communism entails public (or government) ownership of the means of production. The partners in a *mufawadah* are private owners and operators of their enterprise. That is to say, a *mufawadah* exists in a capitalist setting.

- (7) Personal Status —

In addition to the equality condition, the most remarkable feature of *Hanafi* School teaching about a *sharikah al-mufawadah* concerns the personal status of the partners. In actuality, there are three key points about status. First, the partnership cannot be performed between a free man and a slave, or between a slave and a slave. That also is true with respect to an indentured or bonded servant, or *mukatab*. A *mufawadah* is not permissible between a free person and a *mukatab*, or between two *mukatabs*. This point follows logically from the *aliyah* condition, which requires that all partners be free men or women. However, this point also is outdated, given the general illegality of slavery in the Muslim World. The point reflects the bygone era in which it arose.

Of relatively greater significance in the contemporary global economy is the second point. A *sharikah al-mufawadah* cannot consist of non-Muslim partners, at least according to the view of *Imāms* Abū Hanifah and Muhammad Al-Shaybānī. That is, the partnership is not valid between Muslim and non-Muslim. This point may be puzzling, even objectionable, to some Muslims and non-Muslims alike. Indeed, *Imām* Abū Yūsuf<sup>37</sup> allowed Muslims and non-Muslims to enter into a valid *mufawadah*. The justification for this restriction, however, is worth contemplating. Certain transactions, which are considered morally acceptable in other faiths, are not viewed as such in Islam. Examples are buying and selling forbidden products, such as alcohol, pork, and pornography. A non-Muslim may be free to engage in such dealings (subject to personal moral and religious views, and applicable law). Muslims are not allowed to operate such businesses. Thus, the obligation all partners in a *mufawadah* be Muslim ensures (in theory, at least) the partnership itself engages only in permissible transactions.

- (8) Transactional Limitations —

The *Hanafi* School lists transactions in which a *sharikah al-mufawadah* may not engage. Ideally, this list ought to be contained in a partnership contract. Entry into

<sup>37</sup> The full name of Abū Yūsuf is "Yaqub ibn Ibrahim al-Ansari." *Imām* Abū Yūsuf was the first *Qādi* *Al Qudhat* in the Islamic world. Based in Baghdad, he served under the 'Abbāsid Caliph Harūn Al Rashid, who reigned from 786-809 A.D. Yūsuf died in 798. Not only was he a member of the *Hanafi* School, but also he was a renowned student of *Imām* Abū Hanīfa, founder of that School, and helped spread the influence of the School.

any of these transactions by any of the partners, unless the transacting partner has the permission of all other partners, renders a *mufāwadah* void (*bātil*) on the Scale of Validity. In brief, the list is as follows:

- (a) Lending money from the partnership to a non-partner ("qard," meaning a loan, particularly an interest-free loan with no fixed period of repayment).
- (b) Lending any non-monetary asset of the partnership to a non-partner ("i'arah," meaning lending utensils or non-fungible items).
- (c) Giving assets of the partnership to charity ("hibah," meaning gift, or *sadaka*, meaning charity for the poor).
- (d) Standing as a surety for the liability of another partner in a crime or tort that is related to the *sharikah al-mufāwadah*. (However, based on principal-agency relationships, all partners are potentially liable for misappropriation affecting third parties, and for torts committed in the course of business. Thus, for example, suppose a two-person *mufāwadah* steals U.S. \$1,000 books from the University of Kansas Library. The Library sues both partners. Ideally, each partner is held accountable for the books that the partner misappropriated, which could be \$500 each. Suppose one partner endeavors to be the surety for the other, thereby paying the Library \$500 for herself, and a further \$500 for the other partner. This suretyship arrangement is not permissible.)

Notably, there is one way to circumvent these transactional limitations. The partners can agree one or more of the limitations ought to be relaxed. (Thus, in the example in (d), the partners could establish a suretyship arrangement by consent.)

There are two further kinds of activities of a *sharikah al-mufāwadah* the permissibility of which is disputed within the *Hanafi* School. First, it is clear the entire partnership, acting jointly, could stand a surety for a third party. But, may an individual partner stand as a surety for a third party? *Imām* Abū Ḥanīfah says yes, but two of his disciples disagree and would consider the suretyship an act of charity (*tabarru'*). In effect, the disciples suggest the act would be outside the scope of the *mufāwadah*.

Second, suppose one partner in a *sharikah al-mufāwadah* is arrested and jailed for allegedly illegal activities. May a second partner bail out the jailed partner using funds from the partnership, e.g., by posting a cash bond with the appropriate law enforcement authority? The answer is yes, at least if the allegedly unlawful activities are connected to the *mufāwadah*. However, suppose the bailing partner pledges himself (effectively asking the authorities to prosecute him if the jailed partner does not appear for subsequent legal proceedings). In the latter circumstance, the bailing partner acts outside of the scope of the *mufāwadah*.

• *Māliki* School:

In respect of establishing and operating a *sharikah al-mufāwadah*, the *Māliki* School agrees with the *Hanafi* School on five conditions:

- (1) *Ahliyah* Partners (legal capacity or capability).
- (2) Right to Do Business.

- (3) Initial Capital Contributions.
- (4) Asset Category for Capital Contributions.
- (5) Transactional Limitations

However, the *Māliki* School parts company with the *Hanafi* School, and establishes three rather different conditions, as follows:

- (6) Personal Status —

The *Māliki* School holds that *sharikah al-mufāwadah* is valid between a free man and a slave. As *Imām* Mālik explains in a grand treatise, *Al Mudawwanah*, which is one of the most significant *Māliki* School works:

there is no harm in a partnership between a slave and a freeman, if the slave is one who has been authorized (by his master) to do business.<sup>38</sup>

Does the *Māliki* School permit non-Muslims to partner with Muslims in a *mufāwadah*? The question was put to *Imām* Mālik by one of his students, Sahnūn ibn Sa'īd ibn Ḥabīb At-Tanukhī, and the dialogue is recounted by the *Imām* in *Al Mudawwanah*:

Is the partnership of a Christian and a Muslim or a Jew and a Muslim valid in Mālik's opinion? He replied: "No! Only if the Christian or the Jew are present at the time of purchase. Further, there can be no sale, possession or demand for debt, unless the Muslim is present with him. If the case is what I have described to you, it is valid, otherwise not."<sup>39</sup>

In other words, under limited circumstances, Muslims and non-Muslims may participate together in a *mufāwadah* according to *Māliki* School doctrine. The key limitation is that non-Muslims be present with Muslims "at the time of purchase," which refers to the time in which a transaction (i.e., the "sale," "possession," or "demand for debt") is undertaken. The logic is the Muslim partner can be sure the transaction is not one involving products the consumption of which is forbidden according to Islamic moral precepts.

This logic raises two questions. First, must the non-Muslim partners be present when the *sharikah al-mufāwadah* is created? For example, if formation is by written contract (the normal case), must they all be in the same venue to sign the deal? The answer is "yes." The reply given by *Imām* Mālik presumes a valid *mufāwadah* has been formed between Muslims and non-Muslims, but has not yet entered into its first transaction. The participation of non-Muslims in the creation of a *mufāwadah* does not vitiate that partnership. Clearly, this distinction is a significant one vis-à-vis the *Hanafi* School (aside from the views of Abū Yūsuf).

Second, the earlier passage from *Imām* Mālik presumes physical presence, i.e., the Muslim partner is witnessing what her non-Muslim partners are doing. After

<sup>38</sup> NYAZEE, *supra*, at 192 (Selangor, Malaysia: The Other Press, Malaysian ed., 2002) (quoting Sahnūn, *Al-Mudawwanah Al Kubrā [The Large Notebook]*, vol. 5 at 70 (Hereinafter, Sahnūn)). The *Māliki* School scholar Sahnūn was from Qayrawan, in what is now Tunisia, and lived from 766/777 to 854/855 (160-240 A.H.).

<sup>39</sup> NYAZEE, *supra*, at 192-193 (quoting Sahnūn, *supra*, vol. 5 at 70) (emphasis added).



all, mystical appearances aside, that was the only kind of presence possible in the time of the *Imām*. Would non-physical presence, for instance, by remote video-conferencing, count as "presence"? The answer is uncertain. However, the goal of the requirement is to provide the Muslim partner (or partners) with the opportunity to oversee, and double-check, the permissibility of a transaction from an Islamic ethical perspective. If that goal can be met through modern technology, then it would seem reasonable to infer that the *Mālikī* School would permit use of that technology to facilitate the transaction by the *sharikah al-mufāwadah*.

#### (7) Equality

The *Mālikī* School does not require that partners in a *sharikah al-mufāwadah* make equal contributions to the capital of their partnership. The matter was posed to a student of *Imām Mālik*, *Sahnūn*, by one of the students of *Sahnūn*:

What do you think if he (a partner) establishes evidence that it is a *mufāwadah* on the basis of one-third capital and two-thirds [?]. Is this permitted according to *Mālik* so that they may be considered partners to the *mufāwadah*." He [*Sahnūn*] said: "Yes, because it is permitted in *Mālik's* view to participate in this way."<sup>40</sup>

*Sahnūn* published this answer in the treatise *Al Mudawwanah Al Kubrā* (The Large Notebook).<sup>41</sup>

This answer is frustrating because it refers back to *Imām Mālik* with no further explanation. Yet, a clue lies in the factual predicate contained in the question of the student of *Sahnūn*. The question presumes there is evidence of the shares each partner contributed. In other words, unequal capital contributions to a *sharikah al-mufāwadah* are acceptable if there is persuasive proof of the percentage contributions. That evidence helps avoid future disputes.

Likewise, in a key departure from *Hanafi* School teaching, the *Mālikī* School does not require equality among partners in the division of profits or losses. The *Mālikī* School teaches:

equality in wealth and profit is also not a condition.<sup>42</sup>

Additionally, the *Mālikī* School does not require equality in work. That is, the School permits different partners to contribute different amounts of labor, and thereby obtain diverging returns from the profits of the *sharikah al-mufāwadah*.

The sixth and seventh conditions that are *sui generis* to the *Mālikī* School suggest an important contrast between it and the *Hanafi* School with respect to *sharikah al-inān* and *sharikah al-mufāwadah*. A *mufāwadah* according to the *Mālikī* School is more comparable to *sharikah al-inān* under the *Hanafi* School than it is to a *mufāwadah* under the *Hanafi* School.

#### • *Shāfi'i* School:

*Shāfi'i* School teaching on the subject of *sharikah al-mufāwadah* is straightforward. The School agrees this type of partnership exists in the marketplace. It does not chastise the other Schools for their acknowledgment or acceptance of it. However, the *Shāfi'i* School does not approve of this type of partnership. The disapproval from *Imām Shāfi'i*, in *al-Umm*, is both powerful and amusing:

*Sharikah al-mufāwadah* is *bātil* [void] and I do not know of anything else in this world that can be declared void if it is not the *mufāwadah* than the *mufāwadah* partnership. . . . If they think that the *mufāwadah* according to them is that they are partners in all that is found in their ownership for some reason, whether wealth or something else, then, the partnership in between them is *fāsid* [vitiated]. I do not know of gambling except in this or less than this that two persons participate with two hundred *dirhams* and then one of them find a treasure and this is to be shared among them. What do you think if they stipulate this and do not mingle their capitals, is it not permitted, and what do you think of the person who has been given a gift or has hired out his services? If he earns something out of this, does the other become his partners in this? They have rejected lesser things than this.<sup>43</sup>

Thus, the *Shāfi'i* School declares void (*bātil*) any *mufāwadah* that partners might attempt to form under its teaching. But, the School would not treat as void a *mufāwadah* properly formed under the conditions of the other three Schools.

Interestingly, the *Hanafi* School replies to the disapproval of the *sharikah al-mufāwadah* by the *Shāfi'i* School by impugning the logic of the *Shāfi'i* School. The *Hanafi fukahā'* argue that because the *Shāfi'i* School approves of a *sharikah al-inān*, it should *a fortiori* approve of a *mufāwadah*. "*A fortiori*," because the contract for a *mufāwadah* is even stronger than one for a *sharikah al-inān*. Why, then, approve of a less stringent kind of partnership, but not the one with tighter conditions? The reply of the *Shāfi'i fukahā'* is to restrict the *inān* with various conditions, so that this kind of partnership "is reduced to the status of a mere co-ownership (*sharikah al-milk*)."<sup>44</sup>

#### • *Hanbali* School:

The *Hanbali* School defines "*sharikah al-mufāwadah*" as follows:

In its literal meaning, *mufāwadah* is participation in each thing.<sup>45</sup>

This rather mysterious definition masks a theoretical perspective of the *Hanbali* School on *sharikah al-mufāwadah* that is fundamentally different from the approach of the other three Schools. Unlike them, the *Hanbali* School does regard a *mufāwadah* as a specific type of partnership under the umbrella of *sharikah al-'aqd*, but rather the other way around.

That is, the *Hanbali* School looks at *sharikah al-mufāwadah* as the general species of partnership, with other types — *sharikah al-inān*, *sharikah al-abdān*

<sup>40</sup> NYAZEK, *supra*, at 193 (quoting *Sahnūn*, *supra*, vol. 5 at 70).

<sup>41</sup> See NYAZEK, *supra*, at 193.

<sup>42</sup> NYAZEK, *supra*, at 194.

<sup>43</sup> NYAZEK, *supra*, at 229 (quoting *Al-Bahūti, Kashāf Al-Qinā'* [Removing the Masks], vol. 3 at 529).

<sup>44</sup> NYAZEK, *supra*, at 162.

<sup>45</sup> NYAZEK, *supra*, at 211 (quoting *Al-Shāfi'i, Al-Umm* [The Mother], vol. 3 at 206).

(*a'māl* or *al-'amal*), and *sharikah al-uwjūh* (credit cooperative) — being the particular types. Stated differently, a valid *mufāwadah* is formed whenever a *sharikah al-'inān*, *sharikah al-'abdān* (*a'māl* or *al-'amal*), or *sharikah al-uwjūh* is created, because these specific types are individually valid. The reason for this distinct theoretical approach, say the *Hanbali fukahā'*, is the strength of the partnership contract establishing and setting the rules for a *mufāwadah*. This contract is the strongest of the lot, say the *Hanbalis*, in the sense of having the most rigorous conditions that are most appealing from the perspective of Islamic moral teaching.

In brief, the *Hanbali* School sees this type of *sharikah* as a general name for all other partnerships. Logically, then, all of the conditions the *Hanbali* School applies to *sharikah al-'inān*, *sharikah al-'abdān* (*a'māl* or *al-'amal*), and *sharikah al-uwjūh* also apply automatically to a *sharikah al-mufāwadah*. Further, for the *Hanbali* School, the *mufāwadah* is more similar to *sharikah al-'inān* under the *Hanafi* School than is the *mufāwadah* under the two Schools. The reason is the *Hanafi* School has the most unique conditions for a *mufāwadah*. That is, the *Hanbali* School (and, for that matter, the *Māliki* School) conditions for a *mufāwadah* are distinct from the conditions for this partnership laid out by the *Hanafi* School. Instead, the *Hanbali* School conditions resemble the conditions the *Hanafi* School lays out for an *'inān*.

As a practical matter, businesspersons can and do establish and operate under the *Hanbali* School a form of enterprise that the School agrees and approves of called "*sharikah al-mufāwadah*." To do so, their partnership agreement must not only meet the above conditions for the other kinds of partnership, but also must satisfy the following four additional requirements:

(1) Suretyship —

Each partner must become a surety for the other partners, in addition to being in a principal-agent relationship with the other partners. Moreover, each partner can be sued for the debts, defaults, or other failings of the partnership. This suretyship condition means any one partner is potentially at risk for the entire liability associated with the partnership. At the same time, each partner has the assurance her other partners will — if need be — assume her liability.

For instance, assume Maryam and Abdullah are partners in a *sharikah al-mufāwadah*, their partnership defaults on a U.S. \$100,000 loan, and the lender sues both partners for the balance due of \$80,000 on the loan. Suppose Abdullah cannot afford to pay, owing to personal insolvency. Maryam is liable for the full \$80,000, part of that liability arising in her own right, and the remainder as a surety for Abdullah.

(2) Authorization —

The *Hanbali* School requires each partner to authorize every other partner to perform any type of work on behalf of the partnership. This authorization must cover both physical labor and service work, i.e., it is a broad one encompassing activities as diverse as hauling bricks to strategizing about financial matters.

(3) Equality —

The *Hanbali* School does not require equality in capital contribution or profit distribution among the partners. They may contribute capital, or divide profit, as they agree in their contract. For instance, they may elect to divide profits in proportion to their initial capital contributions, or to deviate from those percentages. Obviously, the flexibility to agree on unequal profit percentage distributions is a significant departure from the *Hanafi* School equality condition.

(4) Liability for Losses —

Under the *Hanbali* School, the partners must allocate losses according to their shares in a *sharikah al-mufāwadah*. They are not free to agree on a distribution of losses that puts disproportionate liability on one partner, with disproportion gauged by initial capital contributions. That is because the contributions convey consent about liability.

For example, suppose Maryam contributes U.S. \$300,000 to a *sharikah al-mufāwadah*, while Abdullah puts in \$100,000. If their partnership loses money, then Maryam must absorb three-quarters of the loss, while Abdullah would be liable for the remaining one-quarter. This result is justified by the fact that by contributing 75 percent of the capital, Maryam effectively consented to be at risk for three-quarters of any loss, and likewise for Abdullah.

A minority of *Hanbali* School *fukahā'* urge that a *sharikah al-mufāwadah* is too general a type of *sharikah*, given that it combines the other specific types of partnership.<sup>46</sup> They argue a *mufāwadah* should be considered invalid, because its generality creates uncertainty (*gharar*). Is it really a *sharikah al-'inān*, *sharikah al-'abdān* (*a'māl* or *al-'amal*), or *sharikah al-uwjūh*? Could it be a *sharikah al-mudārabah*? These *fukahā'* call for a precise answer to such questions. Understandably, they are unsatisfied at the prospect that one partner may work in the enterprise as if it were an *'inān*, while another partner might operate on the belief it is a *sharikah al-'abdān*, and a third partner might think it is a *sharikah al-mudārabah*.

The situation is akin to three partners in an enterprise under American law where the first partner thinks the enterprise is a limited liability partnership, the second partner thinks the group is engaged in a limited partnership, and the third partner labors under the assumption they have a particular partnership. This uncertainty is all the more galling in modern times, when the partners may work in different cities (Mecca, Medina, and Jeddah), or even different countries (Saudi Arabia, Oman, and Yemen). Accordingly, these *Hanbali* School *fukahā'* insist all

<sup>46</sup> See SHEIKH MOHAMMED SALEH ALQUTHAYMEEN, *AL-SHARIKAH AL-MUWTA' ALA ZAAD AL-MATQUENA*, vol. IX (Cairo, Egypt: Dar Al-Ansar Press, 1st ed., 2003).

Sheikh Mohammed Saleh AlQuthaymeen (whose full name is "Muhammad Ibn Saalih al-Uthaymeen") lived from 1925 to 2001 (1347-1421 A.H.). This Sheikh was born Unayzah, a city in the Qaseem region of Saudi Arabia. A Professor of Islamic Jurisprudence, he was one of the most prominent Islamic scholars in Fiqh (Jurisprudence) and Aqeedah (Faith). In Saudi Arabia, he served on the Board of Senior Ulama and the Permanent Committee for Fatawa and Research. See *Uthaymeen*, WIKIPEDIA, posted at <http://en.wikipedia.org/wiki/Uthaymeen>. His book, *Al-Sharikah Al-Muwa' Ala Zaad Al-Matquena*, is a discussion of *Zaad Al-Matquena*, which was written by Abi Al-Najja Mosa Ibn Ahmad Ibn Mosa Al-Hajawi (who died in 968 A.H.) as an explanation of the main *Hanbali* School treatise, *Al-Mogani*, written by *Imām* Ibn Qudamah.



partners have a clear, unified conception of the edifice in which they work, and view the *sharikah al-mufawadah* as rickety scaffolding. Their insistence is broadly consistent with the condition on authorization.

Notwithstanding their objection, the majority view within the *Hanbali* School is a *sharikah al-mufawadah* is not void for vagueness. The majority counters with the argument that a *mufawadah* may well come closest of any Islamic business association to the modern theory and practice of the general *sharikah*. The majority points out that the authorization condition supports their argument, particularly in cases in which the partners work in distant geographical locations. Dramatically, the majority finds acceptable what the minority dislikes, namely, different partners have a different view as to the precise nature of their partnership.

There is nothing wrong, say the majority of *Hanbali* School *fukahā*, with one partner working in one city as if the enterprise is a *sharikah al-'inān*, while contemporaneously another partner works in a different city as if the partnership were a *sharikah al-mudārabah*. To the contrary, says the majority, the partners ought to have flexibility to operate commercially as they need to under the large umbrella of a *mufawadah*. The modern marketplace needs partners to engage in different tasks in varying locations, not the strictures associated with the minority approach of all partners doing the same activity in the same place.

A final point about the *Hanbali* School approach to *sharikah al-mufawadah* concerns non-Muslim partners. Does this School permit Muslims to partner with Christians, Jews, and others in a *sharikah al-mufawadah*? There appears to be no formal prohibition, and generally the *Hanbali* School emphasizes acts that are not allowed. In other words, an affirmative answer — that ecumenical partnerships are allowed — may be inferred from the silence of the School on the matter. This answer also may be inferred from two other bases.

First, again generally speaking, the *Hanbali* School is inclined to agree with the *Hanafi* School views as articulated by *Imām* Abū Yūsuf, who (as explained earlier) permits non-Muslims in a *sharikah al-mufawadah*. Second, the majority of *Hanbali* School *fukahā* are pragmatic in their approach to a *mufawadah*, in support of modern commercial contexts. The current era of globalization demands nothing less than flexibility on religious affiliations of partners in a common enterprise.

### [C] *Sharikah al-Abdān* (Skill-based Partnership)

In Arabic, "*sharikah al-abdān*" also is known as "*s harikah a'māl*" (plural) or "*s harikah al-'amal*" (singular). These terms convey the idea of a skill-based partnership. The word "*abdān*" is derived from the word "*bdān*," which means "body." The inference is that the partnership is based on skills performed on account of one's bodily talents. The word "*a'māl*" (plural) or "*al-'amal*" (singular) means "work." Here, too, the connotation is a partnership based on work, in a physical sense. More formally, a "*sharikah al-abdān*" is defined as a:

partnership in which participation by the partners is based on labour or skill, but the partnership has to be of the type '*inān* or *mufawadah*.<sup>47</sup>

<sup>47</sup> NYAZEE, *supra*, at 339.

This type of *sharikah* is found in the *Hanafi*, *Māliki*, and *Hanbali* Schools. They approve of it, in the sense of recognizing its existence in the commercial world, and approve of it from a moral perspective. However, *Shāfi'i fukahā* reject it on ethical grounds, and deem it void.

Also common to the in the *Hanafi*, *Māliki*, and *Hanbali* Schools are four basic rules about the operation of a *sharikah al-abdān*. They are as follows:

#### (1) Capital Contributions —

By definition, a *sharikah al-abdān* is based on skills. Therefore, there is no need for the partners to contribute funds at the time they establish their venture. For example, suppose Maryam, Jaber, and Salem finish their medical residencies in orthopedic surgery. They seek to practice their specialty together, as a team. They can form an *abdān* without actually putting up any cash. To be sure, as a practical matter, they may require money to build a new, or buy an existing medical clinic with surgical facilities. But, as an Islamic legal point, they need not specify in their partnership contract they are contributing funds.

#### (2) Profit and Loss Sharing —

In a *sharikah al-abdān*, all profits or losses associated with one partner are divided equally among all of the partners. For example, in a three-person partnership of Maryam, Jaber, and Salem, suppose U.S. \$1,500 of profit are directly attributable to the work of Maryam, and \$300 of loss is directly attributable to the work of Jaber. The profit is divided equally, each partner getting \$500. Likewise, the loss is split equally, each partner bearing \$100. The net result is each partner earns \$400. What is the moral logic for this result? Maryam, Jaber, and Salem are in a cooperative venture, and each acts on behalf of the other. They are a community formed voluntarily to share economic joys and sufferings, even to the degree of an equality of result.

However, there is one exception to the operational rule of sharing profits and losses, known as a "*sharikah al-abdān in 'Inan*." In this association, the partners specify in their written partnership agreement that they intend to derogate from the normal sharing rule. For example, Maryam, Jaber, and Salem could stipulate in their contract, before the partnership commences operation, that profits and losses will be divided amongst them in 50-25-25 percent shares, respectively. Then, Maryam would keep \$750 of the profit and bear \$150 of the loss, for a net gain of \$600. Jaber and Salem each would take \$375 of profit and \$75 of loss, for a net gain of \$300. The rationale for allowing partners to derogate is respect for their free will to enter into mutually beneficial business arrangements, even on grounds that are not strictly egalitarian in the sense of an equality of result. Derogation from the normal rule in the *Shari'a* allows partners to recognize different skill levels they bring to a *sharikah al-abdān in 'Inan*, and consequent different contributions they are likely to make to profits and losses.

#### (3) Acceptance of Work —

Each partner in a *sharikah al-abdān* is authorized to accept work for the entire partnership on behalf of all other partners. For instance, suppose the *abdān* of Maryam, Jaber, and Salem centers on their skills as orthopedic surgeons. Maryam



attends a soccer (football) game in Cairo involving the national teams of Egypt and Morocco. The Moroccan coach asks Maryam if her *abdān* would serve as the official orthopedic consultant to the team, and perform any necessary diagnoses and surgical treatments for the players. Maryam accepts. Her acceptance is on behalf of Jaber and Salem, too. That is, the Moroccan team is now a client of the entire partnership, and they could be called upon to provide medical treatment to the players. In sum, a partner in a *abdān* who accepts work does so on behalf of herself and all the partners.

As an interesting change in the hypothetical, suppose the team is Saudi Arabia instead of Morocco. Under current Saudi law, a woman can provide medical services to a man within a hospital located in the Kingdom, but not in open public, such as in a soccer stadium. (There is no written law to this effect, but in practice women are not observed to provide services in Saudi soccer stadiums.) Maryam's acceptance would mean Jaber or Salem could treat Saudi players, if they had to provide emergency treatment on the playing field, and Maryam could do the surgery in the hospital. The point, then, is simply to show that a *sharikah al-abdān* is a flexible form of association that can accommodate the entrepreneurial desires of its partners to generate new business clients, even in an extreme environment in which one partner might herself not be able to serve a particular kind of client.

To be sure, this flexibility is not unlimited. A *sharikah al-abdān* can be formed with non-Muslim partners, just as in a *sharikah al-inān*. But, it cannot be formed for the purpose of using skills of the non-Muslim partner pertaining to religiously proscribed activities. Maryam, Jaber, and Salem join an *abdān* with George if they do so to take advantage of George's expertise in brewing beer, fermenting wine, producing pork, or trafficking in pornography.

#### (4) Payment —

Each partner in a *sharikah al-abdān* has the right to demand payment for goods provided, or services rendered, by the partnership, on behalf of all the partners. If any one of the partners receives such payment, then the right embodied in the other partners is terminated. That is, the payment to one partner is payment to the whole partnership, and the payee partner is expected to distribute the payment in accordance with the aforementioned rules on profits and losses. So, for instance, Maryam, Jaber, and Salem all have the right to call for payment of \$1,500 for medical services any one of them provided to Morocco's soccer team. If Jaber collects the payment, then Maryam and Jaber no longer have the right to make that call of the payor-obligor, Morocco's team. In turn, Jaber is to distribute the payment accordingly.

Beyond the similarities in operational rules, however, there are some distinctions among the three *Sunni* Schools as to skill-based partnerships. They are as follows.

#### • *Hanafi* School:

The *Hanafi* School identifies two different types of *sharikah al-abdān*. The first type is an *abdān* by way of *mufāwadah*, while the second type is an *abdān* by way of '*inān*'. "By way of" connotes the manner in which the partnership is created, specifically, terms and conditions concerning monetary contributions of partners.

Literally, the Arabic term "*inān*" means "reins" (as in the reins or bridles on a horse), while "*mufāwadah*" means "negotiation."

A *sharikah al-abdān* by way of *mufāwadah* has the same requirements as a *sharikah al-mufāwadah*, except the partners need not contribute any funds when they establish their association. That exception is in keeping with the general point that a *sharikah al-abdān* is a venture based on contributions of skill, not money. In lieu of monetary contributions, a *sharikah al-abdān* by way of *mufāwadah* requires (1) *kafālah* and (2) *wakālah*. The *kafālah* condition refers to a contractual provision in the partnership agreement on suretyship or guarantee. The provision must state each partner is liable for the losses of the others (except in a case in which a partner behaves in an intentional, abusive manner). The *wakālah* condition is an agency specification in the agreement that each partner is authorized to act as agent for every other partner.

In a *sharikah al-abdān* by way of '*inān*', all the conditions for setting up a *sharikah al-inān* apply, except the obligation that each partner make an initial monetary contributions. Instead, this partnership imposes two conditions. First, *wakālah*, i.e., the agency requirement as in a *sharikah al-abdān* by way of *mufāwadah*, must be met. Second, in a *sharikah al-abdān* by way of '*inān*', the work in which the partners are engaged must be of a kind that a normal person could be hired by a client to perform the work. For example, Morocco's soccer team could hire a physician specializing in orthopedic surgery to be its team doctor. Therefore, Maryam, Jaber, and Salem can form a *sharikah al-abdān* by way of '*inān*' on the basis of their orthopedic surgical skills. In contrast, it would be forbidden for the soccer team from Saudi Arabia to hire a company to supply the players with beer, because of the Islamic prohibition on consumption of alcohol. Thus, Maryam, Jaber, and Salem could not form a partnership with this skill in mind, because Saudi Arabia does not permit the hiring of persons to distribute alcoholic beverages.

#### • The *Māliki* School:

The *Māliki* School sets out two distinctive requirements for establishment of a *sharikah al-abdān*, namely, specialty and location. First, all partners must specialize in the same field of work or craftsmanship. After all, reasons the *Māliki* School, an *abdān* is supposed to be a skill-based partnership, not a general mercantile partnership. That is, it is a focused business entity, not a conglomerate. Yet, this requirement is neither as strict nor as practical as it seems. The *Māliki* School permits partners in an *abdān* to be in different types of businesses, as long as those businesses are related to each other. Just how "related" must the businesses be? Consider the case of Maryam, Jaber, and Salem, who finish medical residencies in cardiac surgery, cardiology, and neurosurgery, respectively. Can they form an *abdān*? Cardiac surgery and cardiology are related, though only one involves surgery. Neurosurgery involves an entirely different part of the body. Yet, all are doctors. The hypothetical becomes a bit more difficult if one of them is a dentist, lawyer, or accountant. Arguments can be made within the *Māliki* School, in both directions, as to whether the three persons are engaged in the same field.

Second, the *Māliki* School instructs that all partners in a *sharikah al-abdān* operate from the same place of business. Their partnership must be located in the same spot, as it were. They cannot operate from different geographical locations. As



with the first condition, the restriction on location is not as rigid as it may seem. Consider an orthopedic surgery partnership of Maryam, Jaber, and Salem, and suppose their clinic is in Bahrain. Are the partners required to perform all of their work in the clinic, to the extent they cannot do routine e-mail work from home or a hospital? Certainly not. Are the partners forbidden from traveling to Dubai, or Bangkok, to perform an operation? Such a prohibition would prevent them from serving so-called "medical tourists" in those two cities. It is unlikely *Mālikī* School *fukahā'* would look askance at the partners providing medical services, on an occasional basis, in locations outside of Bahrain. What they would not like to see is that each partner sets up a facility for herself or himself in three different cities. Suppose Maryam's clinic is in Bahrain, Jaber's is in Dubai, and Salem's is in Bangkok, and each routinely operates independently out of those facilities. Then, they hardly can be called a "partnership" in the sense of having a skill-based communal venture.

• **Hanbalī School:**

The difference in perspective on the *s harikah al-abbān* form of partnership between the *Hanbalī* and *Hanafi* School is modest. The *Hanbalī* School teaches an *abbān* is:

The participation of two or more persons in what they accept for their physical labour and are liable for through their work.<sup>48</sup>

Unlike the *Mālikī* School, the *Hanbalī* School does not require partners to be in the same profession, or have the same skill set, to create this kind of *sharikah*. But, the *Hanbalī* School requires satisfaction of four conditions to establish an *abbān*, all of which are to be stated in a partnership agreement.

First, one partner must have the right to accept work for the entire partnership on behalf of all other partners. Second, if one partner accepts a work from a client, all other partners bear joint liability for that work. They are all liable for non-performance, or defective performance, by any one of them. In essence, the second condition means the partners in the *sharikah al-abbān* are sureties, or guarantors, for each other. Third, liability for losses arising out of the work in which the partnership is engaged is joint and several. The only exception to joint liability for losses is if one partner becomes personally liable because of her own abusive behavior. For example, suppose U.S. \$100,000 of loss is incurred by a medical surgery partnership of Maryam, Jaber, and Salem. All of them together, or any one of them individually, is responsible for bearing this loss, e.g., paying off a debt to a creditor of \$100,000. However, suppose the loss arises because of a medical malpractice judgment rendered against Salem, in which he is found to have been culpable for botching a knee replacement operation. Maryam and Jaber would not bear this loss, as it is attributable to abusive behavior by Salem.

• **Shāfi'i School:**

The *Shāfi'i* School considers the *sharikah al-abbān* type of partnership as *bātil* (legally null and void). To be sure, this School recognizes the fact of the existence of this type as established under the doctrines of the other three Schools. But, it is not

possible to establish an *abbān* under the *Shāfi'i* School. As Al-Shirāzī, a leading *Shāfi'i* scholar, explains:

Because of what is recorded from 'Ā'ishah, may Allah be pleased with her, that the Prophet (peace be upon him) said that each stipulation that is not in the Book of Allah [i.e., the Qur'ān] is *bātil* [void], and this [the participation of two persons with their physical labor in a partnership] is a condition that is not in the Book of Allah. Further, because the labor of each person is exclusively his own; it is, therefore, not permitted to another to participate in this with him. If they form such a partnership and earn, then, each one will take what he has worked for because it is a compensation for his body (physical labor) and belongs exclusively to him.<sup>49</sup>

Observe, then, three noteworthy points.

First, the methodology of the *Shāfi'i* School, with its emphasis on grounding commercial transactions on precepts from the Qur'ān and *ḥadīths*, is obvious from the initial sentence quoted above. These roots of Islamic jurisprudence simply do not allow for a *sharikah al-abbān* partnership. If *Imām Shāfi'i* is correct, then how can the other three Sunnite Schools justify their approval of this type of partnership? The answer is *Hanafi*, *Mālikī*, and *Hanbalī* School jurists use *qiyās* (analogical reasoning) to legalize this *sharikah*. They say an *abbān* is similar to *sharikah al-muḍārabah*. Wealth and work are two different faces of both types of partnership, and they may be combined to advance the interests of the partnership.

Second, there is a commercial basis for the objection of the *Shāfi'i* School to a *sharikah al-abbān*. All partnerships should be established with assets contributed by the partners. They must put in real wealth to create a partnership, and in doing so, their contributions are ascertainable. But, a partnership based on labor or skill causes *gharar* (uncertainty). Uncertainty arises from the fact no two partners are identical in respect of the contributions that may arise from their physical work. In the typical case, the partners themselves are physically distinct, some stronger or more gifted than others. In the atypical case of identical twins, even they might not produce the same results, owing to different effort or education levels. Thus, for the *Shāfi'i* School, individual physical distinctions make it impossible to know what benefits each partner would produce. In turn, there could be disputes as to how earnings of the partnership should be divided. Simply put, for the *Shāfi'i* School, an *abbān* is an entity in which no would-be partners can know what the proper shareholdings and distribution rules ought to be.

On this second point, the question again arises if *Imām Shāfi'i* is correct, then how can the *Hanafi*, *Mālikī*, and *Hanbalī* School jurists justify their approval of this

<sup>48</sup> NYAZEE, *supra*, at 213 (quoting Al-Shirāzī, AL-MUḤADDIRAH, vol. 1 at 36). The title "AL-MUḤADDIRAH" means "The Explanation," and this book is one of the renowned works of jurisprudence in the *Shāfi'i* School.

The full name of Al-Shirāzī is "Abū Ishāq Al-Shirāzī Ibrahim Ibn 'Alī Ibn Yusuf Al-Fairouz Abadi Al-Shirāzī Al-Shāfi'i." He lived from 1003 to 1083 (393-476 A.H.). He was born in Fairouz Abad, a small village in Persia, and moved to Baghdad, and became an important *Shāfi'i* *imām*. He wrote *Al-Muḥadḍah* (The Polite), *Al-Lam' Fi Usul Al-Fiqh* (Shine in the Principles of Jurisprudence), *Al-Tunbah* (The Alert), *Al-Ma'nunah Fi Al-Jadal* (Aid in Controversy), and *Al-Molakah Fi Usul Al-Fiqh* (the Summary of Jurisprudence).

<sup>49</sup> NYAZEE, *supra*, at 227.

type of partnership? The answer follows from the use of *qiyās* (analogy) by the other three *Sunni* Schools to legalize this *sharikah*. A *sharikah al-‘abdān* is similar to *sharikah al-muḍārabah*, and the latter type involves a contribution of wealth (the loan from the sleeping partner) that is repaid by profits from work (namely, that of the borrower). Wealth and work are two different faces of a *muḍārabah*. They are combined in it to develop it. An *abdān* is a similar Janus-faced venture, involving revenue from physical work.

Third, from the second sentence in the above quote, the *Shāfi‘i* School perspective on *sharikah al-‘abdān* is one of radical individual autonomy over the fruits of labor from one's own body. This perspective comes much later in Europe, through the writings of philosophers such as John Locke and Thomas Paine, which emphasizes individual rights and freedoms. Yet, it is grounded in the Qur‘ān and a *ḥadīth* of the Prophet Muhammad, recorded by his wife ‘Ā’isha, that people not exploit the labor of one another. Each person is entitled to the rewards from her own labor, and concomitantly is responsible as an individual for work or sloth. Second, *Imām Shāfi‘i* presages the liberal philosophical thinking of the European Enlightenment by nearly 900 years. The *Imām* lived from 767 A.D. (150 A.H.) to 820 A.D. (204 A.H.) John Locke lived from 1632 to 1704, and Thomas Paine from 1737 to 1809.

#### [D] *Sharikah al-Wujāh* (Credit Cooperative)

In a *sharikah al-wujāh*, partners come together to pool their respective credit standings with lenders. The formal definition of a “*sharikah al-wujāh*” is a:

partnership based on credit-worthiness of the partners in which the ratio of profit and loss is based on the liability borne, but the partnership has to be of the type ‘*inān*’ or *muḥawadah*.<sup>50</sup>

The idea of this credit cooperative is leverage on credit worthiness, not on initial paid-in capital contributions. As a cooperative, the partners can borrow more money than any one of them could individually. The larger sum of capital they borrow can enable them, as a partnership, to make bigger investments and commit to bigger commercial transactions.

As an example, suppose Fatima and Omar are interested in securities brokerage and dealing. That is, they would like to buy and sell stocks and bonds for the account of clients (brokerage), and for their own account (dealing). Fatima herself has U.S. \$1 million of liquid capital, and Omar himself has \$3 million in liquid capital. If Fatima opens a broker-dealer business by herself, then she is more constrained by her relatively smaller asset base than would be Omar if he opens a business by himself. Individual and institutional investors will be less willing to open accounts with her, and banks will be less willing to extend her credit to buy stocks and bonds, than Omar, simply because of the differential liquid capital asset base. However, both Fatima and Omar are better off if they pool their capital into a single *sharikah al-wujāh* with a capital base of \$4 million. They appear to clients and lenders as a stronger broker-dealer, and they can deploy that strength to encourage more clients to open accounts, and lenders to offer them larger lines of credit.

<sup>50</sup> NYAEE, *supra*, at 340.

Leverage is controversial in many non-Islamic environments, such as mergers and acquisitions (M&A) and Wall Street hedge funds. The matter also is controversial in Islamic Law. The four *Sunni* Schools are split into two camps on the legitimacy of a *sharikah al-wujāh*. All four Schools agree this type of *sharikah* exists. But, they do not all find it morally acceptable.

The *Hanafi* and *Hanbali* Schools permit and legalize this *sharikah*. In contrast, *Māliki* and *Shāfi‘i* Schools viewed it as a void *sharikah*. Thus, in a jurisdiction in that follows *Māliki* or *Shāfi‘i* School doctrine, it is not possible to establish a *sharikah al-wujāh*. There are two reasons supporting this prohibition. First, the *Māliki* and *Shāfi‘i* School look to the meaning of “*sharikah*.” Literally, it means “share,” and the share relates either to money or work. But, say these two Schools, a *wujāh* consists of neither money nor work. Rather, it is founded on the pooling of the credit standing of two or more individuals. Second, *gharar* (uncertainty) could easily arise in the operation of this kind of *sharikah*. With no money or skill forming the basis of their deal, the partners might be unclear as to their respective shares and liabilities.

For example, suppose Fatima and Omar seek to form a *sharikah al-wujāh*. Fatima has a reputation as smart and honest commercial dealings, but Omar has a larger line of credit with banks because of relatively more experience. The partnership enters the real estate business, seeking to buy and sell properties. It borrows U.S. \$1 million from a bank, purchases a commercial office building for that amount, and earns revenues from lease payments from tenants. How should Fatima and Omar split the revenue stream? Was it Fatima's reputation, or Omar's credit line, which convinced the bank to make the loan that made the deal possible? Uncertainty of this kind concerns *Māliki* or *Shāfi‘i* School *fukahā*.

As the formal definition (quoted above) of a *sharikah al-wujāh* indicates, this kind of partnership may arise in one of two manners. First, a *wujāh* may be established by way of *al-‘inān*. Second, it may be created by way of a *muḥawadah*. That is, just as the *Hanafi* School identifies two different types of *sharikah al-‘abdān*, namely, (1) a *sharikah al-‘abdān* by way of *muḥawadah*, and (2) a *sharikah al-‘abdān* by way of *‘inān*, this School — plus the *Hanbali* School — discerns the same two kinds of *sharikah al-wujāh*. In respect of both types of partnership, “by way of” connotes the manner in which the partnership is created, specifically, the terms and conditions for creation of a legally valid form of business association.

All the requirements and conditions that apply to establishing a valid *sharikah al-‘inān* also apply to a *sharikah al-wujāh* by way of *‘inān*. Briefly, for a *sharikah al-wujāh* by way of *‘inān*, it is necessary to have in the partnership agreement provisions to the effect that:

- (1) Mandate *ahliyah* partners (i.e., partners with legal capacity or capability).
- (2) Authorize the right to do business.
- (3) Explain profit division at the outset.
- (4) Ensure the profit division is ascertained.
- (5) Articulate the profit division on percentage terms.



(6) Delimit the power of each partner.

The normal requirements for a *sharikah al-'inān* as to initial capital contribution, sameness of asset categorization, liability for losses (proportionate with initial capital contributions), and loss and work input (also proportionate with those contributions) are irrelevant in the context of a *sharikah al-wujāh* by way of *al-'inān*. That is because the *wujāh* is a credit cooperative. The partners do not bring cash to the table, as it were, when they set up their venture.

Similarly, all requirements and conditions for setting up a valid *sharikah al-mufā'adah* also apply to a *sharikah al-wujāh* by way of *al-mufā'adah*. Briefly, the partnership agreement must have provisions on the above six topics, plus two additional points, namely, specifications (7) that the partnership is a *mufā'adah* and (8) a specification on suretyship or guarantee.

[E] *Sharikah al-Muḍārabah* (Sleeping Partnership)

Perhaps no partnership form in Islamic law of business associations is more important than *sharikah al-muḍārabah*. This form affects Muslim families everyday around the world, in both Muslim and non-Muslim countries. That is because a *muḍārabah*, commonly referred to in English as a "sleeping partnership," is the form of organization through which borrowing and lending transactions generally occur (if done in a *Shari'a*-compliant manner).

Those transactions typically involve a lending institution, *i.e.*, a bank or other finance company, which is the creditor, and an individual, family, group of persons, or partnership, which is the borrower. This creditor is the sleeping partner (*rabb al-māl*), and the borrower is its working partner (*muḍārib*). The credit transactions range from buying an appreciating asset like a house, or a consumer durable good like a car, to financing a college education, or investing in a start-up internet business. Moreover, because commercial banks are a critically important instrument through which a central bank implements monetary policy in any modern capitalist economy, the lending transactions effected through sleeping partnership arrangements have systemic implications. The sleeping partners are the banks through which a central bank of an Islamic country loosens or tightens the money supply in that country, and thereby increases or decreases, respectively, the amount of funds the banks have to lend to customers.

To appreciate the importance of the *sharikah al-muḍārabah* partnership, it is necessary to do no more than reflect on one's financial dealings, look to the closest shopping area in one's home town, or open the pages of the financial press. Borrowing and lending are commonplace dealings in the life of non-Muslims. Banks are ubiquitous in developed non-Muslim countries. The *Financial Times* and *Wall Street Journal* discuss monetary policies and credit conditions in the United Kingdom, United States, and other countries. So, too, is it with Muslims and Muslim countries. The *muḍārabah* partnership is an integral part of Islamic economic life.

Ironically, however, putting aside hot-button topics like *jihād* (struggle) and the *hijāb* (veil), there is perhaps no more misunderstood field of the *Shari'a* than Islamic banking law. The common stereotype is "Muslims ban interest," which

leads to the scornful epithet "Islamic banking is primitive." The first statement is only half accurate. It omits the sharing of profits that supplants interest charges. The second statement is erroneous. Centuries ago, *fukahā* debated the fairness (or lack thereof) of usury, and considered ethically acceptable ways for lenders to extend credit. One fruit of their scholarship was the *sharikah al-muḍārabah*. The quintessential and most typical context in which a *muḍārabah* arises is a banking or finance transaction.

## Chapter 25

### BUSINESS ASSOCIATIONS LAW: MODERN PARTNERSHIPS AND AGRICULTURAL VENTURES

In the field of *international commerce and finance*, there are processes at work today which permit a positive integration of economies, leading to an overall improvement in conditions, but there are also processes tending in the opposite direction, dividing and marginalizing peoples, and creating dangerous situations that can erupt into wars and conflicts. Since the Second World War, international trade in goods and services has grown extraordinarily fast, with a momentum unprecedented in history. Much of this global trade has involved countries that were industrialized early, with the significant addition of many newly-emerging countries which have now entered the world stage. Yet there are other low-income countries which are still seriously marginalized in terms of trade. Their growth has been negatively influenced by the rapid decline, seen in recent decades, in the prices of commodities, which constitute practically the whole of their exports. . . . Here I should like to renew an appeal for all countries to be given equal opportunities of access to the world market, without exclusion or marginalization.

*Fighting Poverty to Build Peace*, Message of His Holiness Pope Benedict XVI for the Celebration of the World Day of Peace, 1 January 2009, ¶ 9 (emphasis original)

#### SYNOPSIS

##### § 25.01 FOUR MODERN TYPES OF *SHARIKAH AL-'AQD*

- [A] *Sharikah al-Musāhamah* (Stock Market Partnership)
- [B] *Sharikah al-Taḍamun* (Trading Partnership)
- [C] Two Other Modern Partnerships

##### § 25.02 AGRICULTURAL VENTURES

- [A] *Muzāra'ah* (Sharecropping)
- [B] *Musāqāh* (Irrigation)

##### § 25.01 FOUR MODERN TYPES OF *SHARIKAH AL-'AQD*

Modern forms of partnership comprise the second broad category of *al-'aqd* (contract-based) business associations. There are four different types of modern partnerships: (1) *sharikah musāhamah*; (2) *sharikah al-taḍamun*; (3) *sharikah al-tawṣi'ah*; and (4) *sharikah al-mohass'ah*. Notably, no rules prohibit participation in any of them by non-Muslim or women, along with that of Muslims or men.



As a practical matter, this list is not necessarily exclusive. Different forms may be found, or may develop, in different Muslim countries, particularly with changing commercial conditions. Moreover, not all four types are found in every Muslim country. Their appearance depends on the commercial and financial needs in the markets of a particular country.

As a theoretical matter, the modern kinds of partnership are not truly independent forms. Originally, they arose because of a need, and in a context, in a particular market. Islamic legal scholars reached back to the traditional forms of partnership, and modified them so as to accommodate new developments, most notably the information technology (IT) revolution, and the invention of a dizzying array of new financial instruments. Generally speaking, of the four modern types, the most popular are the *sharikah al-musāhamah* and *sharikah al-ta'āmun*.

#### [A] *Sharikah al-Musāhamah* (Stock Market Partnership)

A *sharikah al-musāhamah* is a partnership the capital of which is divided into equal exchangeable shares in the partnership. The purpose of this partnership is to invest in financial instruments traded on a organized exchange, or in financial assets bought and sold over the counter (OTC). The quintessential example of such an instrument is equity (shares of ownership in a business association) traded on a centralized stock market. Other financial assets also are permissible targets for investment, such as debt (bonds), foreign currencies, exchange, and derivatives (i.e., instruments such as options, forwards, futures, and swaps, the value of which is derived from an underlying asset, such as a stock, bond, or foreign exchange). Some of these assets (such as forwards and foreign exchange) are traded OTC. Not surprisingly, the word "*musāhamah*" is derived from the Arabic noun "*sāham*," which means share (as in equity, or stock).

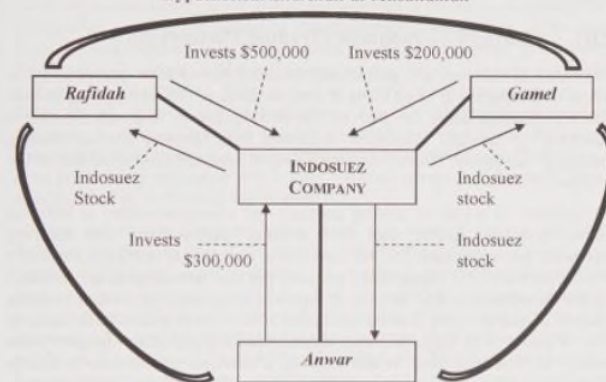
In a *sharikah al-musāhamah* each partner is authorized to buy or sell securities of value up to the amount of her share in the partnership. That share equals her initial paid-in capital contribution. Each partner is liable only to the extent of her share. That is, partners are not jointly and severally liable for the losses incurred owing to the financial decisions of another partner. Critically, a *sharikah al-musāhamah* is a partnership not established *a priori* by the investors, who go forward acting jointly. Rather, it is a venture linking each investor with the enterprise in which they buy shares, and thereby the investors — through their individual choice to procure stock in the same company — become linked to one another.

The *sharikah al-musāhamah* partnership contemplates a community, which reflects (at least indirectly) the ethical footing the *Sharī'a* seeks to provide for legal relationships. The Diagram connected with the hypothetical example below, depicts the nexus among partners and the enterprise in which they invest. In a non-Muslim shareholding pattern, investors are conceived of as independent agents acting rationally and self-interestedly. Their common fortune is tied to that of the company in which they hold stock, and they are able to come together at an annual general meeting (AGM) of shareholders. But, nothing in American Corporate Law would indicate shareholders in a company are linked together to each other in a partnership, and certainly not that this link is a religiously tinged communal bond.

They are hold ownership interests in the company, but they are not partners of one another.

By way of example, suppose Rafidah, Anwar, and Gamel seek to invest in an initial public offering (IPO) of stock issued by the Indosuez Company on the Cairo Stock Exchange. The three investors do not know, or at least need not know, each other. While not prohibited from doing so, there is no expectation they come together and act jointly. There is no partnership agreement unique to the three of them. However, by virtue of their investment in the Indosuez Company, they have formed a *sharikah al-musāhamah*. Diagram 25-1 shows their partnership.

Diagram 25-1:  
Hypothetical *Sharikah al-Musāhamah*



As the emboldened lines in Diagram 25-1 illustrate, the partnership links the three of them to the Company itself. The Company — which takes funds they provide and issues stock to them — is an active, working partner in the *sharikah al-musāhamah*. The partnership also links the three of them to each other, a hallmark distinction. Because they invest in the same enterprise, they are more than atomistic shareholders. They are partners with one another. At AGMs, Rafidah, Anwar, and Gamel can exercise their voice in the management of the Company, either as individuals or a community.

Suppose, then, the initial capital contributions of Rafidah, Anwar, and Gamel are U.S. \$500,000, \$300,000, and \$200,000, respectively. Thus, their respective shares in the partnership are 50, 30, and 20 percent. The aim of the partnership is to invest in shares traded on Middle East stock exchanges. The partners cannot buy stock valued at more than their initial individual capital contributions. Anwar could not, for example, purchase on behalf of the partnership stock of the Indosuez Company traded on the Cairo Stock Exchange worth \$400,000, as that would exceed his limit

by \$100,000. Suppose he invests his entire partnership share in equity of that Company. Subsequently, the Company fails, and the value of its stock drops to zero. The partnership loses \$300,000, which is the cap on the liability of Anwar.

The *sharikah al-musāhamah* form originates from the *sharikah al-'inan* partnership, but also combines features of the *sharikah al-mudārabah*. Like the *'inan* partnership, the partners are contributing capital (in the above example, Rafidah, Anwar, and Gamel). Like the *mudārabah*, these partners are investors (*rabb al-māl*), and the entity the equity of which they purchase is the worker (in the above example, the Indosuez Company). Technically, all requirements for an *'inan* apply to a *musāhamah*. Further, in addition to the standard ways for terminating an *'inan*, a *musāhamah* also can be terminated with the consent of the majority of partners.

### [B] *Sharikah al-Taḍāmon* (Trading Partnership)

*Sharikah al-taḍāmon* is a partnership involving two or more persons for the purpose of dealing in any or all kinds of trade in goods or services (so long as such trade is permissible under the *Shari'a*). The word "*taḍāmon*" is a verb meaning to "guarantee" or "ensure." "*Taḍāmon*" is derived from "*daman*," a noun meaning "guarantor" or "surety." These meanings relate to joint and several liability of the partners.

A *taḍāmon* is a kind of holding company for a conglomeration of different business activities. Rather than form separate partnerships, with different agreements governing each one, for each line of commercial activity in which the partners are commonly engaged, the partners can take advantage of the *sharikah al-taḍāmon* arrangement to serve as an umbrella entity covering all their business ventures. Moreover, there is efficiency, in the form of lower transactions costs, by virtue of the need to forge only one, all-encompassing agreement to govern the diversity of their activities. In this respect, a *sharikah al-taḍāmon* is akin to modern-day holding company in the United States, Japan, Korea, and other non-Muslim countries, the subsidiaries of which engage in an array of businesses from banking and cars to shipping and steel.

In the partnership agreement, the partners must specify the name, purpose (e.g., lines of business activity), and location (including headquarters and any branches) of their *sharikah al-taḍāmon*, plus the names, locations, and citizenships of the individual partners. Also specified in this contract are the time of establishment and duration of the partnership, the operating business year for the partnership (e.g., 1 July through 30 June), and conditions for termination of the partnership (such as the end of the stated life of the partnership, agreement of all partners, bankruptcy of the entire partnership, purchase by one partner of all the shares in the partnership, merger with another partnership, or court order). Termination need not occur with the bankruptcy or death of one of the partners. Rather, the insolvency or expiry means withdrawal by that partner (or, if specified in the agreement, the passing of her share to appropriate heirs), but the association continues.

Partners in a *sharikah al-taḍāmon* pay in initial capital contributions, and receive proportionate shares based on them. The partnership agreement specifies the amounts of capital put up by each partner, and their resulting shares. However, percentage ownership interests in the partnership are less significant in a *taḍāmon* than in most other forms of partnership under the *Shari'a*. First, decisions concerning the partnership are made according to majority vote. That is, the default rule is that decision-making is according to one-person-one-vote, not weighted according to share interests based on capital contributions. The partnership agreement identifies one of the partners as the manager of the *taḍāmon*, or permits designation of a non-partner as manager, and lays out the authority of the manager.

Second, each partner in a *sharikah al-taḍāmon* is liable for all obligations of the partnership. The liability is not limited to the extent of the share of a partner in the partnership, i.e., it is not capped by the initial capital contribution of the partner. Instead, the liability extends to the personal assets of the partner. In addition, the liability of each partner is joint and several. In this respect, a *taḍāmon* is similar to a *sharikah al-mufāwadah*. Furthermore, if a new partner joins a *taḍāmon*, she is liable for all debts of the partnership — not only obligations incurred after becoming a partner, but also obligations existing at the time of joining the partnership. Conversely, if a partner withdraws from a *taḍāmon*, then she is free from any liability associated with it after a certain period (e.g., 1 month) from the effective date of withdrawal has elapsed.

Thus, for example, assume Asma', Altaf, and Mustafa form a *sharikah al-taḍāmon* for the purposes of (1) growing and exporting dates, (2) manufacturing aluminum extrusion (rod) products, (3) providing distribution services for a Japanese camera company, Nikon, and (4) offering training programs in entrepreneurship for women. Obviously, their array of business is diverse, and the *taḍāmon* is the useful conglomerate in which to house their activities. Asma', Altaf, and Mustafa contribute U.S. \$5 million, \$3 million, and \$2 million, respectively, and receive 50 percent, 30 percent, and 20 percent stakes, respectively. Governance of the affairs of the partnership depends not on these percentages, though, but is by majority vote. A decision is taken if two of them favor the contemplated course of action. They decide to form four separate divisions, one for each of the trading activities.

Suppose the "Date Division" loses \$10 million in a particular year, as new competition from Iraqi dates is encountered, and the other three divisions break even that year. The partners would allocate the loss in proportion to their shareholding. Accordingly, Asma' incurs a \$5 million loss, Altaf a \$3 million loss, and Mustafa a \$2 million loss. Suppose the latter two partners are unable to come up with the funds to cover the loss? Then, because each partner is wholly liable for this loss, Asma' incurs the \$10 million obligation, and she logically would look to the capital against which to write down the loss. What happens if the capital is insufficient to cushion this loss? Then, the personal assets of Asma' could be called upon to cover the loss. Alternatively, assume the "Women's Entrepreneurship Division" makes a \$10 million profit in a given year, proving wildly popular with talented young women eager to start their own business. This profit is distributed



among the three partners *pari passu*, i.e., in proportion to their shares in the *sharikah al-ta'amon*.

### [C] Two Other Modern Partnerships

As indicated earlier, in some Muslim countries, two additional modern types of business associations exist, and are recognized and approved. They are:

- *Sharikah al-tawsi'ah*, a two-tiered partnership in which only one partner is jointly and severally liable for the debts of the partnership, and operates the business, and the other partners are jointly liable only up to the extent of their share in the partnership, and cannot direct the affairs of the partnership.<sup>1</sup> The first tier both finances and runs the partnership. The second tier only finances its affairs. Profits and termination are governed by the same kind of arrangements as in a *sharikah al-ta'amon*. "Tawsi'ah" is derived from the Arabic root word "w-s-a," a verb meaning "to direct." "Tawsi'ah" connotes what second tier partners do — provide funds and direct the first tier partners, but otherwise stay out of the management.
- *Sharikah al-mohass'ah*, an informal grouping of persons gathered to engage in businesses of their choosing. Each is responsible for her own share in the business, and not liable for partnership losses beyond that share. Contractual requirements for setting up this partnership are minimal. The word "mohass'ah" is derived from the Arabic root word "h-s-s'ah," a noun meaning "share."

The examples of modern partnerships evince the flexibility, even ingenuity of Islamic legal scholars to develop forms of association to adapt to the needs of the marketplace and market participants. It would not be surprising to observe continued evolution, and perhaps the development of yet new forms of partnership.

## § 25.02 AGRICULTURAL VENTURES

### [A] *Muzāra'ah* (Sharecropping)

Most *fukahā'* do not consider either *muzāra'ah* or *musāqāh* to be types of partnership. Instead, they characterize *muzāra'ah* and *musāqāh* as a type of contract, specifically, one for hiring, known as an "ijārah" contract. They eschew the terms "*sharikah al-muzāra'ah*" and "*sharikah al-musāqāh*." Yet, both *muzāra'ah* and *musāqāh* resemble a *sharikah al-abbān*, in the sense they are built on the skills and labor of the persons involved. Each arrangement involves at least two people — an owner of property (landowner) and a worker (tenant farmer) — voluntarily coming together to engage in an agricultural business. Thus, *muzāra'ah* and *musāqāh* are sometimes considered partnerships, and grouped with a *sharikah al-abbān*, but the controversy continues.

<sup>1</sup> With joint liability, responsibility for an obligation is shared, but (unlike joint and several liability), a partner may not be held individually responsible for the entire amount of the obligation in question. See BRYAN A. GARNER, ED., BLACK'S LAW DICTIONARY 997 (St. Paul, Minnesota: West, 9th ed. 2009) (definitions of "joint and several liability" and "joint liability").

The general meaning of "*muzāra'ah*" is the sharing of crops. "*Muzāra'ah*" is:

[a] contract for the cultivation of land between the owner of the land and the worker with the condition of sharing the produce.<sup>2</sup>

The *Mejelle*, the Civil Code of the Ottoman Caliphate from 1877 to 1926, which codifies part of the *Hanafi fiqh*, defines "*muzāra'ah*" as:

*Muzara'a* is a kind of partnership, where the land comes from one, and the work from the other, i.e., a partnership to cultivate, and divide the crops.<sup>3</sup>

The *Mejelle* refers to the arrangement as a partnership, and identifies its essential feature: a symbiotic link between a landowner (contributing land) and farmer (cultivating it), with the two sharing the yield. In the United States, the arrangement is called "sharecropping."

Despite the straightforward definitions, there is an engaging, lively debate among, and even within, the Four *Sunni* Schools about this arrangement.

#### • *Hanafi School*:

There is a huge split among *Hanafi* School *fukahā'* concerning the *sharikah muzāra'ah*. The issue is whether a *muzāra'ah* is a *bona fide* form of partnership. On one hand, the founder of the *Hanafi* School, Abū Hanīfah, believes a *muzāra'ah* is not legally justifiable, meaning that it is not permissible to establish one. On the other hand, the two companions of Abū Hanīfah, namely, his leading students, Abū Yūsuf and Muhammad Al Shaybānī, see *muzāra'ah* as legally valid. For them, the entity is an authentic type of partnership that may be set up between a landlord and tenant.

Abū Yūsuf and Shaybānī back their position with four arguments:

#### (1) The *Sunnah* (Tradition) of the Prophet —

In Khaybar,<sup>4</sup> the Prophet contracted with certain people for half of their produce. This half related to conquered lands and imposition of a land tax (*kharāj*). A battle occurred in 629 A.D. (7 A.H.) between Muslim and Jewish forces, resulting in the victory of the former, and land being owned by the Muslim state, with Jews as farmers. The essence of the bargain allowed the Jews to remain in possession of the land, in exchange for half of the agricultural output generated by them on that land. The bargain fits the pattern of "*muzāra'ah*" as in the *Mejelle* definition — a partnership to cultivate and divide crops, in which land is provided by the title holder, the

<sup>2</sup> IMRAN ARSAN KHAN NYAZEE, *ISLAMIC LAW OF BUSINESS ORGANIZATIONS — PARTNERSHIPS* 337 (Selangor, Malaysia: The Other Press, Malaysian ed., 2002). [Hereinafter, NYAZEE.]

<sup>3</sup> THE MEJELLE — BEING AN ENGLISH TRANSLATION OF MAJALLAH AL-AHKAM AL-ADLIYA AND A COMPLETE CODE OF ISLAMIC CIVIL LAW § 1431 at 237 (Petyalying Jaya, Malaysia: The Other Press, January 2001) (C.R. TYSER, B.A.L., D.G. DEMETRIADES & ISMAIL HAQFI EFFENDI, trans.). [Hereinafter, MEJELLE.] See also NYAZEE, *supra*, at 246 (quoting MAJALLAH AL-AHKAM AL-ADLIYA [The *Mejelle*], § 1431).

<sup>4</sup> "Khaybar" is a name of a town about 100 miles north of Medina, in the Kingdom of Saudi Arabia. It is renowned for its date farms. In the times of Muhammad, Khaybar was home to a large Jewish community. Several Islamic legal precepts are based historically in events that occurred in and around Khaybar.

Muslim governmental authority, and work by Jewish tenants.

(2) Contemporaneous and Subsequent Practice —

During and after the life of Muhammad, his Companions (*Ṣaḥābah*) and subsequent generations of their followers made use of the *muzāra'ah* arrangement. While their use is not part of the *Sunnah* of the Prophet, and thus technically not a source for an Islamic legal rule, it has tended to broaden and deepen the sense of precedent supporting this kind of partnership.<sup>5</sup>

(3) *Qiyās* (Analogical Reasoning) —

Abū Yūsuf and Muhammad al-Shaybānī compared a *sharikah muzāra'ah* with a *sharikah al-muḍārabah*. At a detailed level, two contrasts were obvious. First, in a *muzāra'ah*, the capital takes the form of land, while in a *muḍārabah* the capital is financial (i.e., money). Second, in a *muzāra'ah*, the work takes the form of agricultural labor, while depending on the specific *muḍārabah*, the work could entail providing one of a wide range of goods or services. But, Abū Yūsuf and Muhammad al-Shaybānī argued that, at a conceptual level, the two forms of business association resemble each other. In both forms, one partner provides capital, and the other partner provides the work. For these students of Abū Hanifah, this similarity — linking the controversial *muzāra'ah* to the valid *muḍārabah* — was further evidence to legitimize the *muzāra'ah*.

(4) Economic Necessity —

Practical economic logic also legitimizes a *muzāra'ah*, according to Abū Yūsuf and Shaybānī. Often, people are owners of land, but do not have the time, inclination, or experience to make productive use of their property. Contemporaneously, other people lack land ownership, but have the time, inclination, and experience to plant, grow, and harvest crops, or raise livestock, on it. It would be a waste to let absentee ownership inhibit productive use of land. Indeed, on religious grounds, wasting gifts from God is sinful. Therefore, Abū Yūsuf and Shaybānī argued legalizing *muzāra'ah* is economically prudent. Doing so does more than simply put absentee-owned land in cultivation. It also results in job opportunities for agricultural laborers, raises incomes in the farm sector, and boosts agricultural output for the community.

The position against which Abū Yūsuf and Shaybānī argue is adopted by Abū Hanifah. The founder of the *Ḥanafī* School offers three reasons why *muzāra'ah* is not a legally valid form of business association:

(1) The *Sunnah* (Tradition) of the Prophet —

Abū Hanifah characterizes the contract Muhammad made with the people of Khaybar as a “*mukhābarah*.” This term is synonymous with

“*musāqah*.”<sup>6</sup> In brief, it is an irrigation contract. In other words, Abū Hanifah is saying the bargain between Muhammad and the Jews of Khaybar did not involve land, cultivation, and yield-sharing. Rather, it was a narrow deal involving only irrigation.

(2) The Khaybar Transaction and *Kharāj* —

Part of the *musāqah* (irrigation) bargain between Muhammad and the Jews of Khaybar involved a land tax, or *kharāj*. Professor Nyazee explains the meaning of “*kharāj*”:

*Kharāj* is of two types. The first is one in which the *imām* imposes a fixed levy in accordance with what the land is able to bear. The second type is the taking of a part of the produce as *kharāj*. Both types are valid. It appears that the people of Khaybar were being subjected to the second type. The evidence for this argument is that the Prophet (peace be upon him) did not stipulate a fixed period for them. Had it been *muzāra'ah*, according to those who permit it, is not valid without stipulation of a period.<sup>7</sup>

Whereas Abū Yūsuf and Shaybānī characterize the arrangement to give up half of the crop as consistent with a *muzāra'ah*, Abū Hanifah argues it is nothing more than a tax on the land. In essence, imposition of the *kharāj* on the Jews of Khaybar, who remained in possession of the land, is part of their submission to (i.e., peace treaty with) Muslim forces after their defeat in battle.

(3) Unknown Wages —

Abū Hanifah pointed out that as a general principle of partnership law, the amount of wages a partner is paid for her labor must be known (or, at least, knowable). In a *muzāra'ah* arrangement, the landowner receives rent, in the form of crop yield, from a tenant farmer, who works the land. In exchange, the worker not only receives possession of the land, but also a wage or earnings of some kind. For example, the wages could be the amount of crop to which the worker is entitled. However, this amount is not known (certainly not before the crop is harvested). A term such as “half the yield” is not specific enough, because the yield is not known. Thus, concluded Abū Hanifah, a *muzāra'ah* breaches the principle that wages be specified, rendering the entire arrangement impermissible.

On balance, the *Ḥanafī* School practices *sharikah muzāra'ah*. That is, the view of Abū Yūsuf and Muhammad al-Shaybānī has prevailed over the arguments of their teacher, and it has become the standard *Ḥanafī* School doctrine accepts a *muzāra'ah* as a *bona fide* form of partnership. This doctrine is embodied in a *fatwā* (i.e., an authoritative legal pronouncement by a *muftī*, who is the highest ranking authority of a School).

<sup>6</sup> NYAZEE, *supra*, at 337.

<sup>7</sup> NYAZEE, *supra*, at 280 (quoting the arguments from both sides, AL-ZAYLA'Ī, TAḤṬĪN AL-HAḠA'Q [CLARIFYING THE TRUTH], vol. 5 at 278 [Hereinafter, AL ZAYLA'Ī]; AL-MAGHRINĀNĪ, AL-HIDAYAH, vol. 4, at 53-54; AL-KASĀNĪ, BADA'Y' AL-SAGĀ'Y [BEAUTY OF THE WORK], vol. 8 at 3808 [Hereinafter, AL KASĀNĪ]).

<sup>5</sup> In general, the *Mālikī* School accepts the practice of the people of Medina (not Mecca) — the Companions of the Prophet (*Ṣaḥābah*) and first generation after him — as the fifth source of the *Shari'ah*, after the *Qur'ān*, *Sunnah* of the Prophet, *qiyās*, and *ijmā'*.



• **Mālikī School:**

The Mālikī School defines "*sharikah muzāra'ah*" as a:

partnership for cultivation and its contract is *ghayr lāzim* (terminable) prior to sowing and either party to this partnership for cultivation may revoke it.<sup>8</sup>

The Mālikī School does not permit *muzāra'ah*, in contrast to the Hanafī School. In other words, the Mālikī School accepts the views on the topic of Imam Abū Ḥanīfah.

• **Shāfi'ī School:**

Generally, the Shāfi'ī School does not accept *muzāra'ah* as a legally valid form of partnership. It reaches this conclusion based on the *Sunnah* of the Prophet, specifically the aforementioned transaction between Muhammad and the Jewish people of Khaybar as characterized by Imam Abū Ḥanīfah. However, there is a unique feature to the Shāfi'ī School perspective on the *muzāra'ah*. This School permits the establishment of a *muzāra'ah*, and accepts it as legally valid, in one narrow case, namely, whenever it is connected to *musāqāh* (irrigation). Thus, only a sharecropping arrangement that includes a provision for irrigation is acceptable to Shāfi'ī School *fukahā*.

• **Hanbalī School:**

In contrast to the Mālikī and Shāfi'ī Schools, the Hanbalī School has the same view on *sharikah muzāra'ah* as the majority of the Hanafī School. That is, the Hanbalī School accepts the arguments of Abū Yūsuf and Shaybānī. Interestingly, this School emphasizes economic necessity as a justification for authorizing a *sharikah muzāra'ah*.

For the Schools that accept the legal validity of a *sharikah al-muzāra'ah*, that is, the Hanafī and Hanbalī School, and in a narrow circumstance, the Shāfi'ī School, what elements are required to establish this partnership? The answer is simple. Only an offer and acceptance are needed. A land owner offers a tenant a parcel of land, by way of a *muzāra'ah*, and proposes they share produce from the land. The tenant is free to respond by accepting or declining the offer. Upon acceptance, the *muzāra'ah* is established. Critically, the share of the agricultural output from the land given over by the tenant to the landowner is all the tenant is obligated to provide to the landowner. In a *muzāra'ah* arrangement, the tenant does not pay any rent for the right to possess and work the land. The tenant may opt not to live on the land, and be an absentee farmer. These features differentiate a *muzāra'ah* from an *ijārah* (hiring of goods or services) arrangement.

A *sharikah muzāra'ah* contract typically is in writing, or at least is supposed to be so. In this partnership agreement, six terms (conditions) should be specified:

(1) **Ahliyah Partners (legal capacity or capability) —**

The contract must identify the partners — landowner (property owner) and tenant (worker, farmer) as having the legal capacity to enter into an

<sup>8</sup> NVAZEE, *supra*, at 278 (quoting MUHAMMAD 'ULAYSH, TAQHRĪT 'ALĀ AL-SHARH AL-KĀMIR ON THE MARGIN OF AL-DASHQ, HUSHTAH [MARGIN NOTES], vol. 3 at 372) [Hereinafter, AL DASHQ].

agreement. Whether a minor has this capability is not in dispute. However, some *fukahā* permit a minor to form *muzāra'ah*, but only if she receives authorization to do so by an adult (presumably, her legal guardian).<sup>9</sup>

(2) **Produce —**

The contract must define what the tenant is to plant, grow, and harvest on the land in question, unless the landowner commits to a general authorization that the tenant is free to sow whatever she prefers. This authorization is akin to a direction to act according to one's own discretion, found in other Islamic partnerships.

(3) **Utility —**

The contract must state that output from the land that is its subject is to be useful and capable of being cultivated. In practice, this condition appears to mean that the product be legal (hence, narcotics would not qualify) and tradable in a marketplace (e.g., dates, eggs, or wheat, all of which can be bought and sold).

(4) **Ownership and Division of the Produce —**

The contract must indicate that both landlord and tenant own the agricultural output from the land in question. The contract must further establish the division of the produce based on a fixed percentage.

(5) **Transfer of Possession —**

The contract should set out the legal obligation of the landlord to hand over the land that the subject of the deal to the worker, and thereby allow the tenant to work on it. It would seem to be an implied term that the landowner not interfere with the ability of the tenant to farm the land.

(6) **Duration —**

The contract should state its ending date.

The sixth condition rightly implies a *sharikah muzāra'ah* is a terminable contract. However, the power to terminate it lies only with the tenant. The contract is binding on the landowner, thus assuring the farmer she cannot be kicked off of the land in an arbitrary or capricious manner. Thus, the standard method of termination is the end of the duration specified in the contract. Death of the farmer also terminates the contract.

Despite the general protection in favor of the tenant against premature termination, there are two ways a *sharikah muzāra'ah* contract may end in a way that imposes adjustment difficulties on him or her. Suppose the landowner is in debt, and the only way she can pay the debt is by selling the land. Alternatively, suppose the land fails to yield any output. In either instance, the *muzāra'ah* contract is terminated.

<sup>9</sup> Likewise, some *fukahā* permit a slave to enter into a *muzāra'ah* arrangement, if allowed by her master.

### [B] *Musāqāh* (Irrigation)

*Sharikah al-musāqāh* is closely connected with, and treated alongside, *sharikah al-muzāra'ah*. The general meaning of "*musāqāh*" is a:

contract for the watering of trees between the owner of land and a worker on the condition of sharing the produce.<sup>10</sup>

Of course, if the land fails to yield any produce, then neither partner receives anything.

Evidently, *musāqāh* is a narrower form of partnership than *muzāra'ah*. Both involve crop sharing, but a *muzāra'ah* does not specify watering of crops. Hence, a *musāqāh* is considered an irrigation arrangement. A *musāqāh* does not mandate crop planting, growing, fertilizing, or harvesting. Technically, the worker is required only to provide irrigation — that is the point of the partnership, namely, for the landowner to get the worker to provide water to her land. Depending on the context, both kinds of partnership may be used to exploit the agricultural potential of the same parcel of land.

For example, consider a hypothetical plot of land called Tamimi Estates. Ms. Tamimi, the owner, is not skilled at farming, nor does she have the technical expertise or equipment to drill a well. She is interested in developing an orange grove on the Estates. Toward this end, Ms. Tamimi establishes a *muzāra'ah* partnership with Mr. Pirzada, an experienced fruit grower. Under the terms of their deal, Mr. Pirzada will plant, fertilize, care for, and harvest oranges on the Estates, in exchange for a defined percentage of the orange output. Ms. Tamimi permits him to live on the Estates as a tenant farmer. As for watering the grove, Ms. Tamimi negotiates a *musāqāh* partnership with Mr. Walid, who is a trained hydrologist and has the heavy equipment needed to find a well. Mr. Walid surveys the property, discovers a water source, and drills a well. Under the partnership terms with Ms. Tamimi, Mr. Walid receives a share of the oranges from the Estates. He does not, however, live on the Estates or otherwise have possession of that land.

That said, the Four *Sunni* Schools do not all specifically reference irrigation in their definitions of "*musāqāh*." The *Hanafi* School makes no mention of it, defining a "*sharikah al-musāqāh*" as:

a contract of work for part of the produce along with the conditions of validity.<sup>11</sup>

The *Māliki* School identifies "*sharikah al-musāqāh*" as:

a contract for serving trees and whatever is associated with it for part of the produce or for the whole lot of it.<sup>12</sup>

"Serving trees" and "associated matters" certainly would cover not only watering, but also fertilizing and other forms of care. The *Shāfi'i* School uses the word "care," teaching that a "*sharikah al-musāqāh*" as:

<sup>10</sup> NYAZEE, *supra*, at 337.

<sup>11</sup> NYAZEE, *supra*, at 286 (quoting AL-KASANI, *supra*, vol. 8 at 3831).

<sup>12</sup> NYAZEE, *supra*, at 287 (quoting AL-DASUQI, *supra*, vol. 3 at 539).

a contract (*mu'amalah* [transaction or agreement]) for the caring of trees for part of their fruit.<sup>13</sup>

Finally, the *Hanbali* School references irrigation, describing a "*sharikah al-musāqāh*" as:

the giving of trees to another so that he undertakes to water them and performs [*sic*] all other associated work for a known part of their produce.<sup>14</sup>

Why does the *Hanafi* School offer the least precise definition of "*musāqāh*"? That School is split on the question of whether a *muzāra'ah* is a *bona fide* form of partnership. Abū Hanifah argues a *muzāra'ah* is not legally justifiable, but his leading students, Abū Yūsuf and Shaybānī, take the opposite view. Insofar as *muzāra'ah* and *musāqāh* are related, given the split over the first kind of partnership, it might be surprising if the *Hanafi* School devoted much attention to articulating a clear definition of the latter term.

Indeed, as for the legal validity of *sharikah al-musāqāh*, the same argument concerning *sharikah al-muzāra'ah* among the Four Schools occurs in respect of *sharikah al-musāqāh*. The *Hanafi* School *fukahā'* are divided. The founder of the *Hanafi* School, Abū Hanifah, thought *sharikah al-musāqāh* is invalid. His two companions, Abū Yūsuf and Muhammad al-Shaybānī, disagreed and argued for the legalization of *musāqāh*. The *Hanbali* School follows the views of Abū Yūsuf and Shaybānī.

The *Māliki* School legal criteria for a valid *sharikah al-musāqāh* are cast in terms of exemptions:

... [*Musāqāh* is permitted as an exemption from the following rules:

1. *Ijārah* [hire or lease] with unknown wages;
2. Renting of land with what it produces;
3. Sale of fruit prior to the process of ripening, in fact, prior to its existence; and
4. *Gharar* [risk or uncertainty], because the worker does not know what the quantity will be.<sup>15</sup>

What this passage connotes is a *musāqāh* is legally valid because it is distinct from the four listed items — it is not a hire contract, land tenancy, fruit sale, or risky transaction. Finally, the *Shāfi'i* School reasons a *musāqāh* must be legally valid by referring to the *Sunnah* of the Prophet:

The source for it is the *mu'amalah* of the Messenger of Allāh (peace be upon him) with the Jews of Khaybar with respect to their date palms and their land for what would be produced by them.<sup>16</sup>

<sup>13</sup> NYAZEE, *supra*, at 287 (quoting AL-RAMLI, NIBAYAT AL-MUHTAJ [THE END FOR THE NEEDY] vol. 5 at 242 [Hereinafter, AL-RAMLI]).

<sup>14</sup> NYAZEE, *supra*, at 287 (quoting IBN QUDAMAH, AL-MUGHNI [THE FULFILLMENT] vol. 5 at 391).

<sup>15</sup> NYAZEE, *supra*, at 287.

<sup>16</sup> NYAZEE, *supra*, at 287 (quoting AL-RAMLI, *supra*, vol. 5 at 242).



In summary, although their exact rationales differ, three of the Four Schools definitively pronounce *musāqāh* to be a legally valid form of partnership.

What are the essential elements in forming a *sharikah al-musāqāh*? The Hanafi School compares a *sharikah al-musāqāh* to *sharikah al-muzāra'ah*. For this School, specifically, Abū Yūsuf and Shaybānī, offer and acceptance are the two key elements to establishing the partnership. A land owner offers land to a worker in the way of *musāqāh*, giving him or her a specific percentage of the produce. The worker accepts or responds by indicating the acceptance. With the acceptance, the *musāqāh* is formed. Among the other three Schools, the majority of *fukahā'* list four ingredients:

- [1] the subject matter specific to it; [2] the portion for which it has been concluded; [3] the description of the work required by the contract; and [4] the period for which it has been concluded and is permitted.<sup>17</sup>

As with other forms of contract-based partnership, these elements, and the entire *musāqāh* arrangement, should be set out in writing.

In a *sharikah muzāra'ah* contract, the same six terms for a *sharikah al-musāqāh* should be specified. But, there are four exceptions unique to a *musāqāh* arrangement:

The conditions of *musāqāh*, in their view [the majority of *fukahā'*], are the same as those of *muzāra'ah*, except in four matters: First, if either one of them refuses to perform the contract, he is to be forced to perform it as there is injury involved in it. This is different from the case of the owner of seed, who cannot be forced. Second if the period is over, access to the trees is to be given without rent and work is to be done without wages, and we will explain this in *muzāra'ah* with wages. . . . Third, if a third party is entitled to the trees, the worker will be entitled to reasonable wages from such a party, while in *muzāra'ah* the value of the crop is to be paid. Fourth, if the period needs to be determined, it will be presumed by way of *istihsān* as the season of the crop is well known.<sup>18</sup>

The first condition raises an interesting difference concerning termination between a *muzāra'ah* and *musāqāh* partnership.

A *muzāra'ah* contract is terminable (*ghayr lāzim*) by the tenant, but binding (*lāzim*) on the landowner. This asymmetry means the landowner cannot force a tenant to work on, or leave, the land. The worker is free to walk away, but then forfeits rights to her share of the crop. In contrast, the *Mālikī* School holds that a *musāqāh* contract binds both parties.<sup>19</sup> The worker must perform by providing irrigation services, in exchange for a designated share of the crop. This School also says a *musāqāh* contract may be inherited. As for termination methods, they are the same for both kinds of partnership.

<sup>17</sup> NYAZER, *supra*, at 288 (quoting Ibn Rusūd, *Bidayat al-Muṭṭahid* [THE START FOR THE MUṬṬAHID], vol. 2 at 245).

<sup>18</sup> NYAZER, *supra*, at 288 (quoting Al-Zayla'i, *supra*, vol. 5 at 284).

<sup>19</sup> NYAZER, *supra*, at 291 (citing Ibn Rusūd, *supra*, vol. 2 at 250, Al-Kasānī, *supra*, vol. 8 at 3835).

## PART EIGHT

### BANKING LAW, CAPITALISM, AND GLOBAL FINANCE

## Chapter 26

### BANKING LAW: RISK (GHARAR)

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If the poor are to be given priority, then there has to be enough room for *an ethical approach to economics* on the part of those active in the international market, *an ethical approach to politics* on the part of those in public office, and an *ethical approach to participation* capable of harnessing the contributions of civil society at local and international levels. . . . The history of twentieth-century economic development teaches us that good development policies depend for their effectiveness on responsible implementation by human agents and on the creation of positive partnerships between markets, civil society and States.

*Fighting Poverty to Build Peace*, Message of His Holiness Pope Benedict XVI for the Celebration of the World Day of Peace, 1 January 2009, ¶ 12 (emphasis original)

#### SYNOPSIS

- § 26.01 DEFINING “GHARAR”
- § 26.02 RATIONALE FOR PROHIBITION ON GHARAR
- § 26.03 TRADITIONAL ILLUSTRATION OF “GHARAR”
- § 26.04 MAJOR VERSUS MINOR GHARAR
- § 26.05 GHARAR AND TYPES OF FORBIDDEN (HARĀM) TRANSACTIONS
  - [A] Short-Selling and *Gharar*
  - [B] *Ja’alah* (Services Fee) Contracts
  - [C] *Bay’ Al-Urbān* (Down Payment) Contracts
  - [D] Sales of Unripe Fruit

#### § 26.01 DEFINING “GHARAR”

Whether banking is conducted on an Islamic or non-Islamic basis, risk is the logical starting point for any discussion of the topic. Every financial transaction involves risk and its allocation. To be sure, there are different types of risk, among the most prominent of which are:

- *Country risk* — the risk that the country in which a transaction is conducted encounters difficulties, typically of an economic nature, that bear adversely on that transaction.
- *Credit risk* — the risk of default by an obligor.



- *Currency risk* — the risk that a currency used in a transaction will appreciate or depreciate, relative to another currency (also called foreign exchange risk).
- *Insolvency risk* — the risk a party to a transaction will go bankrupt.
- *Legal risk* — the risk of a change in laws, regulations, or rules applicable to a transaction.
- *Political risk* — the risk that adverse political developments will occur to the detriment of a party in a transaction.

In every financial transaction, one party willingly accepts the shift of risk from another party, in exchange for compensation (such as a fee) from that other party. Put differently, in both Islamic and non-Islamic banking transactions, it is impossible to banish risk.

This being said, the *Shari'a* has formal rules about risk. In Arabic, "*gharar*" is the loosely equivalent term to the English concepts of "risk" or "uncertainty." It is sometimes said that *gharar* is prohibited in Islamic Law. That is rather an overstatement, insofar as risk and its transfer by mutual consent are at the heart of any financial transaction. However, as explained below, it is accurate to say the *Shari'a* contains important precepts about risk-taking and risk-shifting.

The word "*gharar*" originates from a three-letter past-tense verb "*gharra*," which means "to deceive."<sup>1</sup> The literal meaning of "*gharar*" in Arabic is "trick," or as Qāḍī Ayyad ibn Musa (1083-1149 A.D.) explains:

That which has a pleasant appearance and hated essence.<sup>2</sup>

As in non-Islamic legal systems, the *Shari'a* prohibits trickery, in the sense of fraud, in banking transactions. That is, the literal translation of "*gharar*" as "trick" points to the rationale behind the prohibition. Consider the definition of "*gharar*" offered by Professor Mustafa Ahmad Al Zarqa (1904-1999) of the University of Damascus:

[*Gharar* is] the sale of probable items whose existence or characteristics are not certain, the risky nature of which makes the transaction akin to gambling.<sup>3</sup>

In this definition, the analogy to gambling, and the intimation of excessive risk, are the keys to the justification for banning *gharar*.

<sup>1</sup> See MAHMOUD A. EL-GAMAL, *ISLAMIC FINANCE — LAW, ECONOMICS, AND PRACTICE* 202, endnote 28 (New York, New York: Cambridge University Press, 2006). [Hereinafter, EL GAMAL.]

<sup>2</sup> Quoted in EL GAMAL, *supra*, 202, endnote 28.

The French transliteration of the name of this Islamic judge is Qāḍī 'Iyad. Born in Gibraltar, and a judge in Granada, he was a famous *Maliki* School jurist. His full name is "Abū al-Faḍl Ayyad ibn Amr ibn Musa ibn Ayyad ibn Muhammad ibn Abdillāh ibn Musa ibn Ayyad al-Yahsubi al-Sabti." The university in Marrakech, Morocco, is named after him: University Cadi Ayyad Marrakech.

<sup>3</sup> Quoted in EL GAMAL, *supra*, at 58 (emphasis added) (quoting this and many classical definitions of "*gharar*" that highlight various types of deception, random events, and incompleteness of contract language from W. Al-Zuhayli, *Al-Fiqh Al-Islami wa Adillatuh* vol. 5 at 2408-3411 (Damascus, Syria: Dar Al-Fikr, 1997)).

## § 26.02 RATIONALE FOR PROHIBITION ON GHARAR

The rationale for the prohibition on *gharar* is not risk or uncertainty *per se*. Rather, as the above-quoted definition from Professor Al-Zarqa suggests, *gharar*, in the sense of trickery, and gambling involve unjust enrichment. One side benefits from a transaction, while the other side loses. In itself, this consequence means nothing more than that the transaction is a zero-sum game, the outcome of which is uncertain to the players at the beginning. If they are playing by mutual consent with full knowledge of the risk, then there should be no moral or religious difficulty.

Simply put, the *Shari'a* does not forbid uncertainty — no legal system can do that. Rather, it stresses that gains must be had through straightforward, transparent, and upright dealings. The issue surrounding *gharar* lies in the source of enrichment of one party, and correspondingly, the deprivation of the counter-party. Is that source unjust, because it involves some element of trickery, deception — in a word, fraud? In the compilation of *hadiths* by *Imām* Bukhari, there is an entire "Book of Tricks" containing 25 *hadiths* in which the Prophet Muhammad exhorts believers to avoid the use of trickery in all aspects of their lives, from prayer and *zakāt* to marriage and bargains.<sup>4</sup>

Yet another *hadith* offers a general approach to the problem of *gharar*. The Prophet says:

Why do you get the wealth of your brother, without justification?<sup>5</sup>

The problem with relying on this *hadith* alone to justify the prohibition against *gharar* is its context. The Prophet said these words in response to a hypothetical situation in which fruit is sold that carries a disease and leads to the illness or death of the buyers who consumed the fruit. The teaching that follows is that the seller should compensate the buyers for their loss. The link to *gharar* is only indirect, in that it may have been unclear as to whether the fruit posed a sanitary threat. Accordingly, a more specific *hadith* is needed, and fortunately *Imām* Muslim records one:

A man mentioned to the Messenger of Allah . . . that he was deceived in a business transaction, whereupon Allah's Messenger . . . said: When you enter into a transaction, say: There should be no attempt to deceive.<sup>6</sup>

<sup>4</sup> See THE TRANSLATION OF THE MEANINGS OF SAHIH AL-BUKHARI, ARABIC-ENGLISH by Dr. Muhammad Muhsin Khan vol. IX, book LXXXVI (The Book of Tricks), pp. 71-90, *hadiths nos.* 85-110 (Islamic University, Medina, Kingdom of Saudi Arabia: Dar Ahya Us-Sunnah, Al Nabawiya, March 1978). [Hereinafter, BUKHARI.]

<sup>5</sup> SAHIH MUSLIM — BEING TRADITIONS OF THE SAYINGS AND DOINGS OF THE PROPHET MUHAMMAD AS NARRATED BY HIS COMPANIONS AND COMPILED UNDER THE TITLE AL-JAM'U-S-SAHIH BY IMAM MUSLIM, RENDERED INTO ENGLISH BY ABDUL HAMID SIDDIQI, WITH EXPLANATORY NOTES AND BRIEF BIOGRAPHICAL SKETCHES OF MAJOR NARRATORS, CORRECTED AND REVISED BY DR. HASSAN VOL. III.A, book 22 (Book of Share Tenancy), p. 33, *hadith no.* 1554 (Lahore, Pakistan: Sh. Muhammad Ashraf Booksellers and Exporters, 1990). [Hereinafter, MUSLIM.]

<sup>6</sup> MUSLIM, *supra*, vol. III.A, book 21 (Book of Buyu — Book Pertaining To Business Transactions), p. 13, *hadith no.* 1533. Interestingly, *Imām* Muslim identifies the man as Habbān bin Munqith bin Amr al-Ansari, who was 130 years old and had been wounded in battle.

Essentially the same *hadith* is recorded by *Imām* Bukhari. See BUKHARI, *supra*, vol. III, book XXXIV

Evidently, these two *hadiths* articulate the underlying principle at stake with *gharar*, namely, that it potentially involves taking money through means that involve random chance, or even devious behavior.

It is important to distinguish the Banking Law concept of *gharar* from the Criminal Law concept of *sariqa* (theft). Theft is a *haqq Allāh* (claim of God) offense and triggers a *hadd* (limit) punishment. *Gharar*, even if it seems close to theft because of egregious behavior by one party, does not entail all the requisite elements of *sariqa*. The risk, or uncertainty, may arise from unintentional non-transparency in a transaction, or through the randomness of outcomes. Gambling provides a good analogy. Few observers equate gambling with "theft" in the sense that term appears in criminal law statutes and cases. All observers appreciate the degree of chance that separates winners from losers.

There also is a consequential element to the rationale for the *Shari'a* prohibition on *gharar*. In the first of the above-quoted *hadiths*, Muhammad speaks (disarmingly, perhaps, in comparison with Wall Street parlance) of one's "brother." That reference is not simply to blood relatives, but to all parties with whom or which one might enter a financial transaction. Thus, in financial dealings, a person ought to be sensitive to underlying human relationships, and appreciate the bond among people, and treat their financial counter-parties with dignity. Trickery has deleterious effects on the individuals who are its victims, and on a community at large. The victim resents what transpired, and becomes hostile toward the perpetrator. That is, *gharar* engenders enmity toward a person who cheats to make money from others. The community is worse off on account of this enmity. A general climate of frustration, anger, and even hatred can emerge if the sense of being cheated is widespread, and society can be polarized by a minority wrongfully increasing its wealth at the expense of the majority. Financial transactions can be impeded, markets paralyzed, and economic growth slowed, even halted and reversed, all because of distrust in the integrity of market participants and institutions.

Americans — whether Muslim or not — need look no further back than to the summer and fall of 2008, when problems in the sub-prime mortgage market and with large hedge funds triggered a financial collapse. Smart Wall Street financiers with degrees from brand-name universities no longer appeared trustworthy. Indeed, many were found to be no different than petty thieves — except the consequences of their trickery were far more systemic than that of a common criminal.

### § 26.03 TRADITIONAL ILLUSTRATION OF "GHARAR"

To give a traditional example of *gharar*, consider the following hypothetical illustration. A seller would like to sell an item, such as a horse, but does not have possession of that item. That is because the horse is lost. This example highlights how, in a transaction involving *gharar*, both parties face a potential loss, and either one of two parties actually suffers the loss. The seller is willing to sell the lost horse for half the price to whoever would take the risk of finding it. Conversely, a buyer — who is apprised the horse is lost — is willing to take the risk of buying the lost

horse, and thereafter finding that horse. In this situation, if the buyer finds the horse, the seller loses. Why?

The answer is the seller sold the horse for a lower price than she would have been able to command if the horse had been in her possession. The buyer benefits from procuring a horse for less than what it is worth. The loss to the seller and gain to the buyer are unjust, because they involve a high degree of risk, or uncertainty. What if the buyer does not find the horse? Then, the buyer is the losing party. The loss arises on the assumption she paid money, albeit a reduced amount, for nothing. The seller gains the proceeds from the sale of a horse that is not in her possession. Again, the gain-loss pair is unjust, because of the excessive risk or uncertainty.

### § 26.04 MAJOR VERSUS MINOR GHARAR

Not every transaction involving *gharar* is banned under the *Shari'a*. Some transactions might contain *gharar*, yet still be permitted. The obvious question is what type of *gharar* is permissible versus prohibited? To answer this question, a distinction must be made between two types of *gharar*: major *gharar*, and minor *gharar*. On the one hand, among the *fukahā*, the prohibition of major *gharar* is not controversial. Therefore, there is consensus (*ijma'*) that a major *gharar* invalidates a contract. On the other hand, a minor *gharar* is not forbidden. However, the *Shari'a* encourages Muslims to prevent and avoid the occurrence even of minor *gharar*. The particular distinction between "major" and "minor" thus is the dividing line between permissible and forbidden *gharar*, and this distinction is explored below.

Professor Al Darir identifies four conditions to discern whether *gharar* is major, and in turn, to know whether a contract is invalidated:

- (1) The *gharar* must be excessive.
- (2) The contract that is potentially affected must be a commutative financial contract.
- (3) The *gharar* must affect the principal components thereof.
- (4) If a commutative contract contains excessive *gharar*, but meets a need that otherwise cannot be met, then the *gharar* does not invalidate the contract.<sup>7</sup>

(By "commutative," Professor Al Darir means a transaction involving substitution.) In other words, the first and third conditions state that major *gharar* exists if there is excessive risk or uncertainty about a material term (i.e., one of the principal components, like price or quantity). The second condition limits the general rule against *gharar* to the world of financial transactions, and specifically to deals involving substitution. The fourth condition actually is an exception: even major *gharar* is tolerated if the need the contract serves cannot be fulfilled in any other way.

Accordingly, a financial contract is valid if it is free from the first three conditions. If a contract is not characterized by the first three conditions, then it involves minor *gharar*. Alternatively, a contract is valid if the fourth condition

<sup>7</sup> The Book of Sales (Bargains), p. 186, *hadith* no. 328.

<sup>7</sup> See EL GAMAL, *supra*, at 58-59.



applies. If the contract is not free of the first three conditions, but the fourth condition applies, then it is one involving major *gharar*, and it is saved by the exception. This exception is akin to *ḍarūrāh*, which means necessity. This exception, it may be observed, also is redolent of short-supply rules in International Trade Law. Under such rules (contained in the General Agreement on Tariffs and Trade (GATT), World Trade Organization (WTO) accords, and United States trade law), a measure curtailing or banning exports of a particular product, which otherwise would be illegal, may be permissible if there is no alternative domestic source of supply for the product. Similarly, a ban on trade relations with a particular country typically is subject to an exception to the effect that dealing with the suspect country would serve a larger national interest.

Why does the *Shari'a* allow for the validity of financial contracts with minor *gharar*? "Flexibility" is the answer. It is difficult for financial parties to explain every detail of a transaction, and produce a perfect contract, wherein there is no risk or uncertainty as to any point. Surely some aspect of the deal is ambiguous or unclear, or some term the parties might have inserted in the contract had they thought about it is missing. But, there is no trickery going on between the parties, no effort to obfuscate, and no harm that one party seeks to inflict on another. Islamic Law does not want the best to be the enemy of the good. Knowing that perfection is impossible to reach, it would be senseless — and damaging to the economic interests of the parties and their communities — to invalidate scores of transactions that otherwise involve no fraud. Therefore, the *Shari'a* is pragmatic in showing flexibility by letting the minor *gharar* transaction go forward.

## § 26.05 GHARAR AND TYPES OF FORBIDDEN (ḤARĀM) TRANSACTIONS

### [A] Short-Selling and *Gharar*

The traditional example of *gharar* leads to a modern illustration, characteristic of non-Islamic financial centers like Wall Street. The illustration is short-selling, which means the sale of an asset that the seller does not own, and possibly does not even possess (in which case the deal is called "naked" or "uncovered" short-selling). The asset could be a stock, bond, or other financial instrument, or a foreign currency. For example, suppose a hedge fund called Tiger Capital Management sells short 1,000 shares of stock in Bank of China, to a buyer, the State of Missouri Pension Fund. Tiger does not own those shares, but borrows them from a securities lender, such as United Missouri Bank. (Commercial banks typically lend securities for this purpose, and charge a borrowing fee.) Tiger sells the Bank of China stock short at a price of U.S. \$10 per share, earning a total of \$10,000. It is obligated (under applicable securities regulations) to deliver that stock to the Pension Fund on or before the expiry of three days after the sale transaction, *i.e.*, on or before "T + 3" (where "T" is the trade date). The stock Tiger sells is borrowed from United Missouri Bank for a fee it pays to the Bank of \$1,000. On or before T + 3, Tiger delivers the shares it borrowed from the Bank to the Pension Fund.

At this juncture, attention shifts to the relationship between Tiger and United Missouri Bank, because Tiger is obligated to deliver back 1,000 shares of Bank of China stock. Where does Tiger get that stock, or, as the financial jargon goes, how does Tiger "cover" its exposure, given that it has sold the borrowed shares to the Pension Fund? The answer is that Tiger buys the shares on the stock market (or over the counter, if applicable), in time to meet its delivery obligation. Because the stock is fungible, United Missouri Bank does not mind that the shares Tiger delivers to it are not the precise ones the Bank loaned to Tiger. (Indeed, in modern securities markets, stock typically is paperless, or un-certificated, *i.e.*, it is an electronic entry on the appropriate books and records of its owner.) If Tiger buys the shares at any price less than \$9 per share, then it makes a profit from the short sale. That is because it received \$10,000 on the sale to the Pension Fund, and paid a \$1,000 borrowing charge to United Missouri Bank, the difference being \$9,000. As long as Tiger can cover its open short-sale position of 1,000 shares at less than \$9 per share, it will not consume the profits it made on the short-sale.

Short-selling has at least two distinctly positive effects. First, it adds liquidity to a financial market. Short-sellers are ready, willing, and able to sell an asset, thus adding to the supply of that asset available in the marketplace. Second, short-selling is a signal to the market that there may be problems with the asset or its future environment. Its managers — the officers of the company whose shares are being sold short — may be incompetent or corrupt. The climate for the good or services that company provides may be gloomy, at least in the view of short sellers. For example, sellers may short an airline stock in the belief jet fuel prices are soon to rise.

But, is short-selling un-Islamic? Clearly, there is *gharar* involved. Whether the short-seller makes a profit is uncertain. It depends on whether the price of covering its position (buying another 1,000 of Bank of China shares) is sufficiently below the short-sale price (to the Pension Fund). Stated differently, the short-seller is betting the asset price will fall after its initial sale of the asset, so that it can cover its position at a profit. That gamble involves a potentially unlimited liability. The price of the asset could rise stratospherically, and wipe out the entire capital of the short-seller. At the same time, the *gharar* does not involve trickery, assuming all parties in the transaction understand what each other party is doing, and why, and assuming the short-seller does not spread false rumors in the securities markets to push down the price of the asset. However, assumptions about transparency and integrity often are dubious in practice. Moreover, damage to the community from short-selling can be considerable, if it leads to general stock market declines that depress the value of financial portfolios of average investors.

There are *hadiths* that rather strongly counsel the answer to the above-posed question is that short-selling indeed is un-Islamic. *Imām* Bukhari gives as examples of a "*gharar*" sale the selling of fish that are un-fished, or the selling of a bird that has not yet been caught.\* He records the following injunction:

Allāh's Apostle . . . forbade the sale called '*Habab-al-Habala*' [literally, pregnancy of the pregnant, or simply pregnant, but referring to the sale of

\* BUKHARI, *supra*, vol. III, book XXXIV (The Book of Sales), fn. 1 at p. 199.

an unborn animal] which was a kind of sale practiced in the Pre-Islamic Period of ignorance. One would pay the price of a she-camel which was not born, yet would be born by the immediate offspring of an extant she-camel.<sup>9</sup>

Moreover, *Imām* Muslim recounts the following prophylactic rule:

Allāh's Messenger . . . had forbidden a transaction determined by throwing stones, and the type which involves uncertainty.<sup>10</sup>

An Explanatory Note to the second *hadith* is particularly insightful. The reference to a transaction "determined by throwing stones" is to a market practice prevalent in pre-Islamic Arabia.<sup>11</sup> To determine which among two or more possible transactions would be binding, either the seller or buyer would throw a stone at targets representing each such possibility. The transaction symbolized by the target the tossed stone touched would be the deal that bound the seller and buyer. For example, a seller might offer to sell any one of three shirts to a buyer at the price of one dirham. Which shirt does the buyer get? The answer is the shirt by which the stone the buyer throws comes most closely to rest. Obviously, selecting the terms and conditions of a transaction by throwing stones is unpredictable. It involves random chance influenced only by the skill of the seller or buyer in throwing stones accurately.

As for the reference to "uncertainty" in the second of the two above-quoted *hadiths*, the Explanatory Note summarizes two pre-eminent points:

(a) the transaction should be done after full inspection and *not haphazardly leaving much to chance*. There should be a *clear understanding on both the sides*; (b) Islam does not approve of the transaction which may be called as buying a bird in a bush. The bargain should be struck about *what is present and lying in the possession of the seller*. What lies uncertain in the womb of the future, or what stands outside the possession of the buyer [*sic* (seller)], is not a valid bargain in Islamic Law.<sup>12</sup>

<sup>9</sup> *Bukhari, supra*, vol. III, book XXXIV (The Book of Sales), p. 199, *hadith* no. 353.

<sup>10</sup> *Muslim, supra*, vol. IIIA, book 21 (Book of Buyu — Book Pertaining to Business Transactions), p. 5, *hadith* no. 1513.

<sup>11</sup> *Muslim, supra*, vol. IIIA, (Book of Buyu — Book Pertaining to Business Transactions), p. 5, Explanatory Note (1) to *hadith* no. 1513.

<sup>12</sup> *Muslim, supra*, vol. IIIA, (Book of Buyu — Book Pertaining to Business Transactions), p. 5, Explanatory Note (2) to *hadith* number 1513 (emphasis added).

As cited above, the first *hadith* is quoted from *Imām* Bukhari. Essentially the same *hadith* is recorded by *Imām* Muslim, albeit with less precision and detail than by *Imām* Bukhari. The account in *Sahih* Muslim is:

[The people of pre-Islamic days used to sell the meat of the slaughtered camel up to *habab-al-habala*. And *habab-al-habala* implies that a she-camel should give birth and then the [born should grow young] and become pregnant. Allāh's Messenger . . . had forbidden them that [transaction].

See *Muslim, supra*, vol. IIIA, Book 21 (Book of Buyu — Book Pertaining to Business Transactions), p. 5, *hadith* no. 1514R1, p. 5 (bracketed inserts original). Thus, the Explanatory Note quoted above applies equally well to both compilations.

The italicized language in point (a) reflects the general concern about *gharar*, namely, chance and non-transparency. In point (b), the italicized language can be read as an outright ban on short-selling.

However, a plausible rebuttal to this interpretation would stress the distinction between "possession" and "ownership." A short-seller does not own the asset that is the subject of the sale, yet the seller may well be in actual or constructive possession of that asset. After all, in the above hypothetical, Tiger borrowed shares from United Missouri Bank. As a borrower, Tiger was in possession — at least momentarily, in a physical or imputed sense — of those shares before selling them to the Pension Fund. In sum, the *Shari'a* does rather strongly incline against short-selling, but a lively debate may be had on the point.

It is important to appreciate that *Shari'a* scholars are not the only ones who voice objections to short-selling and hedging practices. Europe first banned short-selling in 1609, when the Dutch banned the practice due to the fall in share prices of the Dutch East India Company. The Bank of England followed suit, banning short-selling in 1697. Today, most developed countries have implemented regulations of some sort to limit the kinds of short-selling risks investors may take on. Australia, Brazil, Canada, China, France, Germany, Hong Kong, Italy, Japan, Korea, Netherlands, Russia, Singapore, Spain, Switzerland, Taiwan, the United Kingdom, and the United States have implemented various regulations against short-selling, especially since financial markets spiraled downwards following the September 2008 collapse of Lehman Brothers.<sup>13</sup> For example, America's Securities and Exchange Commission (SEC) adopted one of the most aggressive stances against the practice, forcing all short-sellers of public companies to deliver the promised securities to the buyer on the settlement date or face penalties. Additionally, a new anti-fraud rule makes it illegal for short-sellers to lie about their ability to deliver the securities on a given date.

Muslim countries, such as the Kuwait, Saudi Arabia, and the United Arab Emirates (UAE, specifically the Emirate of Dubai), also address problems caused by short-selling investors. For instance, in 2008, the Dubai Financial Market called on banks to halt short-selling, because the practice violated existing rules and exacerbated the downward economic trend. Saudi Arabia likened short-sellers to the "mafia," because they manipulated the market and caused suffering to investors.<sup>14</sup>

Internationally prominent non-Muslim religious clerics have spoken out against the practice. The Archbishop of York, John Sentamu (1949-), likened short-sellers to "bank robbers and asset strippers."<sup>15</sup> The Archbishop of Canterbury, who is the leader of the Church of England and head of the world-wide Anglican Communion, called on governments to identify more targets after short-sellers. Short-sellers and hedge funds criticize the Church's condemnation, however, because of the policy of the Church of lending out foreign stock, which many claim perpetuates short-

<sup>13</sup> James Mackintosh, *Short Rift*, *FINANCIAL TIMES*, 6 October 2008, at 10. [Hereinafter, Mackintosh.]

<sup>14</sup> Abeer Allam, *Saudi Investors in the Dark as Index Plummets*, *FINANCIAL TIMES*, 14 November 2008, at 7.

<sup>15</sup> Quoted in Mackintosh, *supra*.



selling. The Church counters this claim by asserting its portfolio does not include hedge fund products.<sup>16</sup>

In sum, targeting short-sellers and hedge funds for regulatory restrictions has become prevalent, especially during shaky economic periods. Various countries and organizations do so, using a variety of tools. Reputation, too, is a sanction. Short-sellers and hedge funds are painted as villains, even if a more considered approach would be to identify deeper, structural sources of financial woes. It is incumbent on contemporary Islamic scholars to answer in a persuasive manner the important question: does Islam prohibit short-selling, and why? Only when scholars pause to answer crucial financial questions like this one can Muslim investors comfortably devise real solutions to counter economic collapse. To the extent this investigation is an ecumenical one, engaging scholars of different faiths, then so much the better. After all, financial markets are global, cutting across investors of all faiths — and even no faith — so there is no reason to localize the analysis and confine it to a particular religious perspective.

### [B] *Ja'alah* (Services Fee) Contracts

Two transactions that are commonplace in non-Islamic economies are consultancy agreements and down payments. Interestingly, both transactions may be considered forbidden (*harām*), at least among some Islamic legal scholars (*fukahā'*), because they entail *gharar*. In Arabic, the controversial transactions are known as *ja'alah* (services fee) and *bay' al-urbān* (down payment).

Literally, "*ja'alah*" is a noun connoting "give for," and is derived from the verb "*ja'al*," which means "to give." In an economic context, "*ja'alah*" is defined as an

[a]greement with an expert in a given field to undertake a task for a pre-determined fee or commission (as in a consultancy agreement or contract).<sup>17</sup>

Put differently, the agreement is one in which a fee is paid to a service provider to perform a task. Thus, "*ja'alah*" may be thought of as a services fee, or job wages, arrangement.

To clarify further the meaning of this term, it is necessary to appreciate that under a *ja'alah* agreement, the hired person is not entitled to a service fee or wages if that person does not complete the specified work. For example, suppose an owner loses her horse. The owner enters into an agreement with an expert on horses to find the horse. Once the expert finds the horse, the expert is paid a specified sum of wages. But, if the expert is not able to find the horse, the owner is not obligated to pay the expert anything.

Is this *ja'alah* agreement forbidden (*harām*) because it entails *gharar*? Only the *fukahā'* of the Hanafi School answer "yes." These *fukahā'* argue the person hired (in the above hypothetical example, the expert in horses) is the losing party in this

situation. In the above hypothetical, suppose the expert in horses does not find the horse. The expert will have expended time and effort, yet receive no payment. In modern economic parlance, the expert suffers an uncompensated opportunity cost. The obvious response is the expert freely entered into the *ja'alah* agreement, and surely understood the risk of non-payment upon failure to find the horse. In brief, the expert voluntarily assumed this risk. It is perhaps odd the Hanafi School *fukahā'* take a strict approach to *ja'alah* contracts, in light of the general permissiveness of that School to business dealings.

The other three Schools — *Mālikī*, *Shāfi'ī*, and *Hanbalī* — permit a *ja'alah* arrangement. Their *fukahā'* argued the transaction does not involve *gharar*. They see the deal as a win-win or lose-lose transaction, i.e., the outcome is not asymmetric. In the above example, if the horse is returned, then the owner and finder benefit. The former gets back the horse, and the latter is paid a fee. If the horse is not returned, then neither benefits. These three Schools support their argument using *qiyas*. They analogize to an example in *surah* 12 of the Qur'an from the Story of Joseph:

<sup>69</sup>Then, when they [the brothers of Joseph] presented themselves before Joseph, he [Joseph] drew his brothers apart and said [to his closest brother], "I am your brother, so do not be saddened by their [the other brothers] past actions [towards Joseph]," <sup>70</sup>and, once he [Joseph] had given them their provisions, he placed the drinking-cup in his brother's pack. A man called out, "People of the caravan [i.e., the brothers]! You are thieves!" <sup>71</sup>and they [the brothers] turned and said, "What have you lost?" <sup>72</sup>They [the guards of the king] replied, "The king's drinking-cup is missing [i.e., the measuring cup of Joseph, who the Egyptian Pharaoh appointed as the king — that is minister — of commerce and the marketplace]," and "Whoever returns it will get a camel-load [of grain]," and, "I [Joseph, the king of commerce] give you my word." <sup>73</sup>They said, "By God! You must know that we did not come to make mischief in your land: we are no thieves." <sup>74</sup>They asked them, "And if we find that you are lying, what penalty shall we apply to you?" <sup>75</sup>and they answered, "The penalty will be [the enslavement of] the person in whose bag the cup is found: this is how we punish wrongdoers." <sup>76</sup>[Joseph] began by searching their bags, then his brother's, and he pulled it out from his brother's bag.

In this passage, Joseph is the person offering a *ja'alah* contract. That is, he is the one agreeing to pay a fee to anyone who finds the missing drinking cup.

The *fukahā'* argue these *ayat* state that whoever finds the king's cup will receive a fee, namely, grain. Conceptually, there is no difference to finding a horse, or performing any specified task. Note, however, two key facts that make the analogy to a *ja'alah* contract less than perfect. First, Joseph not only offers the contract, but also performs it. He is at once akin to the horse owner and horse finder. Second, the contract arises because of a ruse. Joseph did not lose the cup. Rather, he planted it in the backpack of his favorite brother for two reasons. First, he sought to help that brother escape from the company of his other brothers. Second, Joseph wanted to punish the other brothers for what they previously did to him. Those other brothers

<sup>16</sup> See Mackintosh, *supra*.

<sup>17</sup> ZAMIR IQBAL & ABIR MIRAKHOR, AN INTRODUCTION TO ISLAMIC FINANCE THEORY AND PRACTICE, GLOSSARY at x (Singapore: John Wiley & Sons (Asia) Pte Ltd, 2007). [Hereinafter, Iqbal & Mirakhor.]

abandoned him in a deserted land, because they were jealous that their common father, Jacob, was closest to Joseph.

Despite these distinctions, the *Māliki*, *Shāfi'i*, and *Ḥanbali fukahā'* find the analogy sufficiently compelling to uphold *ja'alah* arrangements. For them, there is no prohibited *gharar* in these deals. By further extension, into modern times, energy exploration contracts are permissible. On the one hand, a finder of an oil well or natural gas source gains a finder's fee. The party (e.g., a land owner or other rights holder) that charged the finder with the exploratory task benefits from having a well or source it can exploit. On the other hand, if no energy supply is discovered, neither the party with exploration rights, nor the explorer, obtains any benefit.

### [C] *Bay' Al-Urbān* (Down Payment) Contracts

A *bay' al-urbān* contract is an arrangement to make a down payment for the purchase of an asset. The term is defined as:

[p]ayment of a portion of the full sale price paid in good faith as earnest money. In case the buyer decides not to complete the sale, this advance payment is forfeited to the seller.<sup>18</sup>

As the definition suggests, the seller of an asset is entitled to the down payment if the buyer defaults on the agreement to purchase that asset.

Where does the *gharar* lie in a *bay' al-urbān* contract? The answer is in the uncertainty as to whether the down payment will be returned to the buyer. The buyer is at risk of losing the down payment, a risk tied to the uncertainty of performance by the buyer of the agreement to purchase the asset in question. If the underlying asset sale transaction is not complete, then the buyer loses the down payment, which the seller gains. That gain is said to be for nothing, i.e., in exchange for no value. Accordingly, the *fukahā'* of three Schools — *Hanafi*, *Māliki*, and *Shāfi'i* — consider a *bay' al-urbān* contract *ḥarām*, because of this *gharar*.

Their conclusion, however, rests on weak grounds. In fact, the seller does give up value in return for a down payment forfeited by a buyer. During the time between (1) final agreement on a sales contract, and (2) closure (i.e., commencement of performance) of that contract, the seller withdrew the asset from the market and preserved it for the benefit of the buyer. The seller incurs an opportunity cost doing so, as it could have sold the asset to another, possibly for an even higher price. The *Ḥanbali fukahā'* accept this rationale, and is the only School that approves of a this type of a *bay' al-urbān* transaction. However, the *Ḥanbali* School requires the prior agreement from both, the seller and the buyer, in order to permit this transaction. As with *ja'alah* contracts, with *bay' al-urbān* deals, it is *Ḥanbali* School — not the normally more progressive *Hanafi* School — that lends its approval.

There is a third transaction commonplace in non-Islamic economies that entails forbidden *gharar*. It is the sale of un-ripe fruit, an everyday occurrence in large values and volumes in modern international and domestic agricultural markets. If

fruit had to be ripe to sell it, then it might be spoiled by the time it is delivered to the buyer. Consequently, fruit typically is picked when it is not yet ripe — green bananas being an obvious example — and shipped in that state. By the time it gets to the buyer, such as a wholesale grocery store, it still is not fully ripe. The ripening occurs over several days, while the grocer proudly displays the fruit in the hopes of attracting retail purchasers.

### [D] Sales of Unripe Fruit

All Four Schools agree on the injunction against selling fruit before ripeness. This prohibition is based squarely on a *ḥadith*:

Allah's Messenger . . . had forbidden the sale of palm trees (i.e., their fruits) until the dates began to ripen, and ears of corn until they were white and were safe from blight. He forbade the seller and the buyer [from such a transaction].<sup>19</sup>

Read carefully, this *ḥadith* does not ban selling fruit that is not fully grown.<sup>20</sup> The key words are italicized. The *ḥadith* recognizes implicitly what contemporary agri-businesses know from experience, that to wait until a fruit is fully ripe before selling it is to wait too long. The risk of spoilage is high, and the fruit has little or no shelf life, compelling the buyer to consume it almost immediately. Thus, it is permissible to sell fruit anytime after it has commenced the ripening process, a period that might broadly be characterized as "almost ripe." Indeed, one *ḥadith* uses this characterization:

The Prophet . . . forbade the sale of fruits till their benefit is evident; and the sale of date palms till the dates are almost ripe. He was asked what "are almost ripe" meant. He replied, "Got red and yellow."<sup>21</sup>

"Almost ripe," the "benefit is evident," and "red and yellow" (i.e., not green) all connote the same idea. Conversely, if fruit is so unripe that it is susceptible to blight, then it should not be sold. Another *ḥadith* explains the link between the un-ripened state and susceptibility to disease:

In the lifetime of Allah's Apostle . . . the people used to trade with fruits. When they cut their date fruits and the purchasers came to receive their rights, the sellers would say, "My dates have got rotten; they are blighted with disease, they are afflicted with Qithām [a disease which causes the fruit to fall before ripening]." They would go on complaining of defects in

<sup>19</sup> MUSLIM, *supra*, vol. III.A, Book 21 (Book of Buyu — Book Pertaining to Business Transactions), p. 14, *ḥadith* no. 1535 (emphasis added).

<sup>20</sup> Admittedly, there is one *ḥadith* that states:

Allah's Apostle . . . forbade the sale of date fruits till they were ripe. Abū 'Abdullāh [Al-Bukhārī] said, "That means till they were red [can be eaten]."

BUKHARI, *supra*, vol. III, book XXXIV (The Book of Sales (Bargaining)), p. 220, *ḥadith* no. 400 (bracketed insert in original) (emphasis added). However, this strict utterance is qualified by other *ḥadiths*, such as the ones quoted herein. In other words, it is not the widely accepted view that fruits must be entirely ripe to be sold.

<sup>21</sup> BUKHARI, *supra*, vol. III, book XXXIV (The Book of Sales (Bargaining)), *ḥadith* no. 402 at p. 220.

<sup>18</sup> IQBAL & MIRAKHOR, *supra*, at 82.



their purchases. Allāh's Apostle . . . said, "Do not sell the fruits before their benefit is evident (*i.e.*, free from all the dangers of being spoiled or blighted)," by way of advice for they quarreled too much.<sup>22</sup>

In brief, there is too much uncertainty — *gharar* — as to whether this very young fruit will mature. The seller would be unjustly enriched (and the buyer unjustly deprived) by obtaining money (from the buyer) for fruit that might spoil on account of the early stage at which it was sold. That money could take the form of cash, or dates, in a barter transaction as described in the *hadith*.

What, then, is the precise dividing line between "not almost ripe" and "almost ripe"? When does the unacceptable major *gharar* associated with selling fruit that is "not almost ripe" become permissible minor *gharar* correlated with "almost ripe" fruit? Conceptually, that line is "good condition" — the fruit must be in a condition suitable for sale, and by extension, near-term consumption without causing illness or death. The beauty of the above quoted *hadith* is it allows for the interpretation that agricultural science should answer the question. Different crops — dates and corn, for instance — cross that line at a point known best to specialists (including experienced farmers).

A final and amusing note is whether this *hadith* applies to vegetables, as well as fruit? After all, corn surely is a vegetable? In fact, corn fits in both categories, depending on its origin. Corn is a grain. When it originates from the reproductive part of a plant, it is a fruit. When it comes from the vegetative part of a plant, it is a vegetable. That said, by use of *qiyās* (analogical reasoning), the *hadith* may be applied to any fruit or vegetable, or any object that is edible after a ripening process, and even to decorative flowers.

<sup>22</sup> BUKHARI, *supra*, vol. III, book XXIV (The Book of Sales (Bargains)), pp. 218-219, *hadith* introducing Chapter 87 (bracketed insert in original).

## Chapter 27

### BANKING LAW: INTEREST (RIBĀ)

Neither a borrower nor a lender be;  
For loan oft loses both itself and friend,  
And borrowing dulls the edge of husbandry.  
This above all: to thine own self be true,  
And it must follow, as the night the day,  
Thou canst not then be false to any man.

William Shakespeare (1564-1616),  
*Hamlet* (1601), Act I, Scene 3 (Polonius)

#### SYNOPSIS

##### § 27.01 DEFINING "RIBĀ"

##### § 27.02 LONG HISTORY BEHIND RIBĀ

[A] Religious Perspectives before Islam

[B] Usury and American Law

##### § 27.03 SOURCES FOR RULE AGAINST RIBĀ

##### § 27.04 RIBĀ, QARD AL HASSAN, AND FORBIDDEN (HARĀM) TRANSACTIONS

[A] *Ribā al-Nasī'a* (Excess in Credit Transactions)

[B] *Ribā al-Faḍl* (Unequal Spot Commodity Trades)

[C] *Ribā Al-Jahiliyya* (Defer and Increase)

[D] *Da' Wa Tu'Ajjal* (Prepay and Reduce)

##### § 27.05 RATIONALES FOR PROHIBITION ON RIBĀ

[A] Unjust Enrichment (*Al-Ithra' Bila Sabab*)

[B] Complimentary Rationales

##### § 27.06 SHĪTE DISTINCTIONS

##### § 27.01 DEFINING "RIBĀ"

The prohibition of *ribā* is considered one of the most important and noble missions in Islamic Law. It also has momentous practical repercussions that distinguish Islamic from typical non-Muslim finance:

Islamic finance, an implementation of the *Shar'ā*, is premised quite differently than [*sic*] conventional, interest-based finance: the risk-reward conception is fundamentally different. . . . Core premises in Islam look

more to profit and loss sharing. Thus, trading and partnership or joint venture arrangements are more appropriate risk-reward paradigms. Rewards without commensurate risk and preferential rewards are not permitted. *Ribā* (commonly described as interest) is impermissible under the *Shari'a*; it is both a reward without commensurate risk and a preferential reward to one party (whether a debt provider or an equity provider). The interest-based, debtor-creditor paradigm is rejected, although debtor-creditor constructs are acceptable (if arising as a result of *Shari'a*-compliant arrangements). For the most part, predetermined fixed returns are not permissible. Guarantees or assurances of return of or on capital are not permissible. Further, the use of money as a commodity is not acceptable under the *Shari'a*. Money is not an asset that can itself earn money; it is a measured store of value and a medium of exchange. Every financial transaction must involve a tangible asset, leaving aside certain exceptions, such as intellectual property. Application of these principles precludes the sale and purchase of certain instruments altogether, the sale and purchase of other *Shari'a*-compliant debts at a premium or discount, and the sale of other financial instruments that do not represent interests in tangible assets. Examples include mortgage loans (which also include *ribā* elements), debts (including receivables, which frequently include *ribā* elements) that have been divorced from underlying assets, and derivatives.<sup>1</sup>

Teaching the Muslim community (*ummah*) about transactions involving *ribā* resonates widely in the Qur'an, and is a frequent topic in the *hadith*. Indeed, the topic is treated more frequently than a variety of other issues that are themselves quite important, such as drinking, gambling, and theft. Put succinctly, the *Shari'a* admonishes Muslims to avoid *ribā* by plainly and without any ambiguity stating a prohibition against transactions that involve the paying or receipt of *ribā*. But, this brief statement is deceptive.

The prohibition is a tricky one to understand. To whom does it apply, and when — all Muslims, regardless of whether they are in a Muslim country or not, and regardless of whether they are dealing with a non-Muslim? What kinds of financial transactions involve *ribā* — simple loans, or complex, engineered financial products such as derivatives? What is the purpose underlying the ban on *ribā* — is it to prevent exploitation of one individual (such as a borrower) by another (such as a lender), or is there also a concern to protect the integrity of financial markets and the community at large? Most importantly, what is "*ribā*" anyway — is it interest of any form, or is the concept more akin to the American idea of unjust enrichment, such as a usurious interest rate? (The Arabic term for "unjust enrichment" is "*al-ithra' bila sabab*.")

To begin, it is important to be clear what "interest," or an "interest rate," is. In conventional non-Muslim banking and finance, an:

interest rate is the price paid for borrowing money. We usually calculate interest as percent per year on the amount of borrowed funds. There are

many interest rates, depending upon the maturity, risk, tax status, and other attributes of the borrower.

Some examples will illustrate how interest works:

- When you graduate from college, you have only \$500. You decide to keep it in currency. If you spend none of your funds, at the end of a year you still have \$500, because currency has a zero interest rate.
- A little later, you put \$2,000 in a savings account in your local bank, where the interest rate on savings accounts is 4 percent per year. At the end of 1 year, the bank will have paid \$80 in interest into your account, so the account is now worth \$2080.
- You start your first job and decide to buy a small house that costs \$100,000. You go to your local bank and find that 30-year, fixed-interest-rate mortgages have an interest rate of 5 percent per year. Each month you make a mortgage payment of \$790.79. Note that this payment is a little bit more than the pro-rated monthly interest charge of 5/12 percent per month. Why? Because it includes not only interest, but also *amortization*. This is repayment of *principal*, the amount borrowed. By the time you have made your 360 monthly payments, you will have completely paid off the loan.

From these examples we see that interest rates are measured in percent per year. Interest is the price paid to borrow money, which allows the borrower to obtain real resources over the time of the loan.<sup>2</sup>

As for Islamic banking and finance, the *fukahā'* (legal scholars) of all Four *Sunni* Schools, as well as all of the denominations within those Schools, agree on the prohibition against *ribā*.

In sharp contrast to their non-Muslim counterparts, the *fukahā'* share a similar understanding of the danger that *ribā* might cause to the community. That also is true for *Shi'ite fukahā'*. As for the definition of the term "*ribā*," all Islamic jurists are agreed: the literal meaning of the Arabic noun "*ribā*" is "increase." The Qur'an uses the term, in its verb form "*rabat*," which may be translated as "increases," "grows," or "swells," even in non-economic contexts. For example, *surah 22 ayah 5* states:

... We created you from dust, then a drop of fluid, then a clinging form, then a lump of flesh, both shaped and unshaped: We mean to make Our power clear to you. Whatever We choose We cause to remain in the womb for an appointed time, then We bring you forth as infants and then you grow and reach maturity. Some die young and some are left to live on to such an age that they forget all they once knew. You [Muhammad] sometimes see the earth lifeless, yet when We send down water it stirs and swells [*rabat*] and produces every kind of joyous growth. . . .<sup>3</sup>

<sup>2</sup> PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, *ECONOMICS* 505-506 (New York, New York: McGraw-Hill/Irwin, 18th ed., 2005) (emphasis original). [Hereinafter, SAMUELSON & NORDHAUS.]

<sup>3</sup> THE QUR'AN — A NEW TRANSLATION BY M.A.S. ABDEL HALEEM 22:5 at 209 (Oxford, England: Oxford University Press, 2004). [Hereinafter, QUR'AN.]

<sup>1</sup> Michael J.T. McMillen, *International Legal Developments in Review: 2007 — Islamic Law Forum*, 42 THE INTERNATIONAL LAWYER 1017, 1029-1022 (Summer 2008). [Hereinafter, McMillen.]



(Interestingly, the first and third sentences of this passage, which indicate God's creative power and foreknowledge of life, are used to justify the Islamic precept against abortion.) The metaphor of the swelling of earth after rainfall in the above passage connects the literal and legal meaning of "ribā" together. The link is the concept of addition, or synonymously, excess, as an Explanatory Note to the Chapter containing the *hadiths* on ribā compiled in Ṣaḥīḥ Muslim states:

The word *Ribā* is partially covered by the English word "usury" which, in modern parlance, signifies only an extortionate interest. The Arabic *Ribā*, on the other hand, means *any addition, however slight, over and above the principal sum lent*, and thus includes both "usury" and "interest." It also includes an excess according to the legal standard of measurement and weight, in one of the two homogeneous articles in which such excess is stipulated as an obligatory payment on one of the contracting parties.<sup>4</sup>

Put succinctly, the essence of *ribā* is addition, or excess, not merely "interest," "extortionate interest," or "usury." Accordingly, a standard legal definition of "ribā" in Islamic Law typically reads like the following:

[*ribā* refers to] the practice of charging financial interest or a premium in excess of the principal amount of a loan.<sup>5</sup>

Similarly:

*Ribā* concepts relate to any excess paid or received on principal, or an increase in price or return, particularly an increase that is in some manner a function of time.<sup>6</sup>

Ostensibly, these definitions confine *ribā* to the setting of lending transactions.

That inference is misleading. First, it is critical to understand the concept of a loan, or lending transaction, in the *Shari'a* and Islamic banking circles is more restricted than under American law and non-Muslim financial centers. Under Islamic Law, a loan is an act of charity. It is a manifestation of love and empathy by a wealthy person toward a poor or needy person. (The adjectives "poor" and "needy" are not redundant. A "needy" person is only one step above a "poor" person in terms of hardship.) The monied person is not supposed to extract any excess (*ribā*) from the disadvantaged person. Rather, the former is supposed to help the latter, and expect nothing — other than the exact amount initially transferred — in return. In contrast, in the non-Muslim world, lending to a poor or needy person (aside from the relatively new phenomenon of microfinance, which arose in the Muslim country of Bangladesh and for which Muhammad Yunus won the 2006 Nobel

<sup>4</sup> ṢAḤĪḤ MUSLIM — BEING TRADITIONS OF THE SAYINGS AND DOINGS OF THE PROPHET MUHAMMAD AS NARRATED BY HIS COMPANIONS AND COMPILED UNDER THE TITLE AL-JAM' US-SAḤĪḤ BY IMAM MUSLIM, RENDERED INTO ENGLISH BY ABDEL HAMID SIDDIQI, WITH EXPLANATORY NOTES AND BRIEF BIOGRAPHICAL SKETCHES OF MAJOR NARRATORS, CORRECTED AND REVISED BY DR. HASSAN, vol. IIIA, book 22 (Book of Share Tenancy), p. 47, fn. 1 to Chapter 14 (Lahore, Pakistan: Sh. Muhammad Ashraf Booksellers and Exporters, 1990) (emphasis added). [Hereinafter, MUSLIM.] In view of the above definition, unfortunately Chapter 14 is titled "*Ribā* (Usury)," whereas "*Ribā* (Excess)" or "*Ribā* (Addition)" would be more accurate.

<sup>5</sup> ZAMEER IQBAL & ABBAS MIRAKHOR, AN INTRODUCTION TO ISLAMIC FINANCE THEORY AND PRACTICE 54 (Singapore: John Wiley & Sons (Asia) Pte Ltd, 2007) (emphasis added). [Hereinafter, IQBAL & MIRAKHOR.]

<sup>6</sup> McMillen, *supra*, fn. 11 at 1021 (emphasis added).

Peace Prize) is imprudent. As the conventional wisdom goes, poor or needy people lack creditworthiness, and are unlikely to be in a position to make productive use of loaned funds. The point of lending is to allocate credit to its most efficient uses, with the creditor earning a return, namely interest, for bearing the credit risk of the borrower, and with the borrower paying interest as the cost of funds.

To summarize the first point, the terms "loan," "lending," and their equivalent are seen in entirely different paradigms: for Islam, charity; for non-Muslim banking, credit allocation and wealth creation. What, then, is the appropriate classification under the *Shari'a* for credit allocation and wealth creation? That is, to the world of non-charitable financial transactions that Wall Street calls "loans," what is the right Islamic legal label? The short answer is "profit sharing." That answer is apparent from the ways creditor-debtor relationships are structured under the *Shari'a*.

As explained below, they are designed as profit-sharing ventures between or among partners, who are said (in theory, at least) to have a common purpose, not as potentially adversarial, zero-sum games between lenders and borrowers. It is worth observing that the narrow range of transactions properly called "loans" under the *Shari'a* is the same as that under the Old Testament — charity towards the poor and needy — and thus both Jewish and Islamic Law forbid extraction of excess (*ribā*). (This fascinating inter-faith history is explained below.)

Second, in truth, *ribā* arises in many non-financial contexts. This point is clear from the above quoted Explanatory Note, which speaks not only of lending money, but also of exchanges of homogeneous merchandise. Thus, the Explanatory Note continues:

The following are the ingredients of usurious transactions:

- The two thing[s] of exchange between the two parties must be *homogeneous or of the same character, but differing in size, quality, or measurement*, for example, if gold is exchanged for gold of the same weight, and quality, in [a] hand to hand transaction, it is not interest. If unequal, the excess is interest.
- In case there is a stipulation of demand for the excess over and above the principal sum to be paid at a future date, the excess is considered as interest.<sup>7</sup>

Accordingly, the following definition explains that *ribā* is a concept relevant to monetary transactions other than loans, and even to non-monetary dealings:

["*ribā*" means] to increase, to augment, swellings, forbidden "*addition*," to make more than what is given, the practicing or taking of usury or the like, an excess or an addition, or an addition over and above the principal sum that is *lent* or *expended*.<sup>8</sup>

This definition — specifically, the word "expended" — provides more insight into the concept of *ribā*, what exactly is forbidden, and why.

<sup>7</sup> MUSLIM, *supra*, vol. IIIA, book 22 (Book of Share Tenancy), p. 47, fn. 1 to Chapter 14 (emphasis added).

<sup>8</sup> IQBAL & MIRAKHOR, *supra*, at 54.

What is unacceptable is not increase *per se*, not an addition obtained through earned profit. Rather, the moral lapse lies in obtaining an increase free of charge, without giving value in exchange, or exerting effort — in brief, without doing a shred of work. The definition embodies the principle that any unreasonable increase is considered *ribā*. Thus, Professor Mahmoud El-Gamal gives another definition of *ribā* as follows:

trading two goods of the same kind in different quantities, where the increase is not a proper compensation.<sup>9</sup>

This definition encompasses both non-monetary quantities (such as a barter trade of agricultural products), as well as monetary dealings. That is, it clearly covers situations of increase that arise from exchanging different goods, and by logical extension, services.

## § 27.02 LONG HISTORY BEHIND RIBĀ

### [A] Religious Perspectives before Islam

Another highly significant point is the nearly catholic (universal) concern about *ribā*. *Ribā* is not an invention of the *Sharī'a*, nor does Islamic Law claim as much. Rather, *ribā* is a concept known throughout history, albeit in different terms.<sup>10</sup> Prominent additional examples of restrictions on interest are sourced in at least four different faiths. They are as follows:<sup>11</sup>

#### (1) Hinduism —

The *Vedic* texts of Ancient India, which date from 2000-1400 B.C., are among the sacred scriptures of Hinduism. In the *Vedas*, the Sanskrit term "*kusidin*," which translates as "usurer," is used on several occasions. This term refers to any person

<sup>9</sup> MAHMOUD A. EL-GAMAL, *ISLAMIC FINANCE — LAW, ECONOMICS, AND PRACTICE* at 49 (New York, New York: Cambridge University Press, 2006) (emphasis added).

<sup>10</sup> See James Ackerman, *A History of Usury*, 27 ARIZONA STATE LAW REVIEW 61 (1981). [Hereinafter, Ackerman.] This article covers perspectives on usury of many religions and cultures, although not Islam. It explains that for centuries, many religions and cultures have recognized the intuition that lending to a commercial enterprise, for a business purpose, is not as troublesome as lending to an individual, for consumption, especially to a poor person. The article reviews the views on usury of philosophers and theologians, including Plato (circa 428/427-348/347 B.C.), Aristotle (384-322 B.C.), Saint Thomas Aquinas (1225-1274 A.D.), Martin Luther (1483-1546), and John Calvin (1509-1564).

In addition, the article provides and excellent summary of points made by the famous English philosopher and jurist, Jeremy Bentham (1748-1832), in his *Letter in Defense of Usury* (written in 1787 to Adam Smith (1723-1790) in response to Smith's analysis in *The Wealth of Nations* (1776) about the dangers of speculation) Bentham argued usury restrictions encouraged widespread evasion (even to the extent that the law was ineffective), created contempt for the law. Bentham also pointed out that sometimes a loan is needed to prevent a loss. Of course, as a utilitarian, Bentham urged that freedom of contract, including as to interest rates, was part of liberty, and in any event, trying to limit rates is problematic, because there is no one "right" rate. The article also discusses the use of nominal partnerships in Medieval Europe to avoid the Roman Catholic prohibition on usury (which at the time meant any interest).

<sup>11</sup> See Iqbal & Mirakhor, *supra*, at 69-72.

who lends an asset and charges interest to the borrower. In addition, there are references to "interest" in the later *Sutra* texts (700-100 B.C.), which appear to look askance at charging interest. During this later period, Vasishtha, a renowned Hindu law-maker, created a special rule. The rule forbade members of the two highest castes, *Brahmanas* (Hindu priests) and *Kshatriyas* (warriors), from being usurers, or indeed from lending at interest.

#### (2) Buddhism —

The *Jatakas* (600-400 B.C.) refer to usury in a disparaging way. This sacred Buddhist text states that "hypocritical ascetics are accused of practicing it."<sup>12</sup>

#### (3) Judaism —

The Old Testament prohibits charging usurious interest. This stricture pre-dates the first revealed verse of the Qur'an (in 610 A.D.) by at least 700 years, and more likely by close to a millennium. H.G. Wells observes in his classic *The Outline of History*:

All the books that constitute the Old Testament were certainly in existence, and in very much their present form, at latest by the year 100 B.C. Most of them were probably recognized as sacred writings in the time of Alexander the Great (330 B.C.). They were the sacred literature of a people, the Jews, who, except for a small remnant of common people, had recently been deported to Babylonia from their own country in 587 B.C. by Nebuchadnezzar II, the Chaldean. They had returned to their city, Jerusalem, and had rebuilt their temple under the auspices of Cyrus, that Persian conqueror who . . . in 539 B.C. overthrew Nabonidus, the last of the Chaldean rulers in Babylon. The Babylonian Captivity had lasted about fifty years.<sup>13</sup>

In Hebrew, the word "interest" is expressed by either "*neshekh*" or "*turbith*." The literal meaning of "*neshekh*" is "a bite." The connotation of "*turbith*" is similar to "*ribā*," namely, a gain from lending an asset, whether movable property or money. Several references in the Torah — the first five books of the Old Testament — condemn usury:

- From *Exodus*, Chapter 22, verse 23:

If you lend money to one of your poor neighbors among my people, you shall not act like an extortioner toward him by demanding interest from him.<sup>14</sup>

- From *Leviticus*, Chapter 25:

<sup>12</sup> Iqbal & Mirakhor, *supra*, at 70.

<sup>13</sup> H.G. WELLS, *THE OUTLINE OF HISTORY — THE WHOLE STORY OF MAN* 214 (1920) (Garden City, New York: Doubleday & Company, Inc. ed., 1971).

<sup>14</sup> *The Book of Exodus* 22:24, in *THE CATHOLIC STUDY BIBLE* 82 (Oxford: Oxford University Press, 1990). [Hereinafter, *BIBLE*.]



<sup>36</sup>Do not exact interest from your countryman either in money or in kind, but out of fear of God let him live with you. <sup>37</sup>You are to lend him neither money at interest nor food at a profit.<sup>15</sup>

- From *Deuteronomy*, Chapter 23:

<sup>20a</sup>You shall not demand interest from your countrymen on a loan of money or of food or of anything else on which interest is usually demanded.

<sup>21</sup>You may demand interest from a foreigner, but not from your countryman, so that the Lord, your God, may bless you in all your undertakings on the land you are to enter and occupy.<sup>16</sup>

Thus, as Biblical commentaries observe:

- [L]ending money in the Old Testament was often seen as assistance to the poor in their distress, not as an investment; making money off the poor by charging interest was thus forbidden.<sup>17</sup>
- Interest and overcharge were strictly forbidden in the old law among Israelites because it was presumed that the borrower was in distress. . . . Civil and divine law will take the offender's wealth from him.<sup>18</sup>

In addition, a number of other Old Testament passages condemn interest, or at least, usurious interest, and calling upon the beneficiaries of it to share their gains with the poor. For instance:

- From the *Psalms*:

LORD, who may abide in your tent?

Who may dwell on your holy mountain?

. . .

Who keeps an oath despite the cost,

lends no money at interest,

accepts no bribe against the innocent.<sup>19</sup>

- From *Proverbs*:

The rich rule over the poor,

and the borrower is the slave of the lender.

. . .

He who increases his wealth by interest and overcharge

<sup>15</sup> The Book of Leviticus 25:36-37, in BIBLE, *supra*, at 136.

<sup>16</sup> The Book of Deuteronomy 23:20-21, in BIBLE, *supra*, at 212.

<sup>17</sup> BIBLE, *supra*, fn. to Psalm 15:5 at 654.

<sup>18</sup> BIBLE, *supra*, fn. to Proverbs 28:8 at 777.

<sup>19</sup> The Book of Psalms 15:5, in BIBLE, *supra*, at 654.

gathers it for him who is kind to the poor.<sup>20</sup>

- From *Jeremiah*:

Woe to me, mother, that you gave me birth!

a man of strife and contention to all the land!

I neither borrow nor lend,

yet all curse me.<sup>21</sup>

- From *Ezekiel*:

<sup>5</sup>If a man is virtuous — if he does what is right and just, . . . <sup>7</sup>if he oppresses no one, gives back the pledge received for a debt, commits no robbery; if he gives food to the hungry and clothes the naked; <sup>8</sup>if he does not lend at interest nor exact usury . . . — he shall surely live, says the Lord God.<sup>22</sup>

<sup>1</sup>Thus the word of the Lord came to me: . . . <sup>12</sup>There are those in you who take bribes to shed blood. You exact interest and usury; you despoil your neighbors violently; and me you have forgotten, says the Lord God.

<sup>13</sup>See, I am brushing one hand against the other because of the unjust profits you have made and because of the bloodshed in your midst.<sup>23</sup>

Notably, the above-quoted Old Testament passages span the entire Biblical narrative in the Jewish tradition.

That is, these passages are not only from the Torah, which means "Law" or "Teaching" and includes *Exodus*, *Leviticus*, and *Deuteronomy*. (The Torah is also known as the "Pentateuch," a title dating from the second century B.C. given in the earliest Greek translation, which means "five-part writing.")<sup>24</sup> The passages also come from the Historical Books (such as *Nehemiah*), which recount the story of the rise, fall, and future of the Israelite kingdoms.<sup>25</sup> They are sourced in the *Wisdom Books* (e.g., as found in the *Psalms* and *Proverbs*), the unifying theme of which is to teach the proper path for a successful life.<sup>26</sup> Finally, they are from the *Prophetic Books* (which lay out a theology of salvation through the inspired words of Prophets such as *Jeremiah* and *Ezekiel*).<sup>27</sup> This coverage alone impresses the seriousness of the rule about interest, and the supporting rationale that the poor must not be exploited, in Judaism.

<sup>20</sup> The Book of Proverbs 22:7, 28:8, in BIBLE, *supra*, at 770, 777 respectively.

<sup>21</sup> The Book of Jeremiah 15:10, in BIBLE, *supra*, at 969.

<sup>22</sup> The Book of Ezekiel 18:5, 7-8, in BIBLE, *supra*, at 1050.

<sup>23</sup> The Book of Ezekiel 22:1, 12-13, in BIBLE, *supra*, at 1055.

<sup>24</sup> Lawrence Boadt, *The Pentateuch*, in BIBLE, *supra*, at RG 36-37.

<sup>25</sup> See Leslie J. Hoppe, *The Chronicler's History and the Later Histories*, in BIBLE, *supra*, at RG 187.

<sup>26</sup> See Dianne Bergant, *The Wisdom Books*, in BIBLE, *supra*, at RG 231.

<sup>27</sup> Carroll Stuhlmueller, *The Major Prophets, Baruch, and Lamentations*, in BIBLE, *supra*, at RG 287.

## (4) Christianity —

Significantly, the New Testament does not contain injunctions against interest or usury *per se*. That is not to say the topic ceased to be of importance. The medieval classic *The Divine Comedy*, written by Dante Alighieri between 1308 and 1321 A.D. (the year Dante died), is an allegory in which the author journeys through hell, purgatory, and heaven and describes them in vivid detail in three cantos — *Inferno*, *Purgatorio*, and *Paradiso*, respectively. *The Divine Comedy* builds on Catholic Christian teaching and Ancient tradition, particularly the work of Virgil. Dante's journey in the three realms of the dead, which highlight sin (hell), penitence (purgatory), and salvation (heaven), occurs in 1300, starting with the night before Good Friday until the Wednesday after Easter. In the *Inferno*, Dante defines nine circles of hell, and identifies who is in each circle. Damnation in the seventh circle is the fate of the violent. Usurers burn in the inner ring of the seventh circle of hell.<sup>29</sup> They commit violence against order. Also burning in that inner ring are blasphemers, who commit violence against God, and sodomites, who commit violence against nature. Obviously, then, Dante and many of his contemporaries thought quite poorly of usurers. (Indeed, Dante put people who committed suicide in the middle ring of the seventh circle, just beyond the inner ring, and persons who committed violence against other persons, or against property, in the outer ring.)

With the New Testament, the message relating to interest or usury shifts, and enlarges. The concern is one of oppression and social justice generally, manifest in a large number of passages, not the least of which are the Two Great Commandments and the Sermon on the Mount. Consequently, the New Testament emphasizes forgiveness of debts, extolling such behavior as a spiritually positive practice.

Interestingly, with the Protestant Reformation, the Christian understanding about usury *per se* began to shift. In terms of lexicography, the emphasis changed from any kind of interest to excessive interest. As a legal matter, the prohibition on usury increasingly shifted from a criminal offense to a matter of private conscience. In respect of emerging capitalist financial markets, through the 16th century teachings of John Calvin, Calvinist bankers in Geneva were free to charge non-excessive interest, as long as they were honest in doing so, and paid attention to the needs of the poor.

In summary, the illegality of transactions involving what the *Shari'a* calls "*ribā*" was recognized in the pre-Islamic period, "*al jahiliyyah*." Literally, "*jahil*" means "ignorance," hence the pre-Islamic period is considered one of ignorance, or darkness. However, this appellation is not applied to the entire world. Muslims know that Ancient China, India, Egypt, Greece, Rome, and Persia boasted flourishing civilizations, and the Qur'an itself expresses reverence for Jewish prophets and Jesus Christ. Accordingly, "*al jahiliyyah*" technically applies to the pre-Islamic period on the Arabian Peninsula. It is a geographically bounded rubric, as is the "Dark Ages," which refers to Europe.

In turn, one of the insights emerging from *al jahiliyyah* period is a ban on *ribā*. There is the tell-tale incident of repairing the *Ka'ba* (the holy house in Mecca

(Makkah)). The people of Mecca did not allow any contribution to the repair fund that included *ribā*. In other words, even the pagans believed transactions involving *ribā* were wrongful, and eschewed using funds to which interest had accrued to renovate their sacred site. Their stubborn refusal meant the pagans could not restore completely the *Ka'ba* to its circular form, and helps explain why to this day the shrine is rectangular in shape.

**[B] Usury and American Law**

Of course, long after the advent of Islam, usury became an important topic in the history of American banking law. The United States has a long history of usury laws, other kinds of interest rate regulations, and exceptions to these rules.<sup>29</sup> For example, in the 19th century, there were exceptions to usury laws for loans to corporations, and for salary lending. Two key legal developments led to the general eclipse of usury laws.

First, in 1978, the United States Supreme Court held in *Marquette National Bank of Minneapolis v. First of Omaha Service Corporation* that state usury laws cannot be enforced against nationally-chartered banks that are based in other states.<sup>30</sup> Second, in 1980, in an environment of high inflation, Congress enacted legislation — the *Depository Institutions Deregulation and Monetary Control Act* — that exempted from state usury restrictions federally chartered savings banks, as well as chartered loan companies and installment plan sellers, and thereby essentially over-rode state usury laws. Thus, today, banks are largely free of usury restrictions, and may charge market-based interest rates. However, the 1968 federal *Truth in Lending Act (TILA)*, subjects them to various disclosure requirements, particularly as to costs and fees.<sup>31</sup> The statute is enforced through Federal Reserve Regulation Z.<sup>32</sup> In brief, liberalization at the federal level has preempted the states from imposing usury restrictions. However, restrictions do exist to protect consumers in respect of credit card interest rates. Moreover, some states attempt to regulate interest rates in the "fringe" consumer sector, *i.e.*, auto title pawn, payday lending, and rent to own transactions.

Interestingly, pawn transactions typically are treated not as a loan, but rather as a sale with a right of redemption. Today, auto title pawn is treated as a sale and leaseback. This treatment has created controversy, namely, that in the fringe consumer sector usury limits are needed for moral reasons.<sup>33</sup> Essentially, the argument is that extending credit in this sector at high interest rates creates high risk, and is incongruous with the goal of encouraging upward socioeconomic mobility. In other words, poor people pay more through the use of these loan products than they would on conventional loans, and fall into a debt trap from

<sup>29</sup> See Ackerman, *supra*, at 61.

<sup>30</sup> See 439 U.S. 299 (1978).

<sup>31</sup> TILA is Title I of the *Consumer Credit Protection Act*, 15 U.S.C. § 1601 et seq.

<sup>32</sup> 12 C.F.R. Part 226.

<sup>33</sup> See Lynn Drysdale & Kathleen E. Keest, *The Two-Tiered Consumer Financial Services Marketplace: The Fringe Banking System and Its Challenge to Current Thinking About the Role of Usury Laws in Today's Society*, 51 SOUTH CAROLINA LAW REVIEW 589 (2000).

<sup>28</sup> See DANTE ALIGHIERI, *THE DIVINE COMEDY* canto XVIII, pp. 130-131 (New York: Everyman's Library) (Allen Mandelbaum, trans., 1980).



which it is difficult to escape without a bailout from their families.

Another interesting matter is whether it is "usury" for a seller of a good to quote a cash price and a time price? The answer under United States law is "no." The reason is the so-called "Time — Price Doctrine," which is distinct from the financial concept of the present value of money, and which holds that quotation by a seller of a cash price and a time price does not amount to charging interest. The most famous case on this Doctrine is the 1861 United States Supreme Court decision in *Hogg v. Ruffner*.<sup>34</sup>

### § 27.03 SOURCES FOR RULE AGAINST RIBĀ

Uniformly, all *Shari'a* sources prohibit *ribā*. The *fukahā'* never have seriously doubted or questioned this prohibition. Many different verses in the Qur'ān specifically and unambiguously proscribe *ribā*. For example:<sup>35</sup>

- From *surah* 2:

<sup>270</sup>But those who take usury will rise up on the Day of Resurrection like someone tormented by Satan's touch. That is because they say, "Trade and usury are the same." <sup>271</sup>but God has allowed trade and forbidden usury. Whoever, on receiving God's warning, stops taking usury may keep his past gains — God will be his judge — but whoever goes back to usury will be an inhabitant of the Fire, there to remain. God blights usury, but blesses charitable deeds [*sadaqāt*] with multiple increase: He does not love the ungrateful sinner. <sup>272</sup>Those who believe, do good deeds, keep up the prayer [*as-salāt*], and pay the prescribed alms [*zakah*] will have their reward with their Lord: no fear from them, nor will they grieve. <sup>273</sup>You who believe, beware of God: give up any outstanding dues from usury, if you are true believers. <sup>274</sup>If you do not, then be warned of war from God and his Messenger: You shall have your capital if you repent, and without suffering loss or causing others to suffer loss. <sup>275</sup>If the debtor is in difficulty, then delay things until matters become easier for him; still, if you were to write it off as an act of charity, that would be better for you, if only you knew. <sup>276</sup>Beware of a Day when you will be returned to God: every soul will be paid in full for what it has earned, and no one will be wronged.<sup>36</sup>

- From *surah* 3:

<sup>34</sup> See 66 U.S. 115 (1861). For a recent case on the Time — Price Doctrine, see *Cooperatives v. Ohman*, 402 N.W. 2d 235 (Minn. Ct. App. 1987 (holding against the lender after it revealed its calculations)).

<sup>35</sup> In addition to the above-quoted *surahs* and *ayat*, the following passages also are viewed as dealing with the topic of *ribā*: 2:188 (concerning the proper use of assets, and cautioning against the wrongful consumption of property and against bribery); 4:29 (instructing against the wrongful consumption of each other's wealth, and calling for trade by mutual consent); 9:34 (identifying many rabbis and monks as wrongfully consuming the possessions of others, and warning of a grievous punishment for those who hold gold and silver instead of giving to the cause of God (Allāh)).

<sup>36</sup> Qur'an, *supra*, 2: 275-281 at 31-32.

<sup>130</sup>You who believe, do not consume usurious interest, doubled and redoubled. Be mindful of God so that you may prosper — <sup>131</sup>beware of the Fire prepared for those who disbelieve — <sup>132</sup>and obey God and the Prophet so that you may be given mercy.<sup>37</sup>

- From *surah* 4:

<sup>160</sup>For the wrongdoings done by the Jews, We forbade them certain good things that had been permitted to them before: for having frequently debarred others from God's path; <sup>161</sup>for taking usury when they had been forbidden to do so; and for wrongfully devouring other people's property. For those of them that reject the truth we have prepared an agonizing torment.<sup>38</sup>

- From *surah* 30, *ayah* 39:

Whatever you lend out in usury to gain value through other people's wealth will not increase in God's eyes, but whatever you give in charity, in your desire for God's countenance, will earn multiple rewards.

These passages easily explain acceptance among the *fukahā'* of the prohibition of *ribā*.

Nevertheless, as in many walks of life, theory and practice often diverge. Throughout different times, and in different Muslim countries, financial institutions that pay and charge interest have been tolerated. In some Islamic countries, such as Pakistan, there is an effort to Islamicize the banking system by converting it from a western-style, interest-oriented one to one that strictly complies with the *Shari'a*. In a number of other Islamic countries, such as Indonesia, Saudi Arabia, Malaysia, and United Arab Emirates (UAE), a dual banking system exists, whereby banks may offer *Shari'a* compliant products, conventional western-style products, or both.

Of the four above-quoted passages, the first one is the most critical. Some points of Islamic Law are detailed, but not the rule against interest. The explanation from the Qur'ān is as straightforward as it is poignant, thus conveying the grave danger associated with *ribā*. *Surah* 2, *ayah* 275 connects a person who transacts with *ribā* to a person who is beaten by Satan. In Arabic, "Satan" is an expression of a uniquely and monstrously ugly thing. The *surah* 2 passage then highlights the difference between trade and *ribā*. At the time of the revelation of the Qur'ān, some people argued trade and *ribā* are ineluctably intertwined — two sides of the same coin, as it were. God (Allāh) makes plain this argument is false. Trade in Islam is permitted and encouraged, because through it people work and earn a living. In contrast, *ribā* is strictly forbidden (*harām*). Why?

The passage does not expressly give a reason. For present purposes, suffice it to say the generally accepted arguments are that earning money through interest involves no self-exertion by the lender, and causes oppression to the borrower. As regards *ayat* 278 and 279, the *fukahā'* explain *ribā* is the only sin of which God

<sup>37</sup> Qur'an, *supra*, 3:130-132 at 44.

<sup>38</sup> Qur'an, *supra*, 3:160-161 at 65.

orders people to cease, and threatens war from God and Muhammad if the order is not heeded. *Ayah* 280 encourages the community to support each other and unite against excessive transactions, specifically by forgiving debt. It is noteworthy that *ayah* 281, which follows the injunction against *ribā*, was the last verse revealed to Muhammad before his death in 632 A.D.

Of course, there is a widely understood argument that *ribā* carries benefits. Under non-Muslim banking principles, interest is an economically rational, market-based price of risk to which a lender is exposed, and the appropriate cost for the privilege of borrowing charged to a borrower commensurate with the credit-worthiness of the borrower and uncertainty of repayment. It also may be argued that there is a proper distinction between interest and usury. Only usury involves an injustice, in the sense of an unreasonable and unearned excess. Indeed, *surah* 2 speaks of "interest," while *surah* 3 uses the term "usurious interest," and *surah* 4, *ayah* 161 and *surah* 30, *ayah* 39 employs the word "usury." Surely these distinctions should be respected and probed, and not lumped and condemned under the banal word "interest?"

The *Shari'a* does not gainsay the plausibility of these arguments. Rather, it stresses that the danger of *ribā* is greater than its benefit. True, a few people might benefit from *ribā*, but there are two obvious dangers. First, those people jeopardize their entry into Heaven; by clinging to the gains they get from *ribā*, they put themselves in Hell. Second, a whole community could become progressively less egalitarian, and ultimately destroyed by *ribā*. A small, socioeconomic elite class could be enriched, while the vast majority could be beholden to the elites, and impoverished by their debt bondage. As a general *Shari'a* principle, if the cost or harm of an act exceeds its benefit, then that act is prohibited. Consider *surah* 2, *ayah* 219:

They ask you [Prophet] about intoxicants and gambling: say, "There is great sin in both, and some benefit for people: the sin is greater than the benefit."<sup>39</sup> . . .

Though this passage articulates a principle in the contexts of alcoholic beverage consumption and gambling, the principle — enjoining an act where costs exceed benefits — is not specific to them. Islamic jurists apply it to other contexts, including *ribā*.

The *Sunnah* reinforces the injunctions in the Qur'an against *ribā*. The Prophet Muhammad explains that any transaction involving *ribā* is forbidden. For example, the following *hadith* states:

Do not sell gold for gold, except one for one, and don't increase a thing upon something; and don't sell silver unless one for one, and don't increase something upon something, and do not sell for ready money something to be given later.<sup>40</sup>

Read closely, this *hadith* forbids three broad categories of transactions: (1) the

unequal exchange of a precious metal, specifically, gold or silver, (2) the unequal exchange of any other object of commerce (*ayn*), and (3) any prepayment arrangement (i.e., a contract not calling for delivery-versus-payment). The repetition of the phrase "one for one," or equivalently, "like for like" is significant. The inference from this repetition is that any excess over an equal exchange is considered *ribā*.

Another *hadith* emphasizes the sin associated with *ribā*:

Jābir said that Allah's Messenger . . . cursed that who accepts the interest and that who pays it, and the one who records it, and the two witnesses. He [Muhammad] said: They are all equal [in guilt].<sup>41</sup>

The verb "curse" is a strong one, indicating the strictness of the *Shari'a* in barring business deals involving *ribā*. Significantly, the sin of dealing with *ribā* is not limited to the lender. It extends to the borrower, and by implication a seller or buyer. In fact, it afflicts not only immediate transactors, but also persons who record or even witness *ribā*.

The curse does not apply to voluntary payment of excess. Consider the following *hadith*, also recorded by *Imām* Muslim:

Abū Rāfi' reported that Allah's Messenger . . . took from a man as a loan a young camel (below six years). Then the camels of charity were brought to him. He ordered Abū Rāfi' to return back [to] that person the young camel (as a return of the loan). Abū Rāfi' returned to him and said: I did not find among them but *better camels above the age of six*. He (the Holy Prophet) said: Give that [the better camels] to him for the best men are those who are best in paying off the debt.<sup>42</sup>

Note clearly that Muhammad himself — not the man who loaned the young camel — instructs repayment in the form of the better camels. Accordingly, suppose a lender requires a borrower to pay the lender more than the sum originally loaned to the borrower. The overage — the difference between the original debt and amount repaid — clearly is *ribā*. Because paying the overage is obligatory, as required by the lender, it is forbidden. However, suppose the lender sets no such requirement. When the tenor (term) of the loan expires, the borrower simply pays an extra sum, entirely on her own volition, perhaps motivated by gratitude to the lender. In this scenario, the excess is not characterized as "*ribā*," at least not in the sense of being forbidden.

As a second example, assume a merchant sells commodities to a buyer on credit. Both parties agree on (1) the period of time the buyer has to tender payment, and (2) a fixed additional amount if payment is not timely (i.e., late). Assume the buyer defaults, needing extra time to make payment. The additional amount is *ribā*, as it arose from a requirement of the seller. The entire transaction — the sale of the underlying goods and the credit terms — is forbidden. In contrast, if item (2) is not stipulated in the loan agreement, and to the pleasant surprise of the seller, the

<sup>39</sup> Qur'an, *supra*, 2:219 at 214.

<sup>40</sup> Muslim, *supra*, vol. IIIA, book 22 (Book of Share Tenancy), p. 47, *hadith* no. 1584.

<sup>41</sup> Muslim, *supra*, vol. IIIA, book 22 (Book of Share Tenancy), p. 56, *hadith* no. 1598.

<sup>42</sup> Muslim, *supra*, vol. IIIA, book 22 (Book of Share Tenancy), p. 60, *hadith* no. 1600 (emphasis added).



borrow provides extra cash along as an apology for late payment and a self-generated means of compensating the seller for the inconvenience of late payment, the transaction does not involve *ribā*.

These hypothetical illustrations suggest a problem: might an unscrupulous lender (seller) argue that payment of excess was a condition in a loan (sales) contract "voluntarily" agreed to by the borrower (buyer)? After all, the creditor might claim, the debtor had the option of walking away from the deal. Put differently, is it possible to blur the line between "voluntary" and "involuntary" assumption of an excess payment, and thereby manipulate whether a loan transaction is lawful or not?

In practice, this possibility does exist. However, the *Shari'a* is quite clear on the delineation. If a debtor initiates the excess payment, with absolutely no sense of obligation to do so, then the transaction does not involve *ribā*. As the Explanatory Note to the above-quoted *ḥadīth* states:

Imām Shawkānī in his book *Nail-ul-Autār* [*Collecting the Strings*] asserts that this *ḥadīth* proves the justification of excess of payment over and above the real amount. It should, however, be borne in mind that this is valid *only when this excess payment is made out of one's own sweet will and not as a condition*, for that makes it an interest which is forbidden.

Then there is also an objection that, since The Holy Prophet . . . is not entitled to receive charity, why did he make the payment out of that? The answer given by Imām Shāfi'ī is that The Holy Prophet . . . did not get it as a loan for his own use, but for the poor and as such he was fully justified in repaying it out of the charity of goods. . . .<sup>43</sup>

Conversely, if the creditor even remotely catalyzes the idea, then *ribā* is involved. Stated simply, as long as the payment of excess is a gift springing originally from the heart and mind of the borrower or seller, then it is permissible. This test suggests how unusual "permissible *ribā*" is, for how many debtors gift extra money to their creditors?

#### § 27.04 RIBĀ, QARD AL HASSAN, AND FORBIDDEN (ḤARĀM) TRANSACTIONS

In practice, it is important to appreciate when a proposed deal may be deemed forbidden (*ḥarām*). Thus, a key question is to what kinds of transactions is the rule against *ribā* applicable? Typically, non-Muslims think of examples from their everyday experience, such as mortgages, loans for automobiles, businesses, education, or home improvement, inter-bank lending, and they think of interest rates — depending on the loan — as fixed or adjustable. These experiences are helpful, in that *ribā* in all of these contexts is *ḥarām*. However, to explain the scope of the prohibition in this manner is to impose a non-Muslim framework on an Islamic legal

rule. It is more authentic to understand the scope in the way Islamic legal scholars (*fukahā'*) conceive it.

According to the *Shari'a*, there are two main types of *ribā*. The first category is "*ribā al-nasi'a*." The second category is "*ribā al-faḍl*." They are not the only kinds of transactions in which *ribā* is actually or potentially involved. However, one kind of transaction plainly is permissible (*ḥalāl*), as it in no way violates the rule against *ribā*. That transaction is known as "*qard al-hassan*."

"*Qard al-hassan*" refers to an interest free loan, and is easy to recognize. Whenever a borrower repays a lender exactly the amount loaned, or returns exactly the quantity and quality of object loaned, the transaction is free from interest. For example, suppose a lender loans a borrower U.S. \$1 million, which the borrower uses over the course of a year. The borrower repays exactly \$1 million. Plainly, no interest is involved in the transaction.

Why might a lender engage in a *qard al-hassan* deal? The short answer is charity, i.e., the lender is being kind to the borrower, behaving in a magnanimous manner by eschewing any fee. To be sure, there are devices under the *Shari'a* through which a lender can obtain a fee, such as a *murābaha* arrangement (i.e., cost-plus pricing, or a non-interest bearing loan). In sum, a *qard al-hassan* transaction is a charitable loan, with no interest charge and a low expectation of repayment of principal. Plainly, no *ribā* — no excess or increase — is involved.

#### [A] Ribā al-Nasi'a (Excess in Credit Transactions)

The literal meaning of the Arabic word "*nasi'a*" is "deferral" or "delay." The word arises in the context of Islamic Contract Law, where a "*nasi'a*" contract is one in which a seller delivers goods presently against future payment of the price for the goods. "*Nasi'a*" is derived from the word "*nasa'a*," which means "to defer or delay." Thus, "*ribā al-nasi'a*" is defined as

[r]iba in a money-to-money exchange provided exchange is delayed or deferred and additional charge is incurred with such deferment.<sup>44</sup>

From this definition, it is clear *ribā al-nasi'a* arises only in the context of a money-for-money exchange. The quintessential instance of such an exchange is a loan transaction, specifically, when a lender gives money to a borrower and requires the borrower to return more than what was originally borrowed. This requirement is dubbed the "prior condition." It can be an *a priori* requirement calling for either a fixed or variable percentage of the loan as compensation for the waiting time of the creditor for repayment.

Historically, *ribā al-nasi'a* was well known in the pre-Islamic period (*al-jahiliyyah*). In practice, there are three different ways *ribā al-nasi'a* can arise. All three instances are forbidden, i.e., *nasi'a* in these instances is *ḥarām*. The first way, mentioned above, occurs when a debtor cannot fulfill her debt. The creditor steps in again and increases the debt to extend the time period for the debtor. The second way is when it is time to pay off the debt. A creditor gives the debtor the option

<sup>43</sup> MUNIR, *supra*, vol. IIIA, book 22 (Book of Share Tenancy), p. 60, Explanatory Note (1) to *ḥadīth* no. 1600 (emphasis added).

<sup>44</sup> IQBAL & MIRAKHOR, *supra*, at xiii.

either to (1) pay back the debt on schedule, or (2) allow her more time to pay, but with an interest charge. The third way involves selling commodities of the same kind, but in excess, which arises because of a deliberate deferral of the date of delivery. For instance, one party sells 10 Burmese rubies on 1 January, in exchange for 12 rubies on 1 February. The second party defers payment for the month of January, but the first party charges an extra 2 rubies precisely because the second party is allowed to keep all 12 rubies for an extra month. The *ribā* exists in the payment the seller charges for the deferral, the extra 2 rubies.

Observe that the first two transactions involve an exchange of money for money, while the third transaction is an exchange of goods for goods. Consequently, *ribā al-nasi'a* sometimes is defined in terms of an excess paid or increase in return in the context of "credit transactions in specified commodities."<sup>45</sup> The obvious question is whether an exchange of money for goods, wherein delivery of the goods is deferred, is forbidden. As indicated above, this kind of transaction is called a "*nasi'a* contract," as it is a deferred delivery deal. But, it is not forbidden (*harām*). That is because its elements are not the exchange of like subjects.

The Prophet . . . bought some foodstuff from a Jew on credit and mortgaged his armour to him.<sup>46</sup>

*Nasi'a* contracts involving payment against later delivery are common in Muslim marketplaces. But, the message of this *ḥadīth*, which 'Āisha, wife of Muhammad narrates, transcends *ribā*. It is a lesson in ecumenical commerce. Muhammad did not have enough funds to purchase food. He was willing to buy food from a Jewish person, to whom he entrusted his protective battle covering as a pledge for credit extended to him.

Observe, too, that a forbidden (*harām*) *nasi'a* arrangement involving a money-for-money exchange can occur under the guise of purchasing goods. As Ṣāliḥ Al Fawzān, Professor of Islamic Jurisprudence at *Imām* Muhammad ibn Saud University in Riyadh, Saudi Arabia, explains:

Another type of prohibited trade is that called *'inah*, in which a seller sells a commodity on credit to a buyer and then buys it from him at the same time at a lower price. For example, a trader sells a car for twenty thousand pounds on credit [and] then buys it from the same man (who has just bought it) for fifteen thousand pounds cash. Thus, the original buyer owes the seller twenty thousand pounds to be paid at the due time. This kind of selling is prohibited as it is mere fraud and forms one of the forms of *ribā*. In this way, the seller sells a sum of money on credit for another one in cash, making the commodity just a means of fraud.<sup>47</sup>

<sup>45</sup> McMillen, *supra*, fn. 11 at 1021.

<sup>46</sup> THE TRANSLATION OF THE MEANINGS OF SAHIH AL-BUKHARI, ARABIC-ENGLISH by Dr. Muhammad Muḥsin Khan vol. III, book XXXIV (The Book of Sales (Bargains)), p. 221, *ḥadīth* no. 404 (Islamic University, Medina, Kingdom of Saudi Arabia; Dar Ahya Us-Sunnah, Al Nabawiya, undated). [Hereinafter, BUKHARI.]

<sup>47</sup> DR. ṢALIH AL-FAWZAN, A SUMMARY OF ISLAMIC JURISPRUDENCE, vol. 2, p. 18 (Riyadh, Kingdom of Saudi Arabia: Al-Ma'man Publishing House, 2005). [Hereinafter, AL FAWZAN.]

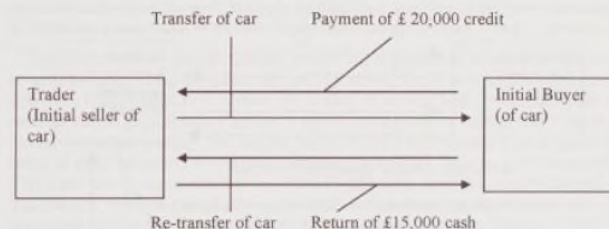
This transaction is known as "*bay' al-'inah*." Non-Muslims familiar with Wall Street finance recognize it readily as a repurchase agreement, commonly called a "repo." That is apparent from Diagram 27-1 of the deal hypothesized by Professor Al Fawzān.

From the Wall Street angle, the deal is unproblematic. Economically, the Trader has loaned a car to the Buyer for an agreed upon time period. The Trader receives £20,000 for lending the car. The Buyer returns the car, and gets back £15,000, when the period expires. The Trader thus gains £ 5,000, which is her profit for lending the car. In sum, the net effect of the repo is the Buyer has had use of the car for a specified period, and paid £5,000 for that use.

However, from the perspective of the *Shari'a*, the £5,000 is *ribā*. In the Islamic legal paradigm, the transaction is money-for-money. A car is used as a vehicle to facilitate the reciprocal exchange of the same thing, money, in different amounts.

Diagram 27-1:  
*'Inah* or Repo Transaction

Step 1: Sale of car for £20,000:



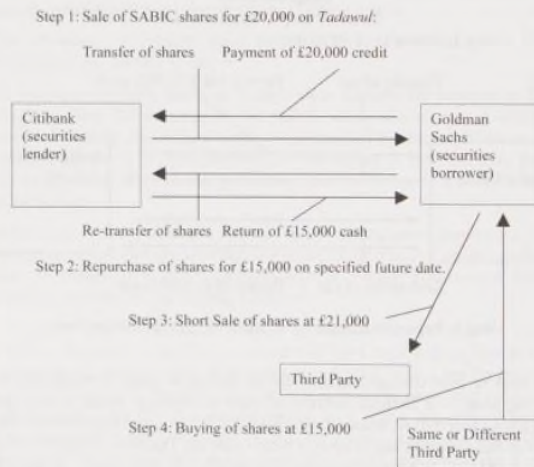
Step 2: Repurchase of car for £15,000 on specified future date.

The *'inah* or repo transaction need not be limited to a car. It could involve any underlying asset — a financial instrument, such as stocks or bonds, real property, such as a house, or indeed money itself. (After all, in the above hypothetical, the car could sit in the garage of the Trader, in which case the Trader essentially is lending the Buyer £20,000 for a fee — interest — of £5,000.) On Wall Street, in the City of London, and many other non-Muslim financial centers, the subject of repos is a financial instrument, and the resulting transaction is called "securities lending." Securities lending sometimes facilitates "covered short selling," i.e., the sale of an asset by a seller that does not own the asset, but borrows it from a lender. (If the seller does not borrow the securities to short sell, then it engages in what is called "naked short selling." Following the global financial market collapses in autumn 2008, several non-Muslim jurisdictions, including Australia, United Kingdom, and United States either banned or restricted short selling.)



To amplify the above example, suppose the two parties are banks, Citibank and Goldman Sachs, and the latter borrows stock from the former in Saudi Arabian Basic Industries Corporation (SABIC), which is traded on the Saudi Stock Exchange in Riyadh, the *Tadawul*. The purpose Goldman Sachs has in mind is to short sell the SABIC shares at a price, hoping to buy them back later on at a lower price, thereby making a profit. The short sale may occur to a third party, possibly on another stock exchange in a time zone different from that of Riyadh, such as the New York Stock Exchange (NYSE). Goldman Sachs might buy them back on that same, or yet a different, stock exchange. The profit from the short sale, anticipates Goldman Sachs, will more than cover the cost of its borrowing SABIC shares from Citibank. Diagram 27-2 depicts the transaction, with an assumed short sale profit of £6,000:

Diagram 27-2:  
**'Inah or Repo Transaction of SABIC Shares, Followed by Short Sale**



For Goldman Sachs, the £6,000 profit from short selling SABIC shares that it borrowed from Citibank covers the cost of borrowing those shares, £5,000. Thus, the net result for Goldman Sachs is a profit of £1,000. Citibank, too, makes a profit, namely, £5,000.

Put simply, from the Wall Street angle, "everybody wins." The key question is why does the *Shari'a* forbid a transaction — the repo — that is commonplace in, and worth hundreds of millions of dollars everyday to, non-Islamic financial centers, and which facilitates other potentially profitable deals, like short selling? Why, stated colloquially, "spoil the party"?

The answer is because a repo — the *'inah* — involves *ribā*. That was made plain by the Prophet Muhammad in a *ḥadīth* recounted by Abū Dāwūd:

If you sell to one another with *'inah*, hold the tails of cows [i.e., become occupied with world gains], become pleased with agriculture, and give up *jihād* [fighting in the Cause of Allah], Allah will make disgrace prevail over you, and will not withdraw it until you return [i.e., adhere] to your religion.<sup>48</sup>

Thus, the *ribā* to which Muhammad refers is the difference in the two monetary amounts exchanged. In sum, the rule against *ribā* manifest in an *'inah* transaction is, from the perspective of contemporary non-Islamic finance, a huge limitation.

Evidently, a *nasi'a* transaction can involve the exchange of precious metals, such as gold-for-gold, silver-for-silver, or gold-for-silver, if one part of the exchange is deferred. Historically, such metals are a kind of money, and occasionally still are used as means of payment. Further, a *nasi'a* transaction can arise with respect to foreign exchange trading. The largest financial market in the world (in terms of the value of daily turnover) is the foreign exchange market. It is an over-the-counter (OTC) market in which currencies issued by different countries are exchanged. In this market, forward foreign exchange deals, and currency swaps, are traded. (On organized exchanges, foreign exchange futures contracts are traded.) When an agreement between two foreign exchange traders calls for one of them to make (or receive) payment of a currency on a delayed basis, then the transaction is characterized as "*nasi'a*."

As suggested, *ribā al-nasi'a* is forbidden. The Sunnah of the Prophet is the source of the prohibition. One *ḥadīth*, collected by *Imām* Bukhari, records that Muhammad said:

There is no *ribā* (in money exchange) except when it is not done from hand to hand (i.e., when there is delay in payment) [*ribā al-nasi'a*].<sup>49</sup>

At first glance, this statement is puzzling. It appears to say *ribā* is permitted in all circumstances, except a *nasi'a* transaction. However, the correct understanding of the statement is different. Saying "[t]here is no *ribā*" means *ribā* does not exist. As long as *ribā* does not exist in a transaction, then the transaction is permissible. The

<sup>48</sup> Abū Dāwūd, *ḥadīth* no. 3462, quoted in AL FAWTAN, *supra*, vol. 2 at 18 (bracketed inserts in original).

<sup>49</sup> BUKHARI, *supra*, vol. III, book XXXIV (The Book of Sales (Bargains)), p. 213, *ḥadīth* no. 386.

"except" phrase means that *ribā* does exist in a *nasi'a* transaction. Therefore, because of the *ribā*, that transaction is forbidden. In turn, the mere characterization of a payment as "*ribā*" condemns the transaction. To be sure, this *hadith* does not itself state *ribā* is forbidden. However, that prohibition is clear from Qur'ānic passages quoted earlier.

Observe, also, from the last part of this *hadith* that a simultaneous exchange of money-for-money, such as U.S. dollars for U.S. dollars of equal amount (but, perhaps, different denominations of bills, such as a \$20 bill for two \$10 bills) is permissible. Likewise, an exchange of money-for-money of different currencies, but equal values — such as U.S. dollars for Emirati *dirhams* of the correct foreign exchange value — is permissible. In other words, there is no *ribā* in a spot currency or foreign exchange transaction. The problem arises when one payment is deferred, or delayed, as in a loan transaction, foreign exchange forward or futures contract, or currency swap. Consider a *hadith* recorded in Saḥīḥ Muslim:

I [Mālik b. 'Aus b. al-Hadathān, who reports this *hadith*] came saying: Who was prepared to exchange *dirhams* (for gold)? Talha b. 'Uбайдullah . . . (as he was sitting with 'Umar b. al-Khattāb) said: Show us your gold and then come to us (at a later time). When our servant would come we would give you your silver (*dirhams* due to you). Thereupon, 'Umar b. al-Khattāb . . . said: Not at all. By Allāh, either give him his silver (coins), or return his gold to him, for Allāh's Messenger . . . said: The exchange of silver for gold (has an element of) interest in it, except when (it is exchanged) *on the spot*; and wheat for wheat is an interest unless both are handed over *on the spot*; barley for barley is interest unless both are handed over *on the spot*; dates for dates is interest unless both are handed over *on the spot*.<sup>50</sup>

This *hadith* indicates that *ribā* is inherently and inextricably connected with the deferred delivery of a like subject (money). Therefore, the transaction is impermissible. Simply put, it is the deferral (*nasi'a*) element that renders a monetary exchange unlawful, because of its inseparability from the element of *ribā*.

This conclusion is dramatic. Not only does it mean interest-based lending is illegal under the *Shari'a*. It also means foreign exchange derivative transactions — forwards, futures, and swaps — are illegal, too. Not surprisingly, few (if any) Islamic countries sponsor foreign exchange derivative markets.

Why are the two — *ribā* and *nasi'a* — inseparable? The Explanatory Note to the above quoted *hadith* offers one reason:

There is no harm in converting gold into silver and silver into [gold]. The Holy Prophet . . . did not give sanction [approval] for the above-mentioned transaction [in the *hadith*] as this form of transaction makes two parties stand on two footings which can at times be unequal. Suppose one person hands over gold to another person and he, after inspection, accepts it and promises to pay silver in return at a future date. This weakens the position of the seller of gold as he cannot make an inspection of silver at the time of

giving gold. There is a possibility that the buyer of gold who has already taken into custody the precious metal may take undue advantage of his advantageous position.<sup>51</sup>

A second reason is the value of money changes frequently. The fluctuations may be unfair to one side of a transaction — the one receiving payment at a later date. To be sure, from a non-Muslim banking perspective, the whole point of a forward, future, or swap foreign exchange contract is to allocate risk, namely, foreign exchange risk, the risk of currency fluctuations. From that vantage point, the transaction is not unfair, but rather an efficient, consensual allocation and assumption of risks by informed parties.

### [B] *Ribā al-Faḍl* (Unequal Spot Commodity Trades)

The literal meaning of the Arabic word "*faḍl*" is "excess." In that respect, "*faḍl*" and "*ribā*" are synonymous. But, *ribā al-faḍl* refers to selling goods of lesser quality for the same kind of goods of better quality. The goods exchanged are (to use an international trade law terms) like, directly competitive, or substitutable products. But, they are not of the same quality. The quality differential — the difference between the lower and higher quality goods traded — is excess. As an example, an exchange of 10 fresh sugary (*sukkari*) dates from Saudi Arabia for 10 stale dates of the same kind would involve excess (and all the more so if the exchange were for 10 dates from California).

*Ribā al-faḍl* also refers to selling of goods of the same category or type, but differing quantities. The excess is the difference in the quantities. For instance, an exchange of 10 identical pairs of blue jeans for 15 of them involves excess.

Interestingly, there is a personal dimension to the meaning of "*riba al-faḍl*." The term is defined as:

Riba in a hand-to-hand or barter exchange.<sup>52</sup>

The transaction in *ribā al-faḍl* literally is hand-to-hand. This feature differentiates *ribā al-faḍl* from *ribā al-nasi'a*. *Ribā al-nasi'a* does not require a deal to take place at the same time and place, hence the use of the term "*nasi'a*," meaning "deferral." In contrast, *ribā al-faḍl* requires that a transaction occur contemporaneously in the same venue, i.e., it is a spot transaction. Accordingly, "*ribā al-faḍl*" also is defined as any excess or increase "relating to unequal spot trades in specified commodities."<sup>53</sup>

Two *hadiths* recorded by *Imām* Muslim clarify the circumstances under which *ribā al-faḍl* arise, as well as the scope of the prohibition against it:

- Gold is to be paid for by gold, silver [by] silver, wheat by wheat, barley by barley, dates by dates, salt by like, the payment is made hand to hand. He who added to it, or asked for an addition, in fact

<sup>51</sup> MUSLIM, *supra*, vol. IIA, book 22 (Book of Share Tenancy), p. 49, Explanatory Note (1) to *hadith* no. 1586.

<sup>52</sup> IQBAL & MIRAKHOR, *supra*, at xiii.

<sup>53</sup> McMillen, *supra*, fn. 11 at 1021.

<sup>50</sup> MUSLIM, *supra*, vol. IIA, book 22 (Book of Share Tenancy), pp. 48–49, *hadith* no. 1586 (emphasis added).



dealt in *usury*. The receiver and the giver are equally guilty.<sup>54</sup>

- Gold for gold, silver for silver, wheat for wheat, barley for barley, date for date, salt for salt, like for like, equal for equal, and hand for hand. If the kinds differed, sell whatever you like, even if it is hand for hand.<sup>55</sup>

Both *hadiths* contemplate the following kind of spot-market transaction: one party transfers low-quality dates (e.g., from California, or dates that are stale) to a second party, in exchange for high-quality dates (e.g., from Saudi Arabia, or dates that are ripe). However, there are slightly different lessons to draw from the statements.

Some *fukahā'* interpret the first *hadith*, which is narrated by Abū Sa'īd al-Khudrī, as limiting the rule against *ribā* to transactions in one of only six items: gold, silver, wheat, barley, dates, and salt. Their view, however, is an excessively literalist view not accepted by the majority of Islamic jurists. The majority of *fukahā'* use analogical reasoning (*qiyaas*) to generalize the rule to cover a transaction in a similar thing. They explain the Prophet Muhammad was using the six items as examples, familiar to his time. Indubitably, the first version makes clear any excess is illegal and both buyer and seller are at fault. As for the second *hadith*, it offers an insight not found in the first variation: an exchange of unlike commodities is not forbidden. That is evident from the last sentence, in which the Prophet says "sell whatever you like" if the goods are different.

Another *hadith* that lends considerable insight into the prohibition against *ribā al-faḍl*, the spot market exchange of goods of the same category but different quality and/or quantity, is narrated by Abū Sa'īd and Abū Hurayrah. This *hadith* states:

[The Prophet Muhammad . . . appointed a person as a Governor of Khaybar, also transliterated as "Khaibar."] That Governor brought to him [Muhammad] an excellent kind of dates from Khaibar [i.e., high-quality dates, such as *janīb*]. The Prophet . . . asked, "Are all the dates of Khaibar like this?" He replied, "By Allāh, no, O Allāh's Apostle! But we barter [i.e., obtain] one *ṣā'* of this [type of [high-quality]] dates for two *ṣā's* of dates of ours [the low-quality dates], and two *ṣā's* of it [the high-quality dates] for three of ours [the low-quality dates]." Allāh's Apostle . . . said, "Do not do so (as that is a kind of usury), but sell the mixed dates [of inferior quality] for money, and then buy good dates with that money."<sup>56</sup>

<sup>54</sup> MUSLIM, *supra*, vol. IIIA, book 22 (Book of Share Tenancy), p. 50, *hadith* no. 1584R4 (emphasis added).

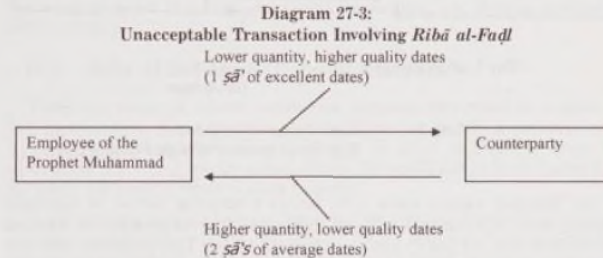
<sup>55</sup> MUSLIM, *supra*, vol. IIIA, book 22 (Book of Share Tenancy), p. 50, *hadith* no. 1587R2 (emphasis added).

<sup>56</sup> BUKHARI, *supra*, vol. III, book XXXIV (The Book of Sales (Bargains)), p. 222, *hadith* no. 405 (bracketed insertions added).

"Khaybar" is a name of a town 100 miles north of Medina, in the Kingdom of Saudi Arabia. It is renowned for its date farms. In the times of Muhammad, Khaybar was home to a large Jewish community. Several Islamic legal precepts are based historically in events that occurred in and around Khaybar, including the *kharij* tax.

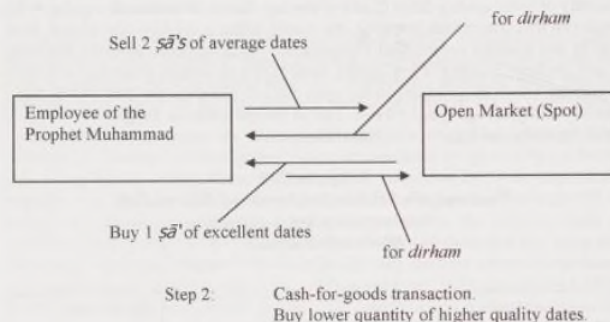
Diagram 27-3 sets out the transaction in which the employee of Muhammad engaged.

As Diagram 27-3 indicates, the essence of the transaction involved an exchange of a smaller quantity of higher quality dates (1 *ṣā'* of excellent dates) for a larger quantity of lower quality dates (2 *ṣā's* of average dates). Muhammad explains to his employee this transaction is wrong, the reason being it involves *ribā al-faḍl*. Both quality and quantity are unequal. Consequently, Muhammad counsels his employee to sell the large quantity of low-quality dates (2 *ṣā's* of average dates) for cash (units of currency, such as *dirhams*) on the open market, and then use that cash to buy a small quantity of high-quality dates (1 *ṣā'* of excellent dates). Diagram 27-4 depicts the religiously and legally acceptable transaction.



Analyzing the *hadith* and Diagrams reveals the rationale for the prohibition against *ribā al-faḍl*. That rationale is potential injustice. In an exchange of merchandise that differs in quality, quantity — or, as in this illustration, both quality and quantity — one side may not receive full, fair value for what that side gives up. To be sure, the American legal response would be that as long as the commercial parties are fully informed about the nature and amount of the subject of their transaction, then they bear the risk of loss. The *Shari'a* demands more of the parties than a law-and-economics style allocation of risk via private contract. Cumbersome as it may be, the parties should split a single, unequal exchange of goods-for-goods into two purchase-and-sale, cash-for-goods transactions. Here lies a basic difference in legal approach.

**Diagram 27-4:**  
**Acceptable Transaction with No Ribā al-Faḍl**  
 Step 1: Cash-for-goods transaction.  
 Sell higher quantity of lower quality dates.



The American regime leaves it to private contracting parties to negotiate, honestly or not, a deal suitable to them. That regime does not presume the potential for injustice does not justify further regulation. Islamic Law essentially does not trust the parties to negotiate a fair deal. The *Shari'a* leaves open to debate whether that is because one party is likely to succumb to the temptation to cheat the other party, or because the parties are simpletons. The nature of merchants and their environment may be Hobbesian or not. That is, Islamic Law does not pronounce judgment that either or both parties are fools or knaves. Rather, Islamic Law sees the potential for injustice, and is not satisfied to leave it to the parties to cure the problem. Better to structure the transaction in small, transparent steps, than to hide the potential in a single deal that mixes qualities and/or quantities.

Better, too, because cautious step-by-step transacting might help prevent monopoly, whereby one party (or a cabal of merchants) corners the market on high-quality dates. A holder of a large inventory of low-quality dates should not be able to trade them for high-quality dates, even of lesser amount, and thereby accumulate an excessive amount of high-quality dates. Rather, the market for both low- and high-quality dates should be liquid, *i.e.*, there should be many ready, willing, and able buyers and sellers of both kinds of dates. Liquidity is a feature more likely to exist if this holder must sell for cash low-quality dates in a transparent open-market transaction. By doing so, there certainly will be low-quality dates available to market participants who cannot afford high-quality dates. Moreover, possibly, the requisite selling of low-quality dates might push down prices for low-quality dates. One result of price depression would be reduced sales proceeds and, in turn, less funds with which to buy high-quality dates. That is, the holder of the large inventory of low-quality dates cannot dump them all on the market without affecting prices. Obviously, this scenario depends on the famous

neo-classical economic assumption of *ceteris paribus* — all other factors being equal — and on assumptions about elasticities of supply and demand. Nonetheless, the basic impulse of the *Shari'a* clearly favors a diverse array of quality in large quantities, with no single dominant market participant.

Note that the prohibition against *ribā al-faḍl* applies both to money and commodities transactions. However, exchanging different currencies like Saudi Riyals for American Dollars or different money types like gold coins for silver coins is permissible only under two conditions. First, the transaction must be a spot market deal. Second, both parties (or their agents) must be present at the same time. The first condition indicates forward and futures contracts are disallowed, or at least highly problematical, in part because of the likelihood that the relative values of the currency will change. The second condition may be satisfied through technological means (*e.g.*, through internet connections), *i.e.*, physical presence is not mandatory.

### [C] Ribā Al-Jahiliyya (Defer and Increase)

There are plenty of Islamic commercial contracts that result in a debts or liabilities (*dayn*) of one party to another. Examples include a contract under which an owner of an asset sells that asset to the buyer on credit, or leases the asset to the buyer for a specific period of time. The credit sale or lease illustrations fall under the generic rubric of asset financing.

Asset financing means a buyer or lessor is obligated to make purchase or rental payments to the seller or lessor, respectively, for the asset according to a schedule set out in the contract. Suppose, however, a buyer/lessee is late in making an installment payment under a credit sale contract, or late in making a rental payment under a lease contract. Could the seller/lessor, *i.e.*, the asset owner, increase the amount owed by the buyer/lessee? This kind of term in a sale or lease contract, namely, that failure to make timely payment of an amount owed triggers an additional financial charge, is common in the American commercial context. However, the answer is “no” under the *Shari'a*. Charging any increase in connection with the further deferment or delay of a debt, where such increase is linked to time, is forbidden (*harām*).

The increase is called “*ribā al-jahiliyya*,” and is said to be the form of *ribā* the Qur'an most strongly condemns.<sup>57</sup> Note that the essence of *ribā al-jahiliyya* is not the planned-for delay or deferral of payments as per the contract in question. Rather, it is the unexpected delay or deferral, deviating from the contract schedule. The Islamic legal logic for the prohibition is that the increase connected to the additional delay or deferral amounts to trading in debts. By charging an extra amount, the seller-lessor of the asset that is the subject of the contract is selling the debt to the buyer-lessee. The price is an even larger debt than under the original contract, with a delay or deferral period even longer than under that contract. The only lawful way under the *Shari'a* for the creditor-seller-lessor to sell

<sup>57</sup> See MAHMOUD AMIN EL-GAMAL, A BASIC GUIDE TO CONTEMPORARY ISLAMIC BANKING AND FINANCE 5 (“Debt re-sale” section) (June 2000), posted at [www.ruf.rice.edu/~elgamal/files/primer.pdf](http://www.ruf.rice.edu/~elgamal/files/primer.pdf). (Hereinafter, EL GAMAL.)



the debt to the debtor-buyer-lessee is to do so at face value, i.e., at the amount and tenor under the original contract. The only other alternative is for the creditor to forgive all or part of the debt.

### [D] *Da'Wa Ta'Ajjal* (Prepay and Reduce)

The Arabic term "*da wa ta'ajjal*" means "prepay and reduce."<sup>58</sup> It is the mirror image of *ribā al-jahiliyya*. Instead of being charged an additional sum of money because of a further delay or deferral in making a purchase price or lease payment to a creditor-seller-lessor, a debtor-buyer-lessee obtains a reduction in the amount owed by prepaying the purchase price or lease amount. Simply put, with "*da wa ta'ajjal*" financing costs of acquiring an asset are cut by paying the full obligatory amount earlier than called for in the underlying contract.

This type of transaction, like deferral and increase, is common in the American commercial context. For example, home mortgage contracts typically allow buyers to prepay their debt, and thus acquire full ownership of their homes, earlier than the customary 15- or 30-year tenor of the loan. Is a prepay-and-reduce transaction lawful under the *Shari'a*?

A clue to the answer is the term "*da wa ta'ajjal*" does not use the word "*ribā*." After all, there is no excess, or increase, charged by the creditor-seller-lessor. Rather, the creditor cuts the aggregate debt amount because of prepayment. Nevertheless, historically *da wa ta'ajjal* was prohibited. The prohibition generated considerable controversy.<sup>59</sup> Consequently, several legal scholars (*fukahā*) relaxed the prohibition. Their (specifically, *muftis*) opinions (*fatawā*) are used to authorize issuance of "Islamic credit cards," whereby purchases by a cardholder are financed automatically for a prescribed period, such as 12 months. If the cardholder prepays, then the charges on the card are reduced.

## § 27.05 RATIONALES FOR PROHIBITION ON RIBĀ

### [A] Unjust Enrichment (*Al-Ithra' Bila Sabab*)

A critically important point emerging from the meaning of "*ribā*," and rule against it, concerns morality. A (if not the) key purpose of the prohibition on *ribā* is to put commercial transactions on a sound ethical basis. Capturing an increase in value without expending or giving anything in exchange is immoral. Specifically, it is at once slothful, greedy, and exploitative — sins that are not uncommonly manifest in non-Muslim financial markets, such as Wall Street, and applied to some non-Muslim financiers, such as hedge fund managers and speculators.

To be sure, at an uncritical level, there is no need for an explanation of the rule. The prohibition is accepted as a matter of faith, as the Qur'an and various *hadiths* say so. But, in the modern world faith is not always accepted unquestioningly. The legal mind, in particular, searches for reason to support, or refute, an article of

faith. It may also be remarked that faith and reason — at least according to Catholic Christian teaching — are two wings of the same bird that allow the bird to soar. True faith is reinforced by correct reason, and *vice versa*, as Pope John Paul II explains in his September 1998 Encyclical, *Fides et Ratio* (*Faith and Reason*). Thus, the question is joined: what, other than a sacred scripture or the sayings of Muhammad supports a ban on *ribā*?

The answer concerns profit. Contrary to the popular stereotype in some non-Muslim financial circles, the *Shari'a* prohibition on *ribā* does not, and never did, ignore the time value of money. Rather, Islamic Law always distinguished between investing and lending money, i.e., between commerce and finance, on the one hand, and charity, on the other hand. This distinction simply is not made by conventional non-Muslim banking. In that system, investing and lending are two sides of the same coin, namely, a single commercial or financial transaction.

There is nothing charitable about lending, nor about charging interest. To both the borrower and lender, the deal is about trading (lending) money (principal) now in exchange for more money (principal plus interest) later. This single transaction is reflected on the balance sheet entries made by a bank in a non-*Shari'a* compliant loan transaction. The bank records the amount of the loan as an asset (a claim of the bank on the borrower) under the category "Note Receivable," and makes a corresponding entry on the liability side of the ledger (containing claims against the bank) for the borrower under the rubric "Demand Deposit" (or other such category). The borrower makes the mirror image entries — an asset account that is a "Demand Deposit," and a liability account that is a "Note Payable." The bottom-line point is the non-Muslim bank and borrower regard the transaction, albeit from opposite sides, in the same way — a business deal.

That is not the view in Islam. Law distinguishes between commerce (or trade) and charity. Under the *Shari'a*, the proper way to make money (other than by inheritance or bequest) is to earn it, for instance by investing or trading for gain. Investing money leads either to an increase or decrease in the principal value of the financial capital at stake. In the context of investing, increase is permissible. But, *ribā* has nothing to do with trade. Rather, it has everything to do with charity, and bespeaks a lack thereof. That is, lending money is a type of charity, a manifestation of assistance to a party in need. That is why the expectation of profit in the context of lending money not only is unreasonable, but also sinful. In sum, it is entirely erroneous to suggest that Muslims somehow "don't get" the concept of the time value of money. Not only do they "get it," their law holds that measuring the value of money over time in the context of charity is wrong.

Consider, therefore, the Explanatory Note to the Chapter containing the *hadiths* on *ribā* compiled in Sahih Muslim. It states:

The question is often asked why Islam has forbidden interest. The answer is: It is because interest is an exploitation of helpless persons. In case money is lent for consumption purposes to the poor, and then an excess payment is demanded from them, it is nothing but sheer callousness.

Some people concede that it is oppression in case money is lent to the poor for consumption purposes. If we look deeply into the working of

<sup>58</sup> See EL GAMAL, *supra*.

<sup>59</sup> See EL GAMAL, *supra*.

business transaction[s.] we will find that even here the interest hits the weakest link in the chain of production—helpless labour. The main fallacy in our reasoning is that we always think of the huge gains and ignore the heavy losses with their depressing effects on the lower strata of society.

Among the four links in the chain of production, land, labour, capital and organisation, the weakest link is the labourer as he cannot store his labour. In case of loss, the capitalist insists upon the pound of flesh and manages to get it on account of his dominant position in business. He thus not only saves himself from loss, but makes [a] fortune in such unfortunate circumstances. The organiser who, in practical life, is also a capitalist shifts the whole burden of loss upon land and labour. Land can offer some resistance as it is not destroyed, but one moment of the loss of labour is lost forever since it cannot be preserved.

Islam makes speculation and partnership lawful business transactions which bind the capitalists to bear a share of the loss, along with other factors of production.

Moreover, the charging of interest undermines the spirit of fellow-feeling and sacrifice, and inculcates selfishness and miserliness in man.

The latest researches [sic] in Economics have proved beyond any shadow of doubt that interest is responsible for the economic crisis in the world. With increase[s] in the rate of interest, the margin of profit declines and the investor prefers to lend his money on interest rather than . . . in business and take the risk.

The ever-increasing growth of the interest-ridden economy is a conspiracy of the selfish and heartless moneyed class against other factors of production.<sup>60</sup>

This passage — which could as easily have been written by Karl Marx (1818-1883) (or one of his less eloquent adherents) as a *Sharī'a* scholar — is both insightful and extravagant, if not extremist.

It is insightful in that the Explanatory Note links *ribā* and exploitation. Eschewing *ribā* is a legitimate urgent request of the *Sharī'a* because of the unlevel competitive playing field it creates and reinforces. The borrower is conceived of as poor and downtrodden, oppressed by a powerful, oppressive money-lender. If a *ribā*-based transaction proceeds, then this asymmetry is reinforced. When such transactions occur throughout a financial system, then socioeconomic inequality becomes widespread. *Ribā* causes damage to individuals, and the community at large. Never mind the obvious fact that some borrowers are major business associations, while some banks are local or regional in size. The *Sharī'a* concern is that *ribā* is unjust, as a matter of individual and social justice, which if allowed will enrich the few and impoverish the many.

<sup>60</sup> Muslim, *supra*, vol. IIIA, book 22 (Book of Share Tenancy), p. 47, fn. 1 to Chapter 14 (emphasis added).

Another way to express this rationale is that *ribā* results in the unjust enrichment of the lender as against the borrower. The Arabic term "*al-ithra' bila sabab*" means "unjust enrichment." Literally, it means "enrichment without cause," as "*al-ithra'*" means "enrichment," "*bila*," means "without," and "*sabab*" means "cause." The unjust enrichment takes the form of the lender making money from money, but putting in no valuable labor or services. When repeated over space and time, the community becomes socioeconomically stratified, with financiers at or near the apex. Pointing to inequities between Wall Street and Main Street, or the City of London and the rest of England, some Islamic scholars and commentators observe that this phenomenon characterizes many post-industrial non-Muslim economies. It also plagues some major emerging non-Muslim countries, such as the "BRICs" — Brazil, Russia, India, and China. Thus, such scholars and commentators call for a more just means of enrichment for financiers than interest-based transactions, and laud the *Sharī'a* as offering the needed alternative.

Significantly, the term "*al-ithra' bila sabab*" is not restricted to the context of transactions in which "*ribā*" may exist, anymore than the American legal concept of "unjust enrichment" is used narrowly. For example, both terms can be used in the context of Property Law. Suppose a person rents a house or apartment, but does not pay the rent. That person reaps "*al-ithra' bila sabab*. That is because the person is enjoying the use of the premises without paying for them.

But, the passage quoted above also is extravagant. As a technical matter, its underlying economic premises are erroneous. There are more factors of production than land, labor, capital, and organization. Technology and human capital are major contributors to economic growth. Moreover, interest rates do not march up relentlessly. They rise and fall, in accordance with the supply and demand for money. An interest rate is an equilibrium price for money. That equilibrium changes with credit conditions.

The passage blithely ignores the stark reality that there are many grossly unequal Islamic countries, and many comparatively egalitarian non-Muslim countries. Compare Pakistan, which under a Supreme Court ruling in December 1999 declared interest-based banking un-Islamic and ordered the government to establish an interest-free economy by 2001, with Sweden, which has an interest-based banking system.<sup>61</sup> Compare Saudi Arabia, which permits both Islamic and non-Islamic banking, to Singapore, which is a conventional banking center. Pakistan and Saudi Arabia suffer from gross income disparities. Sweden and Singapore do not. The rule against *ribā*, which admittedly is not applied perfectly or strictly in Pakistan or Saudi Arabia, does not save those societies from the kind of oppression complained of in the above-quoted Explanatory Note.

Indeed, there are Muslim scholars who criticize Islamic bankers for defrauding borrowers by charging more to borrowers in a lending transaction (through a *sharikah al-mudārabah* partnership) than the borrowers would pay in conventional, interest-based loans.<sup>62</sup> Put differently, it is simplistic, if not foolhardy, to blame *ribā*

<sup>61</sup> See *Pakistan Court Upholds Islamic Banking*, BBC News, 23 December 1999, posted at [http://news.bbc.co.uk/2/hi/south\\_asia/576435.stm](http://news.bbc.co.uk/2/hi/south_asia/576435.stm).

<sup>62</sup> See, e.g., DR. MUHAMMAD SALEEM, *ISLAMIC BANKING — A \$300 BILLION DECEPTION* (Philadelphia, PA:



per se for "the economic crisis" (whichever one that might be), or to call it a "conspiracy" wrought by a dominant socioeconomic class. If there is a single culprit, then it may be selfishness, but that is a sin of the heart, not a defect inherent in the global capitalist order. Capitalists and Communists, Muslims and non-Muslims — none of them has a monopoly on greed.

### [B] Complimentary Rationales

Are there other, complementary rationales in favor of the ban on *ribā*? The answer is yes, and three specific contentions are worth considering and critically assessing. First, one argument is *ribā* impedes the development of financial markets, and even trade. If a small number of people increase their incomes and net worth by receiving interest without any effort, then people in need of funds are harmed, again because of the increasing disparity of income and wealth. If borrowers know this outcome in advance, that they will have to return more than what they originally borrowed, then they will not borrow in the first place. They will fear being over-burdened with debt and unable to pay off in full their interest-based extensions of credit. Without a demand for borrowing, financial markets, and domestic and international commerce, will decelerate.

This argument is seriously flawed, and reflects a fundamental misunderstanding of the key contribution of credit markets and interest in the process of economic growth. Debtors generally use borrowed funds for productive purposes. Individuals use a loan to purchase assets that appreciate (like homes, through mortgage loans), or develop their human capital (through a student loan for education). Businesses use loans to expand production capacity (e.g., by purchasing capital assets). Quite obviously, the returns from the use of the funds more than cover the costs of borrowing. The homeowner develops equity in her house, the student graduates to become a professional with a high income-earning potential, and the business enhances its profitability. Neither this upward economic activity, nor any of its positive knock-on effects (e.g., jobs for workers in the construction, education, and machine tool industries), would be possible without incurring a loan. Interest is the price of the loan, a price that reflects the risk and reward of the project for which the loan is made, the borrower to whom or which the loan is extended, and the general supply and demand for credit at the time the loan is made. Interest is paid off by the borrower through its enhanced capacity. Should the benefits not materialize, then credit work-out arrangements, or even bankruptcy laws, exist to balance rights and obligations of debtors and creditors. Put simply, the argument is entirely backward. Countries (or regions within those countries) that lack well-developed, liquid, transparent credit markets, in which interest functions as a mechanism to allocate credit on the basis of the risks and rewards from proposed projects, tend to be poor.

A second argument put forth in favor of the ban on *ribā* concerns food shortages. The rationale is that *ribā* causes a deficit in food stuffs. The *Sharī'a* encourages buying and selling different items for different prices, but not buying and selling the same item for a different price. For example, buying and selling

gold for gold of the same quality is not a valid exchange if made on unequal terms, whereas an exchange of silver for gold is permissible on unequal terms because the commodities are inherently different. The argument is that when the same type of a commodity — whether gold or silver, or a foodstuff such as barley or wheat — of the same quality is exchanged for different value, the number of market participants with access to high-quality goods, and the ability to exchanging them, will become limited. Only a cabal will end up with high-quality merchandise, namely, the market participants who were able to demand *ribā* from others. The general public will not have access to necessary goods, including foodstuffs. The prohibition on *ribā* essentially orders a party seeking good quality food to sell his or her low quality food to the market, and use the sale proceeds to buy the good quality merchandise. Such transactions will open markets to different types and kinds of goods.

Like the first claim, this argument is seriously deficient. An initial problem is it is imprecise. Further, the argument does not justify what it claims to defend. If the problem at issue is hoarding of high-quality merchandise, then the solution is not to ban *ribā*. Rather, the remedy lies in rules against anti-competitive practices. Unequal exchanges of merchandise that is similar, but not identical, reflects differences in quality. Knowledgeable market participants are typically in the best position to examine goods and differentiate product features, and negotiate appropriate price terms in their sales contract, as well as remedies in the event of breaches by the seller.

A third argument is that *ribā* creates instability in the value of a currency vis-à-vis other currencies. That is, a country with an interest-based banking system will endure greater volatility in the foreign exchange values of its currency than a country that eschews *ribā*. This argument suffers from a confusion of correlation and causation, and has no basis in theory or practice.

Like the second argument, this contention is fuzzy, failing to spell out a clear, causal chain of events. Moreover, foreign exchange rates ultimately are determined by the supply of and demand for one currency against another. Interest rate differentials affect both sides of the market. For example, higher interest rates (e.g., in the United States relative to Japan) attract foreign purchases (by Japanese) of a local currency (dollars versus yen), so as to enable foreign investors (Japanese) to purchase interest-bearing assets denominated in local currency (e.g., bonds issued by the American government or corporations). Interest rates are an important indicator of credit conditions in one country versus another, and a critical discipline on a borrower. For instance, a country with poor fiscal and monetary policies, and high levels of corruption, rightly will have to pay a high interest rate on its sovereign debt to attract foreign investment. As for volatility of an exchange rate, rapid fluctuations typically are due to a variety of factors, of which only one of them is sudden, unexpected shifts in interest rate differentials. Here, again, the argument hardly supports a prohibition on *ribā*.

What may be said by way of summary about the *Sharī'a* proscription against *ribā*? The rule fits perfectly within the Islamic legal paradigm in which believers are called upon to behave in an upstanding manner in their worldly affairs. The fact that not all of them do — that, as in any religion, there are devout adherents and

lapsed followers who may one day return to the fold — is not the fault of the *Shari'a*. It is a testament to human frailty. As for rationales in favor of *ribā*, they range from noble concerns about individual impoverishment and social inequality to muddle-headed anti-capitalist rants.

### § 27.06 SHĪ'ITE DISTINCTIONS

In practice, there appears to be little difference between *Sunni* and *Shī'ite* Banking Law. Both branches of Islam adhere to the same basic prohibitions on *ribā* (interest or excess)<sup>63</sup> and *gharar* (uncertainty), known as a "*gharar*."<sup>64</sup> Sayyid Qutb (1906-1966), a leader of the Muslim Brotherhood, explains:

Anyone who extends to me one *dinar* in order to receive a return of two *dinars* from me is my enemy; I will not wish him well, nor can I regard him in amity. Mutual support (*ta'awun*) is one of the fundamental principles of Islamic society, but *ribā* destroys this sentiment and weakens its foundations. For this reason does Islam despise *ribā*.<sup>65</sup>

Following Qutb, many scholars considered how economic transactions impact the social relationships among Muslims.

In the 1960s and 1970s, prominent *Shī'a* scholars sought to chart a course between unbridled capitalism and atheistic Marxism. The work of the Iraqi Twelver *Shī'ite* cleric Grand *Āyatollāh* Muhammad Bāqir Al Ṣadr (1935-1980) was an intellectual impetus for efforts to find a Third Way.<sup>66</sup> *Āyatollāh* Al Ṣadr authored a renowned book, *Iqtisaduna* (*Our Economics*) (1960-61), which critiqued both capitalism and communism.<sup>67</sup> His work attracted the attention of (*inter alia*) Kuwait, whose government consulted him on ways to manage oil wealth consistent

<sup>63</sup> Haider Ala Hamoudi, *You Say You Want a Revolution: Interpretive Communities and the Origins of Islamic Finance*, 45 VIRGINIA JOURNAL OF INTERNATIONAL LAW 249, 263 (winter 2008). [Hereinafter, Hamoudi.]

<sup>64</sup> Hamoudi, *supra*, at 263-264 (winter 2008).

<sup>65</sup> SAYYID QUTB, *AL-'ADALA AL-LITIMATIYAT* FIL ISLAM at 103 (1st ed., 15th prtg., 2002), quoted in Hamoudi, *supra*, at 283.

<sup>66</sup> Hamoudi, *supra*, at 273-274.

<sup>67</sup> According to one source:

In *Iqtisaduna*, al-Ṣadr strives to show that Islam has answers to problems of the modern world by presenting an Islamic alternative to both capitalism and socialism. He rejects socialism on the basis that Islam distinguishes between the individual and the ruler in an Islamic state in a manner that requires a distinction between private and public property. However, he also rejects capitalism's notion that private property is justified in its own right, arguing instead that both private and public property originate from God, and that the rights and obligations of both private individuals and rulers are therefore dictated by Islam. He also rejects the conclusion that this makes Islamic economics a mixture between capitalism and socialism, arguing that capitalism and socialism each come about as the natural conclusion of certain ideologies, while Islamic economics comes about as the natural conclusion of Islamic ideology and therefore is justified entirely independently of other systems of economics.

*Iqtisaduna*, WIKIPEDIA, posted at <http://en.wikipedia.org/wiki/Iqtisaduna>. See also T.M. Aziz, *An Islamic Perspective of Political Economy: The Views of (Late) Muhammad Baqir al-Sadr*, 10 AL-TAWHID ISLAMIC JOURNAL ISSUE 1 (1993), posted at [www.al-islam.org/al-tawhid/political-economy/](http://www.al-islam.org/al-tawhid/political-economy/) (summarizing the *Iqtisaduna*).

with Islamic precepts. In turn, Al Ṣadr worked on Islamic banking matters, and criticized *ribā* and *gharar*.

*Āyatollāh* Ruhollah Khomeini (1900-1989) used the work of Al Ṣadr "as a template for Islamic government in Iran."<sup>68</sup> However, in many Muslim countries, criticisms by Al Ṣadr of predominant *Sunni* rules tended to be disregarded. Restrictions, if they existed, against *ribā* and *gharar* were analyzed, if at all, along with financial instruments and institutions through a framework of social justice. That framework could be more or less permissive, depending in part on the political and economic environment. Al Ṣadr was executed by Saddam Hussein in 1980.

<sup>68</sup> Hamoudi, *supra*, at 272.



## Chapter 28

### **BANKING LAW: LEGAL DEVICES (*HIYAL*) AND THE PROHIBITION ON INTEREST (*RIBĀ*)**

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Reality is a question of perspective: the further you get from the past, the more concrete and plausible it seems — but as you approach the present, it inevitably seems incredible.

Salman Rushdie (1947– ),  
*Midnight's Children*, Book 2 "All-India Radio" (1981),  
Winner of the 1981 Booker Prize

#### SYNOPSIS

##### § 28.01 LEGAL DEVICES OR FICTIONS (*HIYAL*)

- [A] Need for Legal Devices in All Legal Systems
- [B] Development of *Hiyal*
- [C] Documenting *Hiyal*
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##### § 28.02 NATURE OF *SHARIKAH AL-MUḌĀRABAH* (SLEEPING PARTNERSHIP)

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##### § 28.03 RULES GOVERNING *SHARIKAH AL-MUḌĀRABAH*

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##### § 28.04 *MURĀBAHA* CONTRACTS, THEIR RELATIONSHIP TO *SHARIKAH AL-MUḌĀRABAH*, AND COMMON COMMERCIAL FINANCE TRANSACTIONS

##### § 28.05 BANK FUNDING, TRANSACTIONS, AND LEGAL FEES

## § 28.01 LEGAL DEVICES OR FICTIONS (ḤIYAL)

### [A] Need for Legal Devices in All Legal Systems

How is customary commercial law — the *law merchant*, or *lex mercatoria* — brought into agreement with Sacred Law? This question is a specific example of the general and perpetual challenge faced in the *Shari'a*: the interaction of theory and practice. The answer is a “legal device,” typically a “legal fiction,” called “*ḥiyal*.”<sup>1</sup>

There is nothing unique to Islamic Law about the use of a device with a teleological purpose in mind. Every legal system needs a conduit between theory and practice. Legal fictions exist in both Roman and Canon Law, as they do in American Law. Interestingly, though, the teleological purposes are not the same in each legal system. In Islamic Law, *ḥiyal* serves to circumvent a positive law — to avoid the framework of the Sacred Law. In contrast, in Roman Law, the idea is to fit a new practice within an existing legal framework, and thereby avoid new legislation.<sup>2</sup>

The Arabic word “*ḥiyal*” (plural; the singular is “*ḥila*”) refers to legal devices put to an extra-legal end that could not otherwise be achieved directly under the *Shari'a*. The idea in using a *ḥila* is to conform to the letter of the law, and not be forced to act against it. To be sure, the concept of *ḥiyal* suggests a dis-connect between high theory and street practice. The concept is an effort to bridge the two.

For example, one use of the concept is to permit formation of a contract that is not invalid under the Islamic Law of Obligations, but which would be invalid if done in a clear, overt manner. The goal is to deploy a device that renders a transaction lawful, which if allowed to stand, makes the transaction unlawful. Another illustration (discussed below), which is from Islamic Family Law, is known in Arabic as “*taḥlīl*,” which refers to a device that removes an impediment to marriage.

### [B] Development of Ḥiyal

*Ḥiyal* developed in the Islamic legal world of the Middle Ages. Commercial parties to a transaction were keen to minimize the risk an Islamic judge (*qāḍī*) might rule their deal was contrary to the *Shari'a*. So, they developed formalisms, not for their own sake (i.e., not for the mere purpose of having a formalism), but for an “ulterior purpose.”<sup>3</sup>

Given that *ḥiyal* were developed by private commercial parties, they were not — at the outset — part of the body of Islamic Law. To the contrary, they arose outside of, and alongside of, that *corpus*. At the time, that *corpus* itself was in the process of development. Yet, over time, *ḥiyal* earned the important benefit of legal support.

They became recognized, and essentially part of the body of the *Shari'a*.

Leading jurists of the Middle Ages did more than just work to reconcile strict Islamic theory with the *ḥiyal* of the merchants, and thereby increase the chances of support from a *qāḍī*, who was responsible for administering justice.<sup>4</sup> The more creative of the leading jurists even invented some complicated *ḥiyal* to help their commercial clients. In this limited respect, there may be a similarity between Roman and Islamic jurists. Like their Roman colleagues, Islamic jurists (*fukahā'*) responded to demands of merchant clients. To take the point a step further, it is reasonable to consider similarities between the development of *ḥiyal* and the *law merchant* in English Common Law.

### [C] Documenting Ḥiyal

In general, *ḥiyal* involve two or more discrete (separable) transactions. Each of the separate pieces is lawful. Each of those pieces is recorded or otherwise documented properly. The transactions are aggregated together, and the desired consequence follows. Thus, a *ḥila* can involve several particular disaggregated parts of a large transaction, and thus appear to be quite complex. (Devices such as *sharikah al-muḍārabah*, or sleeping partnerships, and *murābaḥa* contracts, or cost-plus pricing, illustrate this point.)

Obviously, the possibility for opportunistic behavior exists. What if a participant in one of the discrete transactions declines to play a part in the overall operation, but instead acts as if there were no *ḥila*? That person could avail himself of the documents supporting the discrete transaction, and of the lawfulness of the transaction. The *ḥila* would be undermined by this unscrupulous attempt at disaggregation.

To prevent such an occurrence, all of the documents evidencing *ḥiyal* — i.e., each one supporting each piece of a legal fiction — is deposited with a third party. The third party must be trustworthy. In effect, the documents are placed in escrow. That reliable party, if an individual, is called a “*thika*,” though the party can be an institution.

There also is a protocol, or covering document, that is kept by the *thika*. It is called a “*muwāḍa'a*,” or “understanding.” The *muwāḍa'a* is unofficial, but it explains the entire series of transactions, i.e., the *ḥiyal*. In effect, it is the critical over-arching document that helps make sense of the disaggregated pieces, by explaining how they fit together. The *thika* follows the *muwāḍa'a*. In doing so, the *thika* gives each participant in the various step-by-step transactions only the document(s) needed at the time to avoid any deviation from the *ḥiyal*. Similarly, if necessary, the *thika* provides a participant with a document needed attesting to a compensating or offsetting transaction, again to ensure each step in the legal fiction is followed.

<sup>1</sup> JOSEPH SCHACHT, AN INTRODUCTION TO ISLAMIC LAW 78 (Oxford, England: Oxford University Press (Clarendon Paperbacks) 1982). [Hereinafter, SCHACHT.]

<sup>2</sup> See SCHACHT, *supra*, at 80.

<sup>3</sup> SCHACHT, *supra*, at 210.

<sup>4</sup> See SCHACHT, *supra*, at 210.



### [D] Illustrations of *hiyal*

Several good examples of *hiyal* are cited by Professor Schacht.<sup>5</sup> As intimated earlier, one of them arises in Islamic Family Law, and is known as "*tahliil*." Under that Law, there is an impediment to re-marriage after a triple repudiation (*talāk*) of a marriage. Once a husband has thrice pronounced "*talāk*," and thereby divorced his wife, can he subsequently re-marry the same woman? The answer is "no," because divorce by triple repudiation creates an impediment to re-marriage. However, the impediment to re-marriage to the first husband is lifted if the wife marries a different man. Accordingly, a *hila* to accomplish this end is to arrange for marriage to a different man, but ensure the marriage will be dissolved right after it is consummated. This arrangement is called "*tahliil*," a term that refers to a device used to remove an impediment to marriage.

Two other examples, in the context of Islamic Banking Law are the use in customary law of *sufṭaja* (a bill of exchange) and *hawāla* (the transfer of debts). Historically, Islamic Law regulated the use of these items, but customary law allowed usages that exceeded religious limits, thus facilitating Muslim banking during the Middle Ages.<sup>6</sup> Probably among the most commercially relevant examples of *hiyal* devices concern Qur'ānic legislation against interest (*ribā*). Because the injunction is clear, Muslims would prefer not to violate it openly. Yet, candidly, they know that interest (as distinct from excess or usury) plays an indispensable role in commerce.

By way of brief discussion, aside from *muḍārabah* partnerships and *murābaha* contracts, what *hiyal* devices have been used to make payment of interest possible, without violating the Qur'ān? One *hila* is for a debtor to give real property to the lender as security for the debt. The creditor is allowed to use this real property. The amount of use, i.e., the value of the portion used, is the interest.

Another example is the so-called "double sale." The general term in Arabic for "double sale" is "*bay' alān fi bay'ā*." The specific transaction is called "*mukhāṭara*." It is an ancient customary practice, which existed in Medina among other places, from at least the days of Imām Mālik, founder of the *Māliki* School. In the transaction, a debtor sells its creditor an asset, and immediately buys back the asset for a greater amount, with re-delivery of the asset from the creditor to the debtor to occur on a specified future date. Economically, the creditor has "lent" funds to the debtor, secured by the debtor's asset. The creditor will receive those funds back, plus some extra money, when the creditor sells back the asset to the debtor. The difference between the two sale prices effectively is interest. This transaction clearly resembles a *murābaha* contract.

### [E] Why Accept *Hiyal*?

Why would Islamic religious scholars (*ulema*) or jurists (*fukahā'*) accept *hiyal*, given that the *raison d'être* of this concept is to evade application of the *Sharī'a*? Surely the *bien pensants* of the Muslim World — that is, the right-minded,

<sup>5</sup> See SCHACHT, *supra*, at 79.

<sup>6</sup> See SCHACHT, *supra*, at 78.

conventional thinkers — all would look askance at this attempt to exalt form over substance, this thinly veiled effort at results-oriented jurisprudence? Why has orthodoxy not snuffed out *hiyal*, and — as a fearsome follow-on question — is the robustness of the concept through the ages evidence that Islamic Law is Sacred more in theory than in practice?

A pattern in the *Sharī'a*, which Islamic judges (*qādis*) follow in certain cases, is concern with appearances.<sup>7</sup> That is, the Sacred Law is concerned with the outward aspect of a transaction. It does not concern itself with questions of conscience or motives, which are hidden and known only to God (Allāh). More generally, there is a stress in Islamic Law on following the letter, as distinct from the spirit, of that Law. Put in American legal jargon, form matters, and it can and does triumph over substance.

Without more, this explanation is not entirely satisfactory. That is because not all of the Four *Sunni* Schools are equally enthusiastic about *hiyal*. There are important differences that indicate some *ulema* and *fukahā'* are deeply troubled by *hiyal*.<sup>8</sup>

#### • *Hanafi* School:

Among the Four Schools, the *Hanafi* School is the most supportive of the *hiyal* concept. The *Hanafi* School tends not to focus on the morality of a *hiyal*. Indeed, the School finds many *hiyal* (including *tahliil*) are not reprehensible (*makrūh*). However, the *Hanafis* agree no *hiyal* should cause prejudice to another person.

Moreover, this School does not favor a *hiyal* involving an act that is forbidden (*ḥarām*) or even reprehensible (*makrūh*). That is, none of the disaggregated steps that sum to a *hila* should be *ḥarām* or *makrūh*. It is one thing to use a *hiyal* to justify a transaction that, without the legal device, would be *ḥarām* or *makrūh*. That may be irksome enough, yet the *Hanafis* accept the legal necessity of *hiyal*. However, it is quite another matter if one or more steps in the *hiyal* are *ḥarām* or *makrūh*. To use an analogy, that would be like trying to clean a dirty area with a dirty rag.

#### • *Māliki* School:

The *Māliki* School has not devoted a great deal of attention to the topic of *hiyal*. However, the School does not find *hiyal* devices like *tahliil* to be reprehensible (*makrūh*).

#### • *Shāfi'i* School:

Imām Shāfi'i, and for several decades after him, the *Shāfi'i* School, viewed *hiyal* as forbidden (*ḥarām*) or reprehensible (*makrūh*). For several decades after Imām Shāfi'i dies, that was the position of the *Shāfi'i* School. However, the approach to the topic has evolved. It no longer seems to be the case that the School rejects *hiyal*. For example, *tahliil* is practiced in *Shāfi'i* School jurisdictions.

#### • Traditionists:

<sup>7</sup> See SCHACHT, *supra*, at 80.

<sup>8</sup> See SCHACHT, *supra*, at 81-82.

"Traditionists" do not comprise a single School, but rather a movement that cuts across various Schools. It has been, and remains, influential in the *Hanbali* School. Not surprisingly, Traditionists reject *hiyal* entirely. Ibn Taymiyya, the great *Hanbali* scholar, rejected *hiyal* and specifically *tahlil*. He devoted one work to arguing against *hiyal*.

In sum, there has long been, and continues to be, a spirited debate in the Muslim World about the legal validity of *hiyal*, and the religious and moral integrity in using them to rationalize certain transactions. This debate, perhaps, mirrors the one in American Law about form and substance. Perhaps, too, the *Shari'a* even presages it.

## § 28.02 NATURE OF SHARIKAH AL-MUDARABAH (SLEEPING PARTNERSHIP)

### [A] Definition

The *sharikah al-mudarabah* is a topic of vast significance that arises in the everyday commercial life of Muslims in Muslim and even non-Muslim societies. Commonly called a "sleeping partnership," across the centuries the *fukahā'* actually have bestowed on it different rubrics. For example, *fukahā'* from the Ancient Schools of Mecca and Medina, along with the *Māliki* School (the second oldest of the Sunnite Schools, and an outgrowth of these Ancient Schools, founded by Imam Mālik, who came from Medina) eschew the term "*mudarabah*."

In lieu of "*mudarabah*," they use word "*muqaradah*." The *Hanafi* School scholar *Imām Al Kāsānī* explains:

Likewise the term *mudarabah*, in the terminology of jurists of Medina, is explicit in expressing this meaning. They used to call *mudarabah* by the name *muqaradah*, just as they used to call *ijarah* by the name *bay'* (sale).<sup>9</sup>

"*Muqaradah*" derives from the word *qarad*, or *qirād*, which means "cut" (noun) or "borrow" (noun). The connotation is that an owner of financial capital (i.e., money) cuts some of his money and gives it to a borrower for that borrower to invest (e.g., in an asset, consumer durable good, educational degree, or business venture). In turn, "*muqaradah*" refers to a lending transaction. It means "to loan" (verb), but in a full sense of the entire borrowing and lending arrangement and relationship.

Still another name for a *sharikah al-mudarabah* is "*mu'amalah*." To be sure, the term "*mu'amalah*" is not commonly used in Islamic Law books. The meaning of this term is explained by *Al Kāsānī*:

<sup>9</sup> IMRAN AHSEN KHAN NYAZEE, ISLAMIC LAW OF BUSINESS ORGANIZATIONS — PARTNERSHIPS 244 (Selangor, Malaysia: The Other Press, Malaysian ed., 2002) (quoting *Al Kāsānī, Badā'ī Al-Sanā'ī*, vol. 5 at 3589). [Hereinafter, NYAZEE.]

*Imām Kāsānī* was from Kāzrī, in southeast Uzbekistan, but lived most of his life in Halab, Syria. He died in on 9 August 1991 (10 Rajab 587 A.H.).

*Mu'amalah* is a term that includes both sale and purchase, and this is exactly the purpose of this contract.<sup>10</sup>

Interestingly, in the parlance of modern finance, there is a transaction common on Wall Street, London, and other major markets known as a "repo." A "repo" is a sale and repurchase of an asset (e.g., stocks, bonds, money, capital goods). The economic effect of the transaction is to lend a borrower the asset for a short period. The legal effect is to transfer ownership of the asset from the lender to borrower during that period. The transaction is managed through a document, or documents, that establish this legal effect. The Arabic term "*mu'amalah*," while less handy to non-Arabic speakers than "repo," appears to convey the idea of a loan transaction structured as a sale and repurchase.

Of course, the most common Arabic name for the sleeping partnership is "*mudarabah*." This term originates from "*darab*." Literally, it means "to hit" (verb) (though, as discussed in the Chapter on the rights of a wife, this translation is controversial). The words "*darab fi al-ard*," in a literal word-for-word sense, mean to hit (*darab*) on (*fi*) the earth, or ground (*al-ard*). However, when these words are taken together as a single term, "*darab fi al-ard*" refers to a person travelling through the land doing business. Just like the term "*muqaradah*," "*mudarabah*" is an umbrella term that encompasses an entire course of dealing. That is, "*mudarabah*" embraces the journey of a person, or persons, engaged in a business transaction. Evidently, the addition of "*mu*" to "*darab*" (or *qarad*) both enlarges the latter word and imparts to it a broad description.

As a formal legal matter, the general definition of "*sharikah al-mudarabah*" is:

[a] contract of partnership and sharing of profits in which the investor provides all the capital and is liable for the loss.<sup>11</sup>

The *Hanbali* School explains "*sharikah al-mudarabah*" as follows:

Our companions [i.e., the *Hanbali ulema*] have mentioned four cases of permissible partnership. We have mentioned one of these and this [is] the *sharikah al-abbān*. Three of these types are left that have been mentioned by al-Khiraqī [one of the famous *Hanbali ulema*, who was from Isfahan, which is in modern-day Iran, moved to Baghdad, where he taught, and died in 1187 A.D./583 A.H.] in five types, three of which are types of *mudarabah*, which is participation by two persons with the wealth of one, or two persons with their wealth, or the wealth of both and the body of one person. The participation of a body and wealth, and this is *mudarabah*.<sup>12</sup>

<sup>10</sup> NYAZEE, *supra*, at 244 (quoting *Al Kāsānī, Badā'ī Al-Sanā'ī*, vol. 5 at 3589).

<sup>11</sup> NYAZEE, *supra*, at 337.

<sup>12</sup> NYAZEE, *supra*, at 246 (quoting *Ibn Qudāmah, Al-Mughni* vol. 5 at 14).

*Ibn Qudāmah* was considered the *Imām* of the *Hanbali* School following the death of Imam Ahmed Ibn Hanbal (in 855 A.D./241 A.H.) especially in Damascus. *Ibn Qudāmah* was born in Palestine in 1147 A.D./541 A.H. and died in 1226 A.D./620 A.H. Living roughly three centuries after *Ibn Hanbal*, and thus obviously not his personal student, *Ibn Qudāmah* rose to become the most outstanding scholar of the *Hanbali* School. His full name is "Abdullah Ibn Ahmad Ibn Muhammad Ibn Qudāmah Ibn Miqdām Ibn Nasr Ibn Abdullah Al Maqdisi." Typically, he is referred to as "*Ibn Qudāmah Al Maqdisi*," or "*Ibn Qudāma Al Dimashqi*." The latter name reflects the fact he moved to Damascus, after



Similarly, the definition of "*muḍārabah*" found in The *Mejelle*, the Civil Code of the Ottoman Caliphate between 1877 and 1926, which codifies part of the *Ḥanafī fiqh*, is:

a kind of partnership on the condition, that the capital is to be found by one, and the labour and work by the other.<sup>13</sup>

All three definitions convey the economic essence of this partnership, namely, a joint venture relationship between, or participation involving, a creditor (the lender, such as a bank) and debtor (the borrower, such as an individual or business enterprise). Observe that the terms "creditor" and "debtor" (or "lender" and "borrower") are less commonly used in treatises on the *Shari'a* than are the terms *rabb al-māl* and *muḍārib*. "*Rabb al-māl*" means "investor." (Literally, "*al-māl*" means "the money," while "*rabb*" means lord, so the two words together are "lord of the money.") The word "*muḍārib*" connotes "worker." (Literally, it is an adjective describing a person with two possible meanings depending on the sentence context — a person who works, or a person who fights.) While the "*muḍārib*" is not a worker in the sense of being employed and paid wages by the "*rabb al-māl*," the use of these terms in Islamic legal texts is for good reason.

### [B] Three Basic Steps, and Interest or Not?

The underlying economic relationships indicate a certain inter-changeability of the terms. In the quintessential *muḍārabah* arrangement, there are three basic steps.

First, the *rabb al-māl* invests money with the borrower. This investment follows a course of dealing between the two parties. On the one hand, the *rabb al-māl* may approach the *muḍārib* and offer to invest funds with the latter. This may occur because the *rabb al-māl* is confident in the business acumen of the *muḍārib*, and finds the project the *muḍārib* seeks to do to be of commercial appeal. On the other hand, the *muḍārib* may approach the *rabb al-māl* with a business plan, and seek to convince the investor of the economic merits of the plan. In either event, upon the transfer of funds, the debtor acquires the status of "*muḍārib*." In this first step, the worker also acquires the status of *amīn*, or trustee, signifying that she has been entrusted with funds. That is, the *muḍārib* becomes a trustee (*amīn*) once the *rabb al-māl* (investor) delivers capital to her by way of the *muḍārabah*.

In step two, the *muḍārabah* begins to operate, i.e., engages in business. At this point, the *muḍārib* acquires yet another status, namely, *wakil*, or agent. That is, the *muḍārib* becomes an agent (*wakil*) for the *rabb al-māl* in operating the business. Not surprisingly, the definitions of "*sharikah al-muḍārabah*" of two *Sunnite* Schools expressly mention agency. The *Mālikī* School defines "*sharikah al-muḍārabah*" as:

having been educated under Ibn Hanbal in Baghdad. See [http://en.wikipedia.org/wiki/Ibn\\_Qudamah](http://en.wikipedia.org/wiki/Ibn_Qudamah).

<sup>13</sup> THE MEJELLE — BEING AN ENGLISH TRANSLATION OF MAJALLAH KI-ĀHKAM-I-ADLIYA AND A COMPLETE CODE OF ISLAMIC CIVIL LAW § 1404 at 166 (Petalizing Jaya, Malaysia: The Other Press, January 2001) (C.R. Tyser, B.A.L., D.G. Demetriades & Ismail Haqqi Effendi, trans.). See also IMRAN AHSAN KHAN NYAZEE, ISLAMIC LAW OF BUSINESS ORGANIZATIONS — PARTNERSHIPS 246 (Selangor, Malaysia: The Other Press, Malaysian ed., 2002) (quoting *Majallat al-Ahkām al-Adliyah*, § 1404).

"*qirād* is agency for trading in delivered cash for a part of the profits if their extent is known."<sup>14</sup>

Similarly, the *Shāfi'i* School explains "*sharikah al-muḍārabah*":

*Qirād* and *muḍārabah* have as their legal subject-matter a contract comprising agency by the owner to another by giving him wealth so that he may trade with it and share its profits.<sup>15</sup>

The similarity is not surprising. *Imām* Shāfi'i was a student of *Imām* Mālik. Notably, in a *muḍārabah* involving only two persons, creditor and debtor, the worker is herself the only agent of the partnership. That is to say, the *rabb al-māl* cannot act as an agent.

Finally, step three occurs when the partnership begins to make profits. In this step, the *muḍārib* becomes a partner, or *sharik*, along with the *rabb al-māl*, in the partnership. The *rabb al-māl* is a partner from inception, but the *muḍārib* is not a partner with the *rabb al-māl* unless and until the venture makes money. That is, the *muḍārib* becomes a partner if and when profit emerges. If and when it does, then the worker-partner is entitled to a share of the profit. Note, therefore, that as a trustee and agent, the *muḍārib* is not a partner, which accords with the general understanding of trusteeship and agency, as distinct from partnership. The investor, which all along is a partner, is not obliged from the inception of the *muḍārabah* to share profit. Rather, that obligation is a kind of contingent liability, conditional on step three happening, namely, that the business venture turn a profit. From the perspective of the *muḍārib*, her legal right to share profit essentially is a contingent asset, conditional on the same occurrence in step three.

As for the other part of any profit, it goes to the *rabb al-māl*. This allocation makes economic sense. It was the investment, or loan, in the first step, by the *rabb al-māl* that capitalized and thereby catalyzed the venture. Moreover, it was the *rabb al-māl*, in the second step, which (or who) bore the full risk the venture would not generate a stream of revenues in excess of costs. The allocation of profit to the *rabb al-māl* is, therefore, a return on an investment that was not risk-free. Is this return "interest"? In an economic sense, the answer is "yes." The return is compensation for a loan entailing risk.

However, in the conventional non-Muslim banking sense of the term, and from the perspective of the *Shari'a*, the answer is "no." It is not a return fixed contractually as a percentage of the principal value of the initial loan. Rather, the investor is sharing in the success, or not, of the venture to which it (or she) extended financing. If the venture is unsuccessful, then the *rabb al-māl* — not the *muḍārib* — is fully liable for the loss. To be clear, under the *Shari'a*, the *rabb al-māl* does not have the legal right to demand re-payment from the *muḍārib*. In contrast, many *Shari'a* scholars view a conventional interest-based loan transaction as putting the risk of loss on the borrower.

<sup>14</sup> NYAZEE, *supra*, at 246 (quoting *Al Kirashī, Mukhtasar Sidi Khalil*, vol. 6 at 203).

<sup>15</sup> NYAZEE, *supra*, at 246 (Selangor, Malaysia: The Other Press, Malaysian ed., 2002) (quoting *Al Ramli, Nihāyat Al-Muhtāj*, vol. 5 at 218).

After all, under the terms and conditions in standard loan documentation, the lender, such as a bank, is legally entitled to demand full repayment of principal and interest from the borrower, regardless of the success or failure of the project for which the loan was made. To be sure, in reality, banks "eat" losses from loan defaults. That is why they maintain loan loss reserves and capital on their balance sheets. In fact, they are required to do so under the banking laws of the United States, United Kingdom, Australia, Canada, New Zealand, and almost all non-Muslim countries. Still, Muslim scholars would insist that in a *Shari'a* compliant loan transaction, the bank, not the borrower, suffers from the lack of profitability of the borrower.

These scholars also would point out that in a *Shari'a* compliant transaction, the *rabb al-māl* does not ask for collateral from the *mudārib*. Whether the *rabb al-māl* has the legal right to do so appears to be a matter of debate. In practice, however, because in step one (above) the *mudārib* gains the status of an *amin* (or trustee) of the invested funds, it would be incongruous to ask the trustee for a security deposit. Trustees are not asked to put up assets of value to secure losses that might occur to the investments they oversee. In contrast, secured financing — that is, lending against collateral — is commonplace in conventional non-Islamic banking.

## § 28.03 RULES GOVERNING SHARIKAH AL-MUDĀRABAH

### [A] Limits on Participation by *Rabb al-Māl* and Vitiating of *Mudārabah*

In sum, once operational, through a *mudārabah*, the *rabb al-māl* participates in the work of the *mudārib* in three important respects: lending funds to facilitate that work, receiving a portion of the fruits of that work as repayment for the loan, and bearing the risk that the work could prove, as it were, fruitless. Indeed, these three methods of sharing are exclusive, i.e., they are the only ways the investor can participate with the worker in the framework of a *mudārabah*. If the *rabb al-māl* participates with the *mudārib* in a different way, then the *mudārabah* itself either must be converted to a different form of partnership, or becomes legally void.

There are four obvious examples of participation that would vitiate the *mudārabah*. First, a condition that the *mudārib* be entitled to the entirety of any profit renders the *mudārabah* void. The *mudārabah* agreement must allow for the *rabb al-māl* to participate in at least some of the profits. Second, the *mudārabah* becomes void if the *mudārib* breaches any of the terms of the partnership agreement. Upon such violation, the *mudārib* technically becomes a usurper — that is, a usurper of the funds initially provided by the *rabb al-māl*. At that juncture, the *mudārib* turned usurper is liable for returning the capital to the *rabb al-māl*.

Third, suppose the *rabb al-māl* actively engages in the work in which the *mudārib* himself or herself is performing, or indeed requires as a condition of the investment that such work be permitted. The *mudārabah* would be legally void. Specifically, all Four *Sunni* Schools agree the *mudārabah* is void if the *rabb al-māl* requires as a condition (in the "loan" agreement itself) of giving funds to the

*mudārib* that the *rabb al-māl* be permitted to work with, or for, the *mudārib* on the same project for which the funds are given. (By way of loose analogy, imagine the Bank of America lending U.S. \$1 million to Royal Dutch Shell for an oil refinery in Nigeria, but conditioning the loan on the Bank itself working with or for Shell on the construction project, e.g., buying materials, building the refinery, and so forth. That condition would render the arrangement, under the *Shari'a*, void.)

Interestingly, the Four Schools are not unified on the details of the new legal relationship when a *mudārabah* is rendered void. The *Shāfi'i* and *Hanbali* Schools agree a void *mudārabah* becomes a vitiated *ijārah* (wages) contract, as one source explains:

The term vitiated *ijārah* is being used here as the wages in this arrangement are ambiguous, and the *mudārib* is entitled to reasonable wages for his work, while the profit is entirely for the *rabb al-māl*.<sup>16</sup>

That is, the *mudārabah* is void, the new relationship is characterized as a vitiated *ijārah* (wages) contract in which the former *rabb al-māl* is the employer, and the former *mudārib* is the employee. Admittedly, the adjective "vitiated" before "*ijārah*" is confusing, because it connotes that the contractual employer-employee relationship is rendered legally ineffective. Why, exactly, the relationship is "ambiguous" is unclear.

As for the *Māliki* School, it splits into two views. One perspective agrees with the *Shāfi'i* and *Hanbali* Schools, i.e., the key requirement in the new *ijārah* relationship is that *rabb al-māl* give the *mudārib* a reasonable wage. Once wages are given, the *mudārib* is not a partner, but an employee. The second perspective emphasizes that the *mudārib* is entitled to a reasonable profit from the work of the *mudārib*. This perspective indicates the relationship is not really a contractual employer-employee relationship, but rather has vestiges of the *mudārabah*. Significantly, this split is evident in the characterization by the *Māliki* School of the business relationship between the Prophet and his wife, Khadyjah, before their marriage. Under the first view, their association was one of *ijārah*, whereby the Prophet was an employee of, and paid wages by, Khadyjah. Under the second view, their association was a *mudārabah* partnership, with Khadyjah providing the funds like a *rabb al-māl*, and the Prophet being entitled to profit as a *mudārib*, based on a contract the two concluded before their marriage.<sup>17</sup>

Fourth, suppose the *rabb al-māl* acts as an agent for the *mudārib* to get business for the latter. Here, the *rabb al-māl* would be transformed into an agent, or *wakil*. Such agency would be akin to participation in the work, and likely would make the partnership void. Third, what if the *mudārib* opens a store and employs the *rabb al-māl*? In this instance, the *rabb al-māl* becomes an employee of the worker. By analogy to the first case, it seems that the partnership would be rendered void.

A logical follow-up matter is how far the vitiating conditions extend. For example, is it permissible for a *rabb al-māl* to enter into normal commercial transactions, specifically, buying or selling goods or services, with the *mudārib*? In a *mudārabah*

<sup>16</sup> NYAZER, *supra*, at 254.

<sup>17</sup> See NYAZER, *supra*, at 247.



in which the investor and worker are well-known to each other, such transactions would seem natural. The *Hanafi* School finds no difficulty with the proposition, and permits the investor to engage in these transactions. That is because the *Hanafi* School characterizes the *rabb al-māl* as akin to a stranger to the *muḍārib*, once the *rabb al-māl* delivers the capital to the *muḍārib*.

But, the other Schools do see a problem with the *rabb al-māl* buying or selling from the *muḍārib*. For example, *Imām* Shāfi'i argues against such dealing, in effect calling for the *rabb al-māl* to stay quite divorced from the operation of the *muḍārabah*.<sup>18</sup> Thus, suppose there is no *a priori* explicit condition imposed on the *muḍārib* by the *rabb al-māl* that the latter work by or for the former, nor that the latter purchase goods or services from the former. However, after the funds are transferred from the latter to the former, then the *rabb al-māl* begins to buy goods or services from the *muḍārib*. The *Shāfi'i* School does not support this kind of dealing.

### [B] Legality of *Sharikah al-Muḍārabah*

The legality of *sharikah al-muḍārabah* is indisputable. All four Classical Sources of the *Sharī'a* state, in varying degrees of clarity, that this kind of partnership is lawful. First, *surah* 73 *ayah* 20:

... He [God] knows that some of you will be sick, some of you travelling through the land seeking God's bounty, some of you fighting in God's way: recite as much [of the Qur'ān] as is easy for you, keep up the prayer, pay the prescribed alms, and make God a good loan. Whatever good you store up for yourselves will be improved and increased for you.<sup>19</sup>

To be sure, this passage does not expressly reference a *muḍārabah* partnership, though it is as close as any passage in the Qur'ān comes to identifying a particular type of business association. Nonetheless, all four *Sunnite* Schools take the first italicized phrase to imply that this kind of partnership is valid. In essence, the Schools agree that as people journey through life in search of income and wealth, they may enter into investor-worker relationships.<sup>20</sup> In addition, though they are in a religious context, the subsequent reference to making a loan, and the last sentence concerning an increase in value of stored funds, may be applied in the everyday commercial world. Funds stored by an investor, and then placed by an investor with a worker (in effect, stored with the worker), which gain in value through the efforts of the worker, and thereby yield a profit to be shared with the investor, is exactly the scenario in an ideal *muḍārabah* partnership.

At the same time, the ambiguity of the phrase is the reason additional *Sharī'a* sources are helpful to firm up the legality of a *sharikah al-muḍārabah*. From the *Sunnah*, the Prophet approved this type of *sharikah*, at least as recorded by Ibn Mājah:

<sup>18</sup> See, e.g., the Arabic website [www.Islampedia.com](http://www.Islampedia.com) (posting a book entitled *Kitāb al-Fiqh*).

<sup>19</sup> THE QUR'AN — A NEW TRANSLATION BY M.A.S. ABDEL HALEEM *surah* 73, *ayah* 20 at 209 (Oxford, England: Oxford University Press, 2004) (emphasis added).

<sup>20</sup> NYAZEE, *supra*, at 246.

There is great blessing in three things: The credit sale, *muqāradah* [i.e., the name for *muḍārabah* used in Mecca and Medina], and mixing wheat and barley for domestic consumption not sale.<sup>21</sup>

As explained above, according to one characterization by some scholars, Muhammad transacted through this method with his wife Khadyjah prior to their marriage. Khadyjah provided wealth, in the form of commercially valuable assets, and the Prophet traveled to Syria to invest them. Additionally, during the life of the Prophet, several of his Companions entered into *sharikah al-muḍārabah* partnerships. At no point did the Prophet look askance at these arrangements.

Likewise, both *ijmā'* (consensus) and *qiyās* (analogy) buttress the case for the legality of a *sharikah al-muḍārabah* partnership. As for *ijmā'*, virtually all *fukahā'* recognize the existence of, and approve as legally and ethically legitimate, the *muḍārabah*. Interestingly, the point seems to have been so obvious that the consensus has been a quiet one, as Al Kāsāni explains:

Some of the *Hanafi* jurists have reported the *ijmā'* of the Companions about *muḍārabah*, although these are cases of *Ijmā' sukūti* [silent consensus].<sup>22</sup>

The *Shāfi'i* School applies *qiyās* in the sense of drawing an analogy between a *sharikah al-muḍārabah* and a *sharikah musāqāh*. The latter is valid, and the former is like the latter, so the former is valid, too. However, the other Schools are reticent in respect of using analogical reasoning to arrive at a legal justification in favor of a *sharikah al-muḍārabah*. That is because the precise nature of the work in which the *muḍārib* will engage, and the wages she will earn, are not known at the time the partnership agreement is set. Thus, Al Kāsāni concludes:

As far as analogy is concerned, it is not permissible, because it is hiring for unknown wages, in fact for non-existent wages. The work too is unknown. We have, however, given up this analogy in favor of the evidence in the Book [i.e., the Qur'ān], the *Sunnah* and *ijmā'*.<sup>23</sup>

Beyond the four Classical Sources of Islamic jurisprudence, there is a fifth basis for asserting the legality of a *sharikah al-muḍārabah*.

Without the possibility of a *sharikah al-muḍārabah*, many individuals with wealth might not have the time or experience to use it. Conversely, there are many people with experience, but lacking wealth. The *sharikah al-muḍārabah* is a means to allocate financial capital for efficacious purposes. It is, in effect, a meeting ground for savers (those with surplus funds to invest) and users (those needing capital to realize their commercial aims). In this (and other) respects, the *Sharī'a* encourages market growth by uniting money and the experience. Al Sarakhsi (died *circa* 1106

<sup>21</sup> NYAZEE, *supra*, at 247.

As Professor Nyazee explains in a footnote, in the *isnād* (chain of transmitters) of this *hadith*, there are two unknown persons, i.e., persons who do not appear in other documents, and/or the background of which is unknown. See *id.*, fn. 16 at 247. Accordingly, such *hadiths* are not included in the strict compilations of Al Bukhari and Sahih Muslim.

<sup>22</sup> NYAZEE, *supra*, at 247 (quoting Al Kāsāni, *Badā'ī 'Al-Sanā'ī*, vol. 8 at 3587).

<sup>23</sup> NYAZEE, *supra*, at 247 (Selangor, Malaysia: The Other Press, Malaysian ed., 2002) (quoting Al Kāsāni, *Badā'ī 'Al-Sanā'ī*, vol. 8 at 3589).

A.D.) explains the pragmatic reason for condoning a *sharikah al-mudārabah* arrangement:

[It is permitted] because the people have a need for this contract. The owner of wealth may not have the opportunity for a profitable investment, while the person who has such an opportunity may not have wealth, and profit is acquired through both, that is, wealth and the ability to transact. In permitting this contract, the goals of both are achieved.<sup>24</sup>

In brief, the fifth rationale for the *mudārabah* partnership is simple economic necessity.

### [C] Five Conditions for *Sharikah al-Mudārabah*

All Four *Sunni* Schools agree the only indispensable element for formation of a *sharikah al-mudārabah* is offer and acceptance. That is, to establish this kind of partnership, a *rabb al-māl* (investor) must offer her wealth to a *mudārib* (worker) so that the latter can trade with it, i.e., engage in business dealings with it, and thereby increase the value of that wealth. The *mudārib* is free to accept or decline the offer, but assuming she seeks to enter into the venture, must accept it. There is no specific word of acceptance required by any of the Schools. Rather, any sign of acceptance from the *mudārib* is enough, including indication through silence and performance. As part of this offer-acceptance process, the two parties agree to a division of profits, which may or may not be on 50-50 terms. At this juncture, the *mudārabah* is born.

As with most other forms of partnership in the *Sharī'a*, an agreement to set up a *sharikah al-mudārabah* ideally should be memorialized in a written contract. As a default rule, Imam Mālik teaches that if the profit division is not specified at the time the partnership is established via contract, then the rule for sharing should be equality among the partners. Further, like those other types, there are specific conditions that ought to be set out in the partnership agreement to ensure the particular *mudārabah* in question is legally valid. All Four *Sunni* Schools agree there are five general conditions for the legal validity of a *sharikah al-mudārabah*, as follows.

#### (1) Legal Capacity (Capability) —

The Four Schools agree on the *ahliyah* condition (which also applies in other contexts, such as *sharikah al-inān*). Simply stated, all partners in a *sharikah al-mudārabah* must have the legal capacity to transact business. Since a *sharikah al-mudārabah* is a contractual partnership, it obviously requires at least two partners to satisfy the formation elements of offer and acceptance. The *rabb al-māl* (investor), on one side, must have the legal capacity of an agent. The *mudārib* (worker), on the other side, must have the right to act as an agent.

<sup>24</sup> NYAZEE, *supra*, at 247 (quoting Al Sarakhsi, *Al-Mabsūt*, vol. 22 at 19).

The full name of Al Sarakhsi is "Muhammad ibn Ahmad ibn Abi Sahl Abū Bakr Al Sarakhsi." A Hanafi School scholar, his greatest work is *Kitāb Al-Mabsūt*, a 30-volume commentary on the work of Muhammad Al Shaykhāni.

#### (2) Capital Contribution —

Preferably, the capital contributed by a *rabb al-māl* to a *sharikah al-mudārabah* should be cash or currency, the most liquid form of financial capital. However, the investor may offer other forms of tangible property (*ʿurūd*). Associated with this capital requirement are four corollary provisos.

First, the value and amount of capital must be known to both partners. Consequently, tangible property that is not liquid (i.e., for which there is no ready market with a large number of buyers and sellers) is not preferred. Second, the capital must be available at the time the partnership contract is finalized. If a *rabb al-māl* pledges to deliver capital to the *mudārib* (worker) a year after the contract is agreed, then the partnership is invalid. Third, and following logically from the second proviso, the *rabb al-māl* must deliver the capital to the *mudārib*. That is not to say the investor himself or herself must personally deliver the capital to the worker. Use of an intermediary is permissible. The point is that the capital must not remain available — it must be transferred to the control of the worker. Fourth, the *mudārib* must perform the entire work and management of the business. The *sharikah al-mudārabah* is void if the *rabb al-māl* requires her involvement in the operation or oversight of the business. That said, suppose the *rabb al-māl* volunteers in helping and working with the *mudārib*, and the latter agrees. All Four Schools (with the possible exception of the *Shāfiʿi* School) agree this extent of involvement is permissible. Their rationale appears to be that participation by the investor, being voluntary, leaves full control over the nature, composition, and amount of work, and over management decisions, with the worker.

#### (3) Profit —

From the perspective of the economic self-interest of a *rabb al-māl*, the gist of a *sharikah al-mudārabah* is to receive a return on her capital contribution. The source of that return is a portion of the profits earned by the *mudārib*. Ethically, there is nothing wrong with the investor sharing in the profits. To the contrary, the investor has a legitimate claim on a portion of them. But for the capital contribution of the investor, there would be no profits, because the initial funding catalyzed the enterprise.

The questions, then, are what portion should be allocated to the *rabb al-māl*, and what formula should be used to make the allocation? On the first issue, the *Sharī'a* takes a freedom-of-contract approach. With one limiting parameter, it is up to the investor and worker to negotiate a profit-sharing arrangement suitable to them. The limit is that the *rabb al-māl* cannot have 100 percent of the profits. Otherwise, the *mudārabah* is vitiated and the contract between the investor and worker becomes an *ijārah* (hire or wages) contract. But, on the second issue, the *Sharī'a* advocates a prescription. Profit for the investor cannot be expressed as a percentage of the capital she invests with the worker. Likewise, it is not permissible for either party to express her share in the profit as a certain sum of money. In either instance — defining the profit owed as a percentage of the capital contribution, or as a lump sum — the *sharikah al-mudārabah* becomes invalid.

Instead, the proper way to express profit sharing in a *mudārabah* arrangement is in terms of total profit. Put directly, the profit to be shared with the *rabb al-māl*



must be expressed as a ratio, or percentage, of the total profit the *muḍārabah* enterprise earns. If the partnership agreement fails to specify a percentage, then the default rule (noted above) is equal sharing. Technically, in a two-person arrangement, the partnership agreement needs to express the percentage of the profit owed to only one of the partners. The balance goes to the other partner. With more than two partners, such as where there is a *rabb al-māl* plus five *muḍārib*, it is necessary to spell out the sharing among each partner. Again, the default rule is equal sharing of profits among the multiple partners.

In all instances, no profits are to be distributed to the worker (or workers) until the investor receives her entire share. This stipulation is one of priority, namely, that the *rabb al-māl* has a superior claim on any profit to that of the *muḍārib*. Conceptually, that superiority is akin to the priority of a creditor (such as a bank lender in a conventional loan transaction) vis-à-vis a debtor (such as a borrower).

To illustrate the profit condition, assume Nora and Nayef form a *muḍārabah* as *rabb al-māl* and *muḍārib*, respectively. Nora invests U.S. \$5 million in the venture. The partnership earns \$100,000 in its second year of operation, after losing money in the first year. In that first year, Nora earns nothing — there are no profits to be shared. Suppose the partnership contract states Nora is entitled to a 5 percent return on her capital, which would equate to \$250,000. This term renders the *muḍārabah* invalid, because it expresses profit as a percentage of invested capital. Likewise, a term calling for Nora to get a lump sum of \$250,000 would render the arrangement invalid. The legally appropriate way for Nora and Nayef to allocate profits is as a percentage thereof. Thus, a specification that Nora is to receive 5 percent of any profit earned — which in the second year would be \$5,000 — would be correct. Observe that the percentage of total profit must be fixed. An uncertain percentage would render the arrangement invalid.

Perhaps even more importantly, note the risk (in Wall Street parlance) that is borne by the *rabb al-māl*, Nora. Going into the arrangement, it is not at all clear whether, or when, she will realize a 5 percent return on her invested capital. Obtaining no return in the first year, she has incurred an opportunity cost. She could have invested the funds in another venture that would have earned a profit. (If Nora has access to, and is legally able to, invest in United States Treasury securities, then the interest she would have earned on an American government bill, note, or bond is a measure of her opportunity cost.) Nevertheless, allocation of risk to the *rabb al-māl* is precisely the point of a *sharikah al-muḍārabah*. The theory is to be fair to both sides through a just division of profits.

But, if a choice must be made between compensation to the investor and impoverishing the worker, then the *Shari'a* makes that choice. The investor had the money in the first place, and freely opted to offer it to the worker. Thus, without putting the presumption in these terms, the *Shari'a* presumes the investor is in the best position to bear the risk of loss. The worker is not to be put upon by the investor, and possibly put out on the street begging. To put the risk of unprofitability on the worker would be to impose a double loss on that worker. First, the worker has earned no profit himself or herself. Second, the worker is obliged to find (somehow) money to pay back the investor.

By way of critique, consider the systemic effects of this allocation of risk. What incentive does a *rabb al-māl* have to invest in entrepreneurial ventures, such as an angel investments or venture capital project, where the risk of failure is high? Might the Islamic allocation of risk be a disincentive to extending credit, which in turn might be a brake on growth, particularly of small and medium-sized enterprises (SMEs)? That is, if all the risk of unprofitability is on the investor, then are economies following *Shari'a* precepts prone to illiquidity?

One answer is the potential return also is high. For example, if there is a 50 percent failure rate in the first five years among restaurant entrepreneurs, then there also likely is a handsome payout for the successful eating establishments. Another answer is that investing in risky entrepreneurial ventures is not for the faint-hearted, risk-averse *rabb al-māl*. Rather, it is for the investor that (again in Wall Street parlance) is both risk-loving and has the net worth to absorb losses. A third answer is practical. The investor can require collateral, a deposit (*amīn*), to secure at least a portion of the investment. Thus, if the invested capital is used to purchase real property, such as a shopping center, then the investor can look to that property for some satisfaction — selling it, and keeping the proceeds. To be sure, the investor might chafe at the prospect of owning real or personal property, and arranging for its sale to get back any of its initial investment. Nevertheless, these security arrangements are common in Muslim countries that follow *Shari'a* banking principles, for instance, in instances of loans to buy a home or car.

Finally, is it permissible for a *rabb al-māl* and *muḍārib* to agree to convey a portion of the profit from their partnership to a third party? The answer is that it depends on the nature of the third party. *Imām Mālik* sees no harm in granting the entire profit for a charity. That view accords with a theme animating through Islam itself, namely, generosity. But, if the third party is not a charity, then allocating in a *muḍārabah* agreement any part of the profit renders the *sharikah al-muḍārabah* invalid. Thus, a permissible specification in the partnership contract is allocation of 10 percent of the total annual profit to a mosque or hospital. But, an allocation to Emirates Airlines, or to the re-election campaign of a Malaysian Prime Minister, would be invalid.

#### (4) Authorization and Power to Work —

Technically, there are two categories of *sharikah al-muḍārabah*: an absolute (or unrestricted) *sharikah al-muḍārabah*; and a restricted *sharikah al-muḍārabah*. The *rabb al-māl* (investor) and *muḍārib* (worker) must decide on which type they seek to establish by the time they sign a contract to create the partnership. The only way a *sharikah al-muḍārabah* is restricted is by mentioning the terms of restriction in the contract establishing the partnership at the time the partnership is created. Otherwise, the “default rule” is the *sharikah al-muḍārabah* automatically is an absolute *sharikah al-muḍārabah*. That said, the instance of restricted *muḍārabah* is common in lending transactions between a bank and an individual seeking funds to buy a home or car.

Suppose a *rabb al-māl* (the bank) lends money to the *muḍārib* (the individual), with the individual stating an intent to purchase real property or a vehicle. What protects the bank against the individual using the funds to open a store, pay for the college tuition of a family member, or take a holiday in Italy? The answer is the



bank inserts conditions in the *mudārabah* contract requiring the borrower to use the funds only for a specified purpose. The partnership thereby is a restricted *mudārabah*. If the individual breaches the restriction, then she is liable to the bank under the terms of the partnership agreement.

In contrast, in an absolute *sharikah al-mudārabah*, the *mudārib* receives permission from the *rabb al-māl* to engage in a full range of purchase and sale transactions concerning goods and services. This authorization is broad, and rightly so because the *mudārabah* is unrestricted. Implied in this broad authorization are eight specific powers. That is to say, in an unrestricted *mudārabah*, the general authority from the *rabb al-māl* carries with it eight powers for the *mudārib* to exercise in conducting the affairs of the partnership:

- Buying, Selling, and Leveraging:

The *mudārib* has the right to buy and sell goods or services up to the value of the initial capital contribution (investment) from the *rabb al-māl*. That is obvious enough, because the point of the partnership is to earn a profit, which is impossible unless one or more purchase or sale transactions are conducted. However, transactions conducted by the *mudārib* cannot exceed 100 percent of this capital base. The only exception is where the *rabb al-māl* grants the *mudārib* broad authority to act according to her opinion (or discretion), and explicitly permits the *mudārib* to commit the partnership in engagements that outstrip its capital.

Under the exception, the *rabb al-māl* specifically empowers the *mudārib* to purchase goods or services on credit beyond the limit of the capital of the partnership. In modern financial parlance, this exception is permission to "leverage," i.e., to borrow off a pool of capital or assets. In Arabic, the term is "*wilāyat al-istidānah*," which is comprised of two words, "*wilāyat*," meaning "guardianship," and "*istidānah*," meaning "purchases on credit terms," and includes increasing the amount of credit through such purchases, but excludes obtaining a cash loan. Thus, the *Sharī'a* rule is simple: the *mudārib* can engage in transactions up to the amount the *rabb al-māl* invested in the *mudārabah*, but cannot leverage off of this capital base without permission from the *rabb al-māl*.

If the *mudārib* exceeds the capital without permission from the *rabb al-māl*, what happens? The *Hanafi* and *Hanbali* Schools hold that the *mudārib* bears responsibility for any losses in excess of the capital base. For example, in a partnership between Nora and Nayef in which Nora invests U.S. \$5 million but gives Nayef authority to act according to his discretion, suppose Nayef purchases \$6 million in shares of United Airlines. Subsequently, the Airlines declares bankruptcy, and equity interests are wiped out. The shares are worthless, and under the *Hanafi* and *Hanbali* Schools, Nora loses \$5 million, and can hold Nayef personally liable for the additional \$1 million. Nayef acted outside the scope of his authority granted by Nora to use his discretion.

In contrast, the *Māliki* School allows sale transactions in excess of the capital base without an express permission from the *rabb al-māl*, but not purchases. In other words, the *Māliki* School is the most permissive of the Four Schools in condoning leveraging. Accordingly, the same result in the United Airlines hypothetical would occur under *Māliki* School jurisprudence, as it involves a sale

transaction. But, suppose that in the Nora-Nayef *mudārabah*, Nayef sells \$6 million worth of industrial goods manufactured by the partnership to an Argentine company. The goods are delivered, but before making payment, the Argentine buyer defaults on its obligations, and does not pay the *mudārabah*. The transaction is for purchase, not sale, thus under the *Māliki* School, \$5 million of loss is allocated to Nora, and \$1 million to Nayef.

As for the *Shāfi'i* School, it does not permit any transaction beyond the capital without an express permission to that effect from the *rabb al-māl*. Thus, this School is the most restrictive on leveraging. An ambiguous "act according to your discretion" directive from the *rabb al-māl* is insufficient to immunize the *mudārib* from loss in excess of the capital base. The *mudārib* needs explicit authorization for such protection, otherwise if the *mudārib* engages in any transaction exceeding the limit of the capital, not only is that transactional contract voided, but also the entire *sharikah al-mudārabah* becomes void.

- Appointing Agents:

A *mudārib* is permitted to appoint an agent, and delegate responsibility to that agent, in respect of the business of the *sharikah al-mudārabah*. Lest it be thought this appointment is by one agent to another agent, keep in mind that a *mudārib* is more than an agent. For the *Hanafi* School, Al Kāsānī justifies the appointment:

because *mudārabah* is more general than agency, and he [the *mudārib*] can utilize the authority that is lesser in status (inherent in it).<sup>25</sup>

In brief, by appointing an agent, a *mudārib* confers a portion of the status that she, as the working partner, possesses.

- Hiring Services and Assets:

A *mudārib* is empowered to hire a wide array of goods, services, and assets to advance the business interests of the business of the *sharikah al-mudārabah* partnership. Imam Kāsānī explains that a *mudārib*

... has the authority to hire workers who labor with the wealth as this is the commercial practice. A human being cannot carry out all tasks by himself and is in need of hired services. Further, the *mudārib* has the authority to rent houses for storing goods, because he cannot preserve these assets without them. He may also hire boats and beasts of burden, because the transportation of goods from one place to the other is a way of earning of profit, and he cannot do this all by himself.<sup>26</sup>

The explanation for this power is pragmatic. Only in unusual *sharikah al-mudārabah* arrangements could a *mudārib* accomplish all work by herself. Ex-

<sup>25</sup> NYAZEE, *supra*, at 261 (quoting Al Kāsānī, *Badā'ī Al-Sanā'ī*, vol. 8 at 3707). Al Kāsānī goes on to explain:

This means that *mudārabah* is a higher level contract as compared to agency. In fact, agency is part of it, therefore, he has the authority to employ this lower level contract that is included within it.

Quoted in *id.*, fn. 67 at 261.

<sup>26</sup> NYAZEE, *supra*, at 262 (quoting Al Kāsānī, *Badā'ī Al-Sanā'ī*, vol. 8, at 3707).



amples might be where the venture is to create art or write a book. The *rabb al-māl* invests funds with the *mudārib*, who is an artist or writer, to be used for supplies such as paint and canvasses or a computer and research materials. The *mudārib* then proceeds in a solitary fashion. When the painting or book is complete and sold, profits are shared with the investor.

By contrast, in the mainstream of cases, a *mudārib* needs help to conduct the intended affairs of the partnership. She may need to sub-contract certain tasks to experts, as in the case of a construction project in which the *mudārabah* is engaged. The *mudārib* will need the services of electricians, plumbers, and ventilation specialists, none of which she can perform herself. Likewise, the *mudārib* will need heavy machinery — bulldozers, cement mixers cranes, and the like — to complete the building project. Assuming the *mudārib* does not own such assets, it will be necessary to rent them.

- Traveling:

A *mudārib* has the power to travel to different places in pursuit of the business affairs of the *sharikah al-mudārabah*. Al Kāsānī explains this power in light of the origin of the word “*mudārabah*.”

As the contract has been concluded independent of a particular location it will be observed in an unrestricted manner, and also because the meaning of the word *mudārabah* is a supporting evidence. *Mudārabah* is derived from *darb* fi *al-arḍ* and that means traveling . . . This is the opinion of *Abū Hanīfah* and *Muhammad*, and is also one opinion of *Abū Yūsuf* as narrated by *Muhammad*. In a narration of the authors of *Imlāʾ* the *mudārib* does not have this right. It is also narrated from him that he made a distinction on the basis of whether the person does business in a settled manner and also whether he has the right to claim transportation costs.<sup>27</sup>

As the explanation also indicates, accompanying the power to travel is the power to deploy the funds of the partnership. A *mudārib* can use capital invested by the *rabb al-māl* during this travel to cover necessary transportation, lodging, and meal expenses.

- Doing Business:

A *mudārib* has the power to engage in any common business transaction to advance the interests of the *sharikah al-mudārabah*. This power includes depositing goods, such as via a bailment whereby the *mudārib* leaves goods owned by the partnership with a third party for a specific purpose (e.g., improving or doing maintenance on those goods). This power is consistent with the general principle that if a *rabb al-māl* grants the *mudārib* authority to act according to her considered opinion in all matters, then the *mudārib* can engage in any transaction, without any restriction.

However, this principle is subject to an exception. A *mudārib* does not have the right to enter into three kinds of transactions without the express permission from the *rabb al-māl*. First (as indicated earlier), a *mudārib* does not have the right to

exceed the limit of the capital of the *sharikah al-mudārabah*. Second, she is not authorized to give gifts or make donations out of the capital or assets of the partnership. Finally, a *mudārib* is not permitted to extend a loan from the partnership to another party.

- Engaging in Financial Transactions:

A *mudārib* is permitted to perform all monetary transactions on behalf of the *sharikah al-mudārabah*. Such transactions include depositing money, claiming debts, or making endorsements (*hawālah*) in order to transfer funds or payment instruments. As with the rights to hire, travel, and do business, this right is a pragmatic necessity. Indeed, it may be viewed as foundational. If a *mudārib* were not empowered to make payments, then her other powers would be commercially meaningless.

- Pledging Property:

A *mudārib* is authorized to pledge property of the *sharikah al-mudārabah* as collateral for the debts of the partnership. That power implies the *mudārib* can leverage (i.e., borrow against) the assets of the *mudārabah*, and thereby obtain credit to expand business operations beyond what would be possible through the capital base. Conversely, the *mudārib* also can accept pledges for the partnership, and thus become a creditor vis-à-vis a third party.

For example, suppose in a *sharikah al-mudārabah* in which the *rabb al-māl*, Dalal, invests U.S. \$1 million with the *mudārib*, Ibrahim. Ibrahim uses \$300,000 of the \$1 million capital to purchase unimproved land outside of Cairo, Egypt, to build a hotel with a view of the Pyramids of Giza that will rival that of the Mena House Hotel (a remarkable and renowned facility in its own right). Contemporaneously, Ibrahim seeks to construct a hotel near the famous Temple of Karnak, in Luxor, but the land for it costs \$700,000. He is understandably reluctant to deplete all of the capital of the partnership (i.e., the \$700,000 remaining, following the purchase of the Cairo property). Thus, Ibrahim pledges the Cairo property, valued at \$300,000, to a property owner-seller in exchange for that amount, plus expends \$400,000 of the partnership capital, to come up with the purchase price for the land in Karnak. In brief, Ibrahim has leveraged the Cairo property to obtain the Karnak property.

Observe that in the above example, Ibrahim is not permitted to leverage property to obtain a conventional cash loan entailing interest. Such a loan runs afoul of the *Shariʿa* rules against *ribā*. Rather, Ibrahim is mortgaging one property (in Cairo) to make a credit purchase of a second property (in Karnak). The owner of the property in Karnak is selling her property on credit terms, and accepting the Cairo property as collateral in the event Ibrahim defaults in the future in making payments to him or her for the property.

- Entrusting Goods:

Is it permissible for a *mudārib* to give goods of the *sharikah al-mudārabah* (without transferring ownership of them) to a third party? The general answer is “yes” (as the discussion above concerning deposits and bailment indicates). But, suppose the *mudārib* seeks to entrust a third party with assets, so that the third party can use those goods in trading? Critically, the third party will not share in any

<sup>27</sup> NAYEE, *supra*, at 262 (quoting Al Kāsānī, *Badāʾiʾ Al-Sanāʾiʾ*, vol. 8 at 3708).

profits from the trading. Rather, profits derived from transactions by the third party will go to the *mudārabah*. As an example, suppose a *mudārib* such as Ibrahim has 10,000 shares in high-tech Korean information technology (IT) companies, and gives those shares to Yahia for Yahia to trade on the Korea Stock Exchange (KSE) in Seoul. The shares are assets of the partnership. While Yahia might pay a fee to Ibrahim for use of the shares, Yahia will not get any profits from his trading of those shares, nor even a wage from Ibrahim to compensate him for his time and expertise. Is this entrustment of shares permissible?

The *Sunni* Schools are split on the question. According to the *Hanafi* School, and the minority view of the *Hanbali* School, it is permissible to give goods to another person without wages by way of *biḍāʿah* to trade. The Arabic term "*biḍāʿah*" means giving another person goods to trade, but not wages or profit sharing.<sup>26</sup> A simple example is when the owner of a store leaves the merchandise of the store to another shopkeeper (as distinct from an employee), while the owner is absent for prayer, business, or leisure. The logic seems to be that the entire transaction is voluntary and consensual, and specifically the third party (e.g., the other shopkeeper) agrees to trade the property for no wage or share in profits. The *Hanafi* and minority *Hanbali* School holding is that this kind of arrangement is acceptable.

In contrast, under the *Māliki* School, and majority view of the *Hanbali* School, a *mudārib* does not have the power to hand over the goods by way of *biḍāʿah* to another person. One explanation, from the *Māliki* School, is this kind of transaction is inconsistent with the expectation of the *rabb al-māl* as regards the *mudārib*. The *rabb al-māl* invests funds with the *mudārib* expecting work to be done by her (subject, of course, to normal hiring of sub-contractors). If the *mudārib* essentially parks funds or assets, even briefly, with a third party, then the third party is doing the work expected of the *mudārib*. Arguably, a second justification for the *Māliki* and majority *Hanbali* School position is it is unfair (notwithstanding consent) for the *mudārib* to gain from profits earned by a third party without also sharing them, or at least paying the third party a wage. As for the *Shāfiʿi* School, it is silent on the matter. Thus, the answer to the question about entrustment of Korean IT company shares to Yahia is "it depends on the School."

#### (5) Liability —

Rules for dividing liability of the debts of a *sharikah al-mudārabah* as between the investor (sleeping partner, or *rabb al-māl*) and workers (i.e., the *mudārib*) are complicated. As a generality, liability rests with the investor. That is, the sleeping partner bears the risk of the entirety of any loss. If the investor requires the worker to be responsible for any part of the loss, the whole contract for the *mudārabah* partnership becomes void. At this level of generality, all four *Sunni* Schools are in agreement.

However, there is an array of qualifications, elaborations, and exceptions to the generality. The following points summarize the intricacies:

- Liability for Loss of Capital Before Business Commences —

Suppose a *rabb al-māl* invests capital with a *mudārib*. Before the *mudārib* begins to engage in transactions using that capital, the capital is lost. The investor bears this loss. Moreover, the *mudārabah* becomes void, because its essential subject matter — the capital — is gone before the partnership even started doing business. As the *Hanafi* School jurist Al Sarakshi explains:

If the investor gives him a thousand *dirhams* by way of *mudārabah*, concluded on half profits, and this capital is lost before he could buy anything with it, the *mudārabah* becomes void, because of the loss of its subject-matter.<sup>29</sup>

Suppose, however, that the *rabb al-māl* delivered the capital to an agent, not directly to the *mudārib*. Assume the agent loses the money, but not before transferring some value to the *mudārib*. In this instance, the *mudārabah* is still valid. That appears to be justified on the ground that money is fungible, and not all of the capital is lost — the agent gave some funds to the *mudārib*.

- Liability for Loss of Capital After Business Commences —

Suppose a *rabb al-māl* invests capital with a *mudārib*, and the worker invests the original capital. In other words, the *sharikah al-mudārabah* commences operation. However, the *mudārib* fails to return the initially invested capital to the investor after completing the investment. The worker is liable for the capital lost. That is because the worker is a trustee (*amīn*), and the original capital is a trust (*amānah*) placed by the investor in her hands. This rule is consistent with the requirement that the *mudārib* cannot draw any profits earned by the *mudārabah* unless and until the *rabb al-māl* is re-paid its investment plus its agreed-upon share of profits.

- Liability for Purchases of Goods or Services Before Profit is Realized —

Liability for debt that arises out of purchases of goods or services, up to the extent of the capital, and before the realization of any profit, is on the worker. Suppose a *rabb al-māl*, Sheba, invests U.S. \$100,000 with a *mudārib*, Omar. Omar purchases \$25,000 of computers for the *sharikah al-mudārabah* on credit from Apple Computer. Assume no profit is yet made. Omar is liable for paying this bill, as he has the invested capital at his disposal to do so. However, what if — before Omar pays the bill — the capital is lost? Is Omar still liable? The answer is "no." The liability shifts to Sheba. Al Sarakshi writes of the case of liability after purchase, but before the profit:

If a person gives to another a thousand *dirhams* by way of *mudārabah* on half profits, and he (the worker) buys something with it, and the thousand are then destroyed before he could pay the seller, then, the *mudārib* will go back to the *rabb al-māl* for a similar amount. The reason is that the capital was a trust (*amānah*) in his hands after the purchase, as it was before it, and is therefore a loss of the capital. The purchase, however, was not void due to the loss of a thousand. The *mudārib* is a worker for the *rabb al-māl* in this purchase and he has recourse to him for what has become due by virtue of the agreement. For this reason he recovers another thousand from the *rabb al-māl* and delivers it to the seller.

<sup>26</sup> NYAZEE, *supra*, at 322.

<sup>29</sup> NYAZEE, *supra*, at 266 (quoting Al Sarakshi, *Al-Mabsūt*, vol. 22 at 169).



If he takes the (second) thousand from the *rabb al-māl* and does not pay it till such time that this too is lost, he has the right to recover yet another thousand. Likewise, all amounts that are lost out of those that he took into his possession until he makes the payment. Each of these amounts that he takes from the investor are [*sic*] held in trust in his possession . . . . The capital is a trust in his hands and he, therefore, has the right of recourse time and again until the payment reaches the seller, as against possession by the agent.<sup>30</sup>

Observe that the potential liability of the *rabb al-māl* is unlimited. Theoretically, there is no limit — other than the good judgment of the investor to put an end to matters — on the number of iterations in which the investor contributes capital, the worker enters into contracts, the capital is lost, and the counter-party seller on the contracts demands payment. In brief, obligations to third-party vendors of goods and services to the *mudārabah*, entered into by the *mudārib*, must be honored. If the capital exists to honor them, the *mudārib* uses it to make payment. If not, the *rabb al-māl* is liable.

• Liability for Purchases of Goods or Services After Profit is Realized —

Liability for debt that arises out of purchases of good or services, up to the extent of the capital, and after the realization of any profit, is on the worker. Again suppose a *rabb al-māl*, Sheba, invests U.S. \$100,000 with a *mudārib*, Omar. Omar purchases \$25,000 of computers for the *sharikah al-mudārabah* on credit from Apple Computer. Assume profit is made. Omar is liable for paying this bill. He has both the invested capital and profit at his disposal to pay the bill.

• Liability for Purchases of Goods or Services in Excess of Capital Without Permission —

If the worker purchases goods or services beyond the extent of the capital without the permission of the investor, then the worker is liable for the debt. Working without legal authority from the investor is simply a violation of the *sharikah al-mudārabah* contract. (Obviously, if the worker had permission from the investor to exceed the capital limits, then the transactions in excess of capital are lawful, and the investor bears full and unlimited liability.) To be sure, the investor bears some liability, namely, the loss of invested capital and her share of profits. But, the worker has unlimited liability, in the respect that the further she transacted beyond the capital limit without permission, the greater the liability on him or her.

• Liability for Purchases of Goods or Services in Excess of Capital with Permission —

Suppose a *mudārib* has permission from the *rabb al-māl* to enter into transactions for the purchase of goods or services in an amount or amounts that exceed the invested capital. The *mudārib* enters into such transactions, on the basis of this authorization. In essence, the *mudārib* is leveraging the capital base to buy goods or services on credit. The authorization from the investor to the worker to make purchases on credit in excess of the capital limits is called "*widā'iyat al-istidānah*." In practice, the authorization empowers the worker to use the good name and

credit-standing of the investor. Once the *rabb al-māl* confers this authority on the *mudārib*, the partnership automatically switches from a *sharikah al-mudārabah* to a *sharikah al-uwjāh*. No change in the partnership agreement is required — the shift occurs by operation of law.

The reason for this shift is the different essential attributes of the two kinds of partnership. A *sharikah al-mudārabah* requires a specified capital to create the partnership. But, by allowing transactions with borrowed capital, the partnership now looks like a credit cooperative — which is the form of association known as a *sharikah al-uwjāh*. With the shift, all of the requirements applying to a *sharikah al-uwjāh* are triggered. Further, as a result of the transformation, both the worker and investor bear unlimited liability. As for profit, it is divided equally between them.

In respect of the last rule, there is some ambiguity. In particular, do the terms of the *mudārabah* agreement still apply in any fashion?

It seems clear purchase and sale contracts entered into with third-party vendors before the *mudārabah* became a *uwjāh* agreement remain valid contracts. But, as between the investor and worker, it appears that their relationship is governed by the *mudārabah* agreement, up to transactions valued at or less than the original capital. For transactions in excess of the base capital, the *uwjāh* contract governs their affairs.<sup>31</sup>

#### [D] Termination of *Sharikah al-Mudārabah*

The termination of *sharikah al-mudārabah* may occur in any one of six different ways. First, it can terminate by rescission if a proscribed transaction is entered into by the partnership, such as the voiding of a *mudārabah* if the *mudārib* transacts beyond the capital limit without permission from the *rabb al-māl*. Second, if a *mudārabah* agreement specified the association lasts only for a certain period of time, then the partnership terminates at the end of the stated period. Third, total loss of the capital of a *mudārabah* ends the partnership. Fourth, the insanity of either partner terminates a *mudārabah*. Fifth, a *mudārabah* ceases to exist upon the death of either partner. Sixth, an order of a court can terminate *sharikah al-mudārabah*.

#### § 28.04 MURĀBAHA CONTRACTS, THEIR RELATIONSHIP TO SHARIKAH AL-MUDĀRABAH, AND COMMON COMMERCIAL FINANCE TRANSACTIONS

One of the confusing points about loans under Islamic Law is that unless they are a charitable transaction, they are not properly called a "loan." That is confusing to non-Muslims, because in non-Islamic financial centers, which dominate global financial markets, the term "loan" applies broadly to any extension of credit for which interest is charged by the lender to the borrower. Under the *Sharī'a*, such non-charitable transactions are appropriately classified as profit-sharing ventures.

<sup>30</sup> NYAZEE, *supra*, at 207 (quoting *Al-Sarakhsi, Al-Mabsut*, vol. 22 at 169).

<sup>31</sup> See NYAZEE, *supra*, at 272 (fourth bullet point).

A *sharikah al-mudārabah* is an example of one such venture. A *rabb al-māl* (sleeping partner) provides funds to a *mudārib* (working partner), and shares in the profits of the *mudārib*, in accordance with their partnership agreement. There are a large number of uses to which the *mudārib* might put the funds. Several examples come from the financial world:

- Investment funds, such as mutual funds or hedge funds, whereby the *mudārib* is the fund manager.
- Securities brokerage, whereby the *mudārib* buys and sells financial instruments (e.g., stocks or bonds) for the account of third parties.
- Securities dealing, whereby the *mudārib* buys and sells financial instruments for its own account.
- Securities underwriting, whereby the *mudārib* brings to market and invests in initial public offerings of financial instruments (e.g., stocks or bonds).

Further examples come from the non-financial world. A *mudārib* might use funds from a *rabb al-māl* for a construction project, such as building a new high rise, bridge, toll road, or utility. In these and the financial deals, the *mudārib* might hire (sub-contract) some or all of the work to a third party. The point is that a *mudārabah* partnership quintessentially is designed for a business purpose, be it commerce or finance.

But, what about common retail transactions in which households, Muslim and non-Muslim alike, engage? Examples include purchasing a major asset, like a home, or an expensive consumer durable good, like a car. How are these deals structured, to avoid the rule against *ribā*?

Some sources suggest routine consumer transactions are dealt with through the device of a *sharikah al-mudārabah*. This device is said to be the purist legal fiction (*hiyal*) to avoid *ribā*. However, several other sources indicate that a somewhat different device, called a "*murābaha*," is used — and they appear to provide the better view.

The term "*murābaha*" derived from the word "*rabah*" which means "profit." The legal definition of *murābaha* is:

A cost-plus-sale contract where a financier purchases a product, i.e., commodity, raw material or supplied, for an entrepreneur who does not have his/her own capital to do so. The financier and the entrepreneur agree on a profit margin, often referred to mark-up which is added to the cost of the product. The payment is delayed for a specified period of time.<sup>32</sup>

There is no doubt as to the status of *murābaha* — it is a contract, not a species of partnership like a *mudārabah*. However, it is a form of profit-sharing, and in economic terms is a contract for resale plus a stated profit. That is, a *murābaha* is an agreement for the purchase and resale of an asset (such as a home) or commodity (such as a car), with a surcharge to represent an amount for profit, in lieu of

interest. Simply put, *murābaha* refers to cost-plus pricing, or synonymously, a non-interest bearing loan.

For example, a bank (the creditor) purchases a home or car for a customer (the debtor), and resells the item to the customer. The customer must repay the bank not only the purchase price (the amount for which the bank bought the home or car), but also an extra sum, the difference between the cost to the bank and the resale price. That difference is the surcharge.

Consider the following example. Fatima would like to purchase an apartment in Abu Dhabi for U.S. \$1 million, but lacks the liquid cash to pay that price. She goes to the Dubai Islamic Bank, and asks for a "loan." The Bank agrees to purchase the apartment for her, paying the entire purchase price to the seller, Walid. Ownership of the apartment is transferred from Walid to Fatima upon payment by the Bank of \$1 million to Walid.<sup>33</sup> Fatima is legally obliged to repay the bank the full \$1 million principal. In addition, she must pay a surcharge, or profit, to the bank. That amount is negotiated between her and the bank, and hypothetically in this transaction is \$50,000. The entire transaction is a *murābaha* contract, which Diagram 28-1 summarizes.

<sup>32</sup> ZAMIR IQBAL & ABUL M. MIAKHOUB, AN INTRODUCTION TO ISLAMIC FINANCE THEORY AND PRACTICE GLOSSARY xi (Singapore: John Wiley & Sons (Asia) Pte Ltd, 2007).

<sup>33</sup> In some circumstances, under a *murābaha* contract the creditor (Dubai Islamic Bank) might hold title to the asset being purchased, albeit for a brief period, before transferring it to the borrower (Fatima).



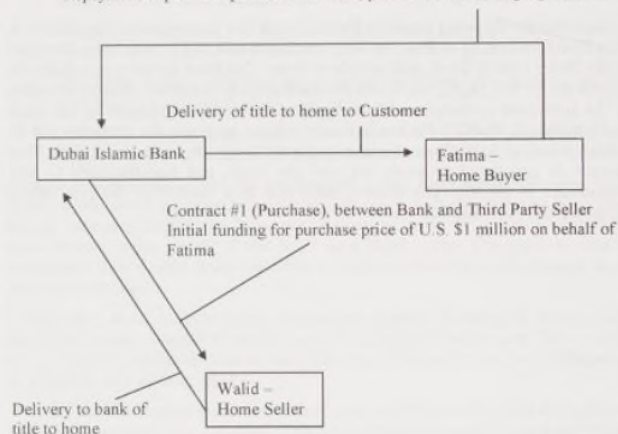
Diagram 28-1:  
Hypothetical *Murābaḥa* Contract

Contract #2 (Resale), between Bank and Customer

Repayment of purchase price of \$1 million, plus \$50,000 surcharge (profit)

Contract #2 (Resale), between Bank and Customer

Repayment of purchase price of \$1 million, plus \$50,000 surcharge (profit)



Another way to summarize a *murābaḥa* contract is that it is cost-plus pricing.<sup>34</sup> A bank, seller, and buyer are the three participants to reform a *murābaḥa*. The key to the contract is that the bank pays directly to the seller of the asset in question the purchase price, essentially buying the asset for the customer of the bank. The bank then resells the asset to the customer for its cost, plus an amount for a profit. Conceptually, the bank has traded a house, in the same way that an old-fashioned trader of dates would buy a package of them for \$10, and resell them at \$15 them for a profit of \$5 (not including any transaction or other costs).

For many, but not all, Islamic legal scholars, the surcharge is not considered to involve or interest (*ribā*) or result in unjust enrichment (*"al-ithra' bila sabab"*). However, some sources consider it essentially equivalent to a fixed interest loan.<sup>35</sup> The concern a *murābaḥa* contract is too close for comfort to a fixed interest loan, i.e., the surcharge is little else than *ribā*, is not unfounded. In practice, some

less-than-scrupulous Muslim financiers calculate the amount of profit by using non-Muslim interest rate benchmarks.

Examples include the interest rate on United States Treasury securities (especially long bonds, which have a maturity of 10 years or more, and thus best approximate the tenor of a mortgage loan, which typically is 15 or 30 years), the Fed Funds rate (the rate charged in the United States on short-term, inter-bank loans), or the London Inter-Bank Offer Rate (LIBOR, which is the rate banks charge to one another on unsecured, dollar-denominated loans in the London market). In the above hypothetical, the overage of \$50,000 is exactly 5 percent of the initial capital. In other words, some *fukahā'* point out the hypocrisy of what is really going on — making an interest-based calculation, but calling the result by a label other than *ribā*.

From the brief explanation of *murābaḥa* above, seven requirements emerge. That is, to create a valid *murābaḥa* contract, the following seven steps, with attendant conditions, must occur:

• *Step 1: Customer's Initial Purchase Request*

A customer initiates a request to a bank for the bank to buy a particular item on her behalf, and concomitantly promises to buy that item from the bank. The customer has the right to specify the precise merchandise and supplier, or can agree jointly with the bank on these points. The customer also has the right to withdraw, i.e., to cancel the arrangement, before the bank purchases the goods.

• *Step 2: Bank's Acceptance*

The bank accepts the proposition and agrees to purchase the item from the third party seller designated by the buyer, or as agreed between the bank and buyer. If the seller is not a third party, such as the customer or her agent, then the *murābaḥa* is prohibited. The reason is if the seller is the customer (or agent thereof), then the transaction would be characterized as an *'inah* arrangement (an exchange of one sum of money for a greater amount at a later date), which is a form of *ribā* and is strictly prohibited.

• *Step 3: Known Profit*

The price of the merchandise, as well as the profit in the transaction for the bank, must be known. That is, the resale price at which the customer buys the item from the bank, as well as the price the bank pays initially for it, must be established.

• *Step 4: First Sale Contract (between Bank and Third-Party Seller)*

The bank must form a contract with the third-party seller to buy the item desired by the customer of the bank. Typically, this contract is a sales contract (*bay'*).

• *Step 5: Second Sale Contract (between Bank and Customer)*

The bank forms a second separate contract with the customer to sell the item. This contract also is a sales (*bay'*) contract, and is for the re-sale of the

<sup>34</sup> See MAJIDUL ALAM CHOUDHURY & MOHAMMAD ZIAUL HOQUE, AN ADVANCED EXPOSITION OF ISLAMIC ECONOMICS AND FINANCE 26, 74 (Lewiston, New York: The Edwin Mellen Press, 2004).

<sup>35</sup> See, e.g., ANGELO M. VENARDOS, ISLAMIC BANKING & FINANCE IN SOUTH-EAST ASIA — ITS DEVELOPMENT & FUTURE 234 (Singapore: World Scientific Publishing Co. Pte. Ltd., 2005).

item in question at an agreed upon price. This resale contract also states that the customer may pay the price on a deferred basis. That way, the bank ultimately is able to deliver the item to the customer knowing the customer is legally obligated to pay the re-sale price on or by some future date after this delivery. The terms may call for installment payments.

• *Step 6: Bank Takes Possession*

At the moment the bank purchases the item, and, therefore, acquires ownership of the item, the customer is legally obligated to buy that item from the bank. The right of the buyer to cancel the arrangement terminates at this moment. The buyer must pay the resale price to the bank via a deferred payment arrangement. The bank must take actual physical or constructive possession of the item. For example, if the merchandise is a car, the bank must take possession of it via a certificate of title, which shows the bank is the owner of the car. Likewise, if the item is a financial instrument, such as a stock or bond, the bank would take possession by having the instrument registered in its name. In the case of a home, the bank would take possession by having a title deed recorded in its name.

• *Step 7: Delivery to Customer*

Finally, the bank delivers the item to the customer. Delivery may occur by transferring actual physical possession of the item to the customer, or conveying constructive possession. For instance, the bank may deliver a certificate of title to a car to the customer, arrange for stocks or bonds to be re-registered in the name of the customer, or re-title real property in the name of the customer.

These steps occur in a logical sequence connected to form an integrated deal. While the customer is the catalyst and end point — the steps start with a customer request and end with delivery to the customer — the bank plays the highest profile role. A *murābaha* contract is possible because of the active transactional and logistical activities of the bank. The bank is responsible for formation and performance of two contracts, one for purchase and the other for re-sale, which yield, respectively, a cost-plus pricing deal. Every business day throughout the Muslim world where Islamic banking practices are followed, this kind of deal is frequently observed.

As final considerations, first, it is important not to confuse “*murābaha*” with “*qard al hassan*.” The latter term refers to an interest-free loan, such as where a lender loans U.S. \$100,000 to a borrower, and the borrower repays exactly \$100,000 in the future. With *murābaha*, in contrast, the lender would purchase an asset (or consumer item) for the borrower at \$100,000, and sell that asset to the borrower. The borrower would pay for the asset in installments (e.g., over 5 years), with the total repayment being (for instance) \$125,000. The \$25,000 spread is the fee the lender charges for the entire transaction.

Second, this spread also highlights why a *murābaha* arrangement is accurately characterized as a “non-interest bearing loan,” or equivalently as “cost-plus pricing.” The \$25,000 spread is a fee, and (perhaps arguably) not interest — even if it is calculated by the lender *a priori* using interest rate benchmarks such as

LIBOR. The \$100,000 is loaned for a non-interest fee. Likewise, the \$100,000 purchase price is the “cost” of the asset, and the \$25,000 markup is the “plus pricing.”

## § 28.05 BANK FUNDING, TRANSACTIONS, AND LEGAL FEES

Consider the following example of a *murābaha* arrangement. A client of a bank would like to purchase a car for U.S. \$10,000. The bank agrees to purchase the car from the automobile dealer for that amount. The bank offers to sell the car to its client for \$13,000. The client agrees, and under the term of the *murābaha* deal, is obligated to pay back the bank \$3,000 in installments of \$1,000 per year across three years. The bank thus obtains a profit of \$1,000 per year for three years. The total revenue in the transaction for the bank is \$13,000, but the profit for the bank is \$3,000 as of the end of the third and final year of the transaction. Obviously, the arrangement is a quintessential cost plus pricing, or *murābaha*, deal.

Suppose that in advance of this auto financing deal, the bank requires the services of a lawyer. That is, the bank needs to hire outside counsel to take care of all aspects of the deal — negotiating with the auto dealer and client, drafting the relevant sale contracts between the bank and dealer and bank and client, and ensuring proper, timely payments are made. The lawyer requests that she be paid 3 percent of the total revenue earned by the bank on the transaction, which is \$390. The bank replies that payment to the lawyer based on total revenue does not conform with the *Shari'a*. That is because the lawyer is requesting a payment defined in terms of interest on the total transactional value. The bank makes a counter-offer: the bank will pay the lawyer 3 percent of the total profit earned by the bank on the deal, or \$90. The bank insists that it not only wants to provide *Shari'a*-compliant financing (*tamweel*) to its customers, but also wants to pay its lawyer in a manner that comports with Islamic Law.

The argument and rationale of the bank are correct. To be sure, the bank and lawyer can quibble about the reasonableness of the 3 percent figure — the lawyer may call for a higher number. But, if satisfying the profit-sharing impulse of the *Shari'a* is the goal, then the lawyer ought to be paid out of the profits the bank earns from its transactions, not out of the total transactional value of the deal or deals at issue. To pay the lawyer based on the total transactional value, or total revenue, is to create unjust enrichment (“*al-ithra' bila sabab*”) for the lawyer. The lawyer earns interest (*ribā*) based on money, rather than being involved in a communal profit-sharing endeavor.

Consequently, the lawyer enters into an arrangement with the bank that is separate and distinct from that between the bank and its client. This arrangement may take one of two forms. First, the bank may hire the services of a lawyer. The contract (‘*aqd*) for such services would be an *ijāra* agreement. The terms, including the fee the bank pays to the lawyer, would be negotiated between the parties. Second, the lawyer and bank could form a *sharikah al-mudārabah* partnership. The lawyer is the sleeping partner (*rabb al-māl*), and the bank is the working partner (*mudārib*). The latter agrees to share a portion of its profits with the former. (Note



that an important issue to check would be whether such a partnership, if entered into in the United States, would raise concerns under applicable bar rules about affiliations between lawyers and non-lawyers.)

This kind of arrangement — a *sharikah al-mudārabah* partnership — also applies to the funding operations of the bank. How does the bank get funds to purchase the car for its client? More generally, how does the bank obtain funds to engage in a wide variety, and large volume, of financing transactions, from automobile and home purchases to proprietary trading in financial instruments such as Islamic bond (*shukūk*)?

One source is investors in the bank, that is, high net worth individuals, and other institutions, that contribute capital to the bank. These entities become partners with the bank in a sleeping partnership arrangement: they are the sleeping partners, and the bank is the working partner. The bank provides them with a return calculated as a percentage of the profits of the activities and operations of the bank. This return is not calculated as interest on the total value of the transactions in which the bank engages, nor as a percentage of total revenues. For example, suppose the investors are lured by the promise of the bank to provide 30 percent of its profit to them. If the bank makes \$1 million in a particular year, then the investors would split \$300,000 among them. The 30 percent figure, as well as the method for dividing the profits, would be spelled out in the *sharikah al-mudārabah* partnership contract between the investors and bank. In effect, the investment contract is a partnership contract.

A second source is depositors in the bank. Normal, everyday retail customers of the bank deposit their money in the bank. The bank offers them a return for doing so. Under a conventional, non-Muslim bank deposit contract, that return is calculated as interest on the total value of the fund deposited. But, the bank seeking to comply with the *Shari'a* offers depositors a percentage of the total profits of the bank. For instance, suppose a bank earns \$1 million in a particular year as profit, and has 100 depositors, all of whom have the same arrangement with the bank — profit sharing of 25 percent, distributed equally among them. Then, the 100 depositors would split \$250,000 (25 percent of the \$1 million profit) equally, or \$2,500 each. To be sure, the deposit contracts need not all be identical in terms of the percentage profit sharing. As with the investors, for the depositors, the 25 percent (or other) figure, and the method of distribution, would be set out in the *sharikah al-mudārabah* partnership contract between the depositors and bank. In effect, the deposit contract is a partnership contract.

## Chapter 29

### FINANCE (TAMWEEL): ISLAMIC BONDS (SHUKUK) AND SECURITIZATION

... [T]he area of finance . . . is a key aspect of the phenomenon of globalization, owing to the development of technology and policies of liberalization in the flow of capital between countries. Objectively, *the most important function of finance is to sustain the possibility of long-term investment and hence of development.* Today this appears extremely fragile: it is experiencing the negative repercussions of a system of financial dealings — both national and global — based upon *very short-term thinking, which aims at increasing the value of financial operations and concentrates on the technical management of various forms of risk.* The recent crisis demonstrates how financial activity can at times be completely turned in on itself, lacking any long-term consideration of the *common good.* *This lowering of the objectives of global finance to the very short term reduces its capacity to function as a bridge between the present and the future, and as a stimulus to the creation of new opportunities for production and for work in the long term.* Finance limited in this way becomes *dangerous for everyone*, even for those who benefit when the markets perform well.

*Fighting Poverty to Build Peace*, Message of His Holiness Pope Benedict XVI for the Celebration of the World Day of Peace, 1 January 2009, ¶ 10 (emphasis added)

#### SYNOPSIS

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#### § 29.03 PRESENT VALUE, PRICE, AND YIELD OF NON-MUSLIM BONDS

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- [A] Typical Transactions
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- [D] *Shukuk* and Conventional Non-Muslim Stocks

### § 29.01 IMPORTANCE OF ISLAMIC FINANCE (*TAMWEEL*)

"*Tamweel*" is the general Arabic term for "finance" or "financing." It is widely used throughout the Muslim world. "*Tamweel*" covers a vast array of financial instruments and transactions. The term also is taken as a name by many institutions that are players in Islamic financial markets. Note "*tamweel*" does not mean "loan." In the conventional non-Muslim sense of the term "loan," a "loan" is prohibited (*harām*) under the *Shari'a* because it bears interest (*ribā*). "*Tamweel*," however, connotes the provision of funds through means that are compliant with the *Shari'a*.

Obviously, Islamic finance — *tamweel* — is not a new phenomenon. Merchants and traders have had to finance their operations since the time of the Prophet Muhammad in a manner that is consistent with the religious and ethical norms of Islam. Those operations have included, through the ages, transactions with non-Muslim commercial parties. What is new is the interest in Islamic finance in the non-Muslim world. A number of events, particularly ones in non-Muslim countries, have attracted attention in recent decades.

For example, in 1978 the first Islamic bank was established in a western country, Luxembourg. It was called the "Islamic Banking System," and later renamed the "Islamic Finance House Universal Holdings, S.A." Its purpose was to serve high net worth individuals in a manner compliant with the *Shari'a*. In 1983, the Bahraini Solidarity Group established the first *Shari'a* compliant insurance company, Takaful SA, in Europe. In 2005, thirty-five *Shari'a* compliant investment funds and sub-funds existed and were marketed in the non-Muslim western world. By then, Luxembourg had obtained the status as the leading center in the non-Islamic world for the registration of *Shari'a* funds.

Among the many possible illustrations of the increasing global prominence of Islamic finance is *shukuk* (Islamic bonds). The *shukuk* market is a rapidly growing one, in both the Muslim and non-Muslim financial world. The demand for this product is increasing, as is the supply of the product. Further evidence of the robust state of affairs is the veritable cottage industry in books and articles on Islamic finance. The phenomenal growth in Islamic bonds:

is not surprising, as it is a reflection of how Malaysia has developed the *shukuk* market and how active these banks are in the market. Another notable performance is by the Hong Kong and Shanghai Banking Corpo-

ration's (HSBC) Islamic investment entity — *Amāna* [also transliterated as *Amanah*] — which has played an important role in the development of this market.<sup>1</sup>

Their observation points to the role of non-Islamic financial institutions like HSBC in fueling market expansion. Such banks tend to be larger and better capitalized than most Muslim banks, and have a more extensive international network of branches and agencies. Without their involvement, the market for financial instruments like *shukuk* that comply with the *Shari'a* might have been slower to grow and smaller in size.

Islamic financial instruments are important for both economic and ethical reasons. They play a significant role in funding business projects, and thereby contribute to the overall economic growth of a community, region, or country. More significant, however, is their ethical dimension. In the last analysis, Islamic Banking Law is not merely a flexible body of rules to support modern capitalist growth *per se*, but rather a set of Divinely-inspired moral precepts that support economic betterment in a way that comports with the will of God (Allāh).

Despite the enthusiasm, there is on occasion hypocrisy, even unscrupulousness, in some Islamic financial markets, and in respect of some Islamic financial instruments. For instance, no Sovereign Wealth Fund (SWF) of any Islamic country (as of March 2011) operates exclusively on *Shari'a* principles. Not infrequently, the investors that try most scrupulously to adhere to those principles are private individuals or institutions in non-Muslim countries, including the United States and United Kingdom. As another example, it is not evident that the financial returns from *Shari'a* compliant financial instruments are any better, in the long term, than conventional non-Muslim analogs. The returns may be superior in a moral or religious sense, but that is true only if the issuers of the instruments are not cheating their investors. As any actual or would-be investor knows, cheating is a temptation that knows no religious boundaries.

Wherever located, financial institutions that seek to provide customers with *Shari'a* compliant investment vehicles face a problem: how can they certify to prospective investors that the financial instrument they propose to sell truly adheres to Islamic Law? Invariably, the answer is certification from one or a group of prominent Islamic legal and religious scholars. Yet, as in any field, not all scholars are alike. Some are more prone to being hired out to give an opinion in exchange for a fee, and more susceptible to influence by the payor, than others. Indeed, the universe of truly exceptional, unbiased, high-integrity *Shari'a* experts on Banking Law is small. Of course, the same critique may be offered of non-Islamic financial products that are marketed as socially responsible investments.

These kinds of problems aside, the fact is Islamic finance is a significant force in world financial markets. Regrettably, the modern mainstream media in countries like the United States tends not to focus on this fact. Thus, lost amidst the attention of much of the media on war and terrorism is a second fact. Islamic financial products have a long, rich history of legal and religious thought in their support.

<sup>1</sup> ZAMIE IQBAL & ABBAS MIRAKHOR, AN INTRODUCTION TO ISLAMIC FINANCE THEORY AND PRACTICE 186 (Singapore: John Wiley & Sons (Asia) Pte Ltd, 2007). [Hereinafter, Iqbal & Mirakhor.]



## § 29.02 CONVENTIONAL NON-ISLAMIC BONDS

### [A] Definition

In both Islamic and non-Islamic finance, a "bond" is a debt security, which is: a claim on a specified periodic stream of income. Debt securities are often called *fixed-income securities*, because they promise either a fixed stream of income or a stream of income that is determined according to a specified formula. These securities have the advantage of being relatively easy to understand because the payment formulas are specified in advance. Uncertainty surrounding cash flows paid to the security holder is minimal as long as the issuer of the security is sufficiently creditworthy. . . .

The bond is the basic debt security. . . .<sup>2</sup>

A "bond," then, is "a security that obligates the issuer to make specified payments to the holder over a period of time." That is true in both non-Islamic and Islamic finance.

However, the role of interest (*ribā*) is the critical factor differentiating conventional bonds from Islamic bonds (*shukūk*). In non-Islamic finance, a "bond" is an interest-bearing certificate sold by a company or government to raise capital, i.e., money. In Islamic finance, interest plays no role, or at least it is not supposed to.

In both financial systems, the relationship created by a bond between issuer and purchaser is analogous to a loan. With a bond, a purchaser, or investor, is the creditor, who loans the issuer, which is the debtor, funds in the form of the initial payment for the bond, which is the original issue value, or initial public offering (IPO) price. That price is known as the "par value," "face value," "nominal value," "stated value," or "principal amount" of the bond. Typically, it is U.S. \$1,000 per bond. Thus, bonds are issued "at par," meaning sold in an IPO at the value on their face, such as \$1,000.

A bond issuer uses the funds raised through floating bonds for purposes made known to the investors, which range from financing current expenditures to providing for long-term physical capital projects. For instance, for private issuers, the expenditures may pertain to purchasing a company in a merger-and-acquisition deal, and the projects may be construction of a new factory. For public sector (i.e., governmental) issuers, the expenditures may relate to defense or health care, and the projects may relate to infrastructure (e.g., ports, roads, or telecommunications facilities) or education (e.g., new schools).

<sup>2</sup> ZVI BODIE, ALEX KANE & ALAN J. MARCUS, *ESSENTIALS OF INVESTMENTS* (New York, New York: McGraw-Hill/Irwin, 5th ed., 2004) (emphasis original). [Hereinafter, BODIE ET AL.]

Note that unlike a bond, a certificate of deposit (CD), and commercial paper, are considered short-term money market instruments, not a species of debt securities.

### [B] Investment Appeal

Why invest in bonds? Bonds are an attractive investment vehicle. Like a fixed-term loan, there is a specified rate at which the issuer must pay the bond holder at fixed intervals. This rate is fixed and thereby provides the bond holder with a steady stream of income throughout the life, or tenor, of the bond. Second, the bond issuer must pay the bond holder the principal amount of the bond upon maturity. In brief:

- The steady income stream is interest, also called the "coupon rate," such as 5 percent. Typically, this coupon rate payment is made annually in Europe and semi-annually in America.<sup>3</sup> The term "coupon rate" derives from the era in which all bonds were paper-based (that is, certificated rather than uncertificated securities), and the bond holder claimed her interest payment from the issuer by clipping off the coupon from the bond and mailing it to the issuer.<sup>4</sup>
- The repayment upon maturity, i.e., when the bond is redeemed, is the principal amount borrowed by the issuer, namely, the par value, such as \$1,000.

For example, suppose an investor purchases a bond with a par value of \$1,000 and coupon rate of 8 percent and maturity of 30 years.<sup>5</sup> The issuer must pay the investor 8 percent of \$1,000, or \$80, annually until the bond matures in 30 years. Upon maturity, the issuer redeems the bond, which means it pays back the face value of \$1,000, to the bond holder. Thus, if the investor held the bond from its initial IPO until maturity, she will have obtained \$2,400 in interest payments for having loaned the issuer \$1,000, and will receive back that \$1,000 loan.

Manifestly, interest plays an indispensable and central role in conventional finance, in contrast to Islamic finance. Indeed, typically an issuer sets the coupon rate high enough to induce investors to purchase its bonds at par value.<sup>6</sup> Coupon payments typically are fixed. Fixed-rate bonds offer reliable, stable income and thereby diversify an investment portfolio that contains instruments like stock or real property, which entail the risk of dramatic fluctuations in value and returns.

Note, however, that coupon payments on certain bonds are based on a dynamic index, such as one based on a particular financial market. Such instruments are called "floating rate" bonds. For instance, the coupon rate on a floating rate bond might be linked to an index of interest rates, and rise and fall directly with that index. Conversely, there are bonds known as "reverse floaters." Their coupon rate falls when interest rates rise, i.e., the relationship between the coupon rate and index is inverse. Thus, an investor suffers a double loss of interest rates rise: the

<sup>3</sup> BODIE (Finance), WIKIPEDIA, posted at [http://en.wikipedia.org/wiki/Bond\\_\(finance\)](http://en.wikipedia.org/wiki/Bond_(finance)). [Hereinafter, BODIE (Finance).]

<sup>4</sup> See BODIE ET AL., *supra*, at 296.

<sup>5</sup> See BODIE ET AL., *supra*, at 296.

<sup>6</sup> See BODIE ET AL., *supra*, at 296.

<sup>7</sup> See BODIE ET AL., *supra*, at 302.

present value of the coupon payments fall with this rise, and the amount of the payments falls.

Diversification, then, is a key reason for investing in bonds. The adage "do not put all your eggs in one basket" applies to savings. It is imprudent to invest all assets in one particular market. In times of crisis, different asset markets across regions or countries tend to be linked. But, in normal times, asset price movements in different markets tend to reflect underlying fundamental economic and political factors in those markets. That means different assets entail different risks. An investor is wise to diversify risks, so that if prices fall in one asset category in her portfolio, they rise in another category. A diversified portfolio, then, includes bonds, along with stock, precious metals, foreign currency, and real property.

### [C] Differences with Equity

As indicated, a bond is a security, and so is stock (equity). Both financial instruments fluctuate in value as long as they are outstanding and the underlying company continues to operate. However, when issued by a private company, there are important differences between these two instruments. First, with the exception of a consol bond,<sup>8</sup> which has no maturity date (i.e., it is a perpetuity), a bond matures over a pre-determined period. Second, mere ownership of a bond does not give its holder an equity stake in the company, as does stock ownership. An equity investor is a part-owner of the entity issuing the stock, whereas a bond holder is a creditor of the issuer. Depending on the terms of the bond, the bond holder is at best a secured creditor, and at worst an unsecured creditor, of the issuing company.

### [D] Bond Issuers and Types

Bonds are issued either by a private entity or sovereign government. They also are issued by certain international organizations, such as the World Bank and regional development banks. A private issuer typically floats a bond in the form of a "debenture" or an "asset-backed" security. A debenture is issued against unsecured collateral and based upon the general creditworthiness of the issuer.<sup>9</sup>

Technically, debentures are used by sovereign issuers as well. For instance, United States Treasury Bills and Treasury Bonds are debentures. Regarding private issuers, in contrast to a debenture, an asset-backed bond is secured with an asset or pool of assets. Asset-backed bonds are common instruments. Examples include mortgage-backed securities (MBSs), collateralized mortgage obligations (CMOs), and collateralized debt obligations (CDOs). With an asset-backed bond, payment of the coupon rate and redemption at par value is integrally linked to, and derived from, the cash flow from the assets underlying the bond. Motivated at bottom by greed and fear, there seem to be no bounds on the innovativeness of Wall Street financiers. "David Bowie" bonds are backed by royalties from some of his musical albums, and "Walt Disney" bonds are securitized by the income stream

from Disney movies.<sup>10</sup>

Among bonds floated by private issuers, specifically corporations, another distinction is important: "convertible" versus "exchangeable" bonds. A convertible bond allows the bond-holder to convert the bond into shares of stock in the issuing company. Typically, convertibles have a low coupon rate, precisely because they offer an investor the appeal of the convertibility option, meaning that the investor can decide whether to remain a creditor of the issuer, or become a part-owner in it. An exchangeable bond allows the bond holder to convert the bond into shares of stock in a corporation other than the issuing corporation. Usually, this company is a subsidiary or otherwise affiliated with the issuer. A similar but distinct innovation is known as a "pay-in-kind" bond.<sup>11</sup> An issuer of such a bond has the flexibility of paying interest either in the form of cash or additional bonds. This option protects the bond issuer against cash shortages, as it can make coupon payments to investors with more bonds rather than consume precious cash reserves.

One unique type of privately issued debt security is a "subordinated" bond. An indenture governing this bond gives the bond a lower priority in liquidation if the issuer files for bankruptcy — hence the adjective "subordinated." In a liquidation proceeding, if there are any proceeds remaining once previous debts are settled, then senior bond-holders are paid before subordinate bond-holders. Not surprisingly, unsubordinated bonds tend to have a lower credit rating because they are riskier than asset-backed securities.

The New York Stock Exchange (NYSE) is the largest bond market. It boasts a vast number of corporate bond listings. However, most bonds trade in the over the counter (OTC) market. Of course, sovereign governments regularly issue bonds, which trade OTC. These bonds are typically auctioned at pre-determined times, although the United States Treasury sometimes re-opens a bond, selling more bonds of a previous issuance.<sup>12</sup> Here again, Wall Street plays a leading role. Treasury securities are issued through a primary dealer system, with the United States Treasury Department auctioning Treasury securities to primary dealers through the Federal Reserve Bank of New York. Primary dealers, in turn, buy and sell Treasuries on the secondary market. In the United States, sub-federal governments — that is, states, territories, counties, and municipalities, and other sub-regions or districts — also issue bonds. They do so typically to fund large projects that cannot easily be financed through taxes or federal aid.

Like private issuers, sovereign governments float certain species of bonds that are noteworthy. For example:

- The United States issues "zero-coupon bonds," which pay no interest, i.e., there are no coupon payments associated with them.<sup>13</sup> United States Savings Bonds are an example. But, such bonds are issued at prices

<sup>10</sup> See BODIE ET AL., *supra*, at 302.

<sup>11</sup> See BODIE ET AL., *supra*, at 302.

<sup>12</sup> United States Department of the Treasury, *Treasury Bonds: FAQs*, posted at [www.savingsbonds.gov/indiv/research/indepth/tbonds/res\\_tbond\\_faqs.htm](http://www.savingsbonds.gov/indiv/research/indepth/tbonds/res_tbond_faqs.htm).

<sup>13</sup> See BODIE ET AL., *supra*, at 296, 314-316.

<sup>8</sup> See *Consols*, WIKIPEDIA, posted at <http://en.wikipedia.org/wiki/Consols>.

<sup>9</sup> See *Debenture*, INVESTOPEDIA, posted at <http://www.investopedia.com/terms/d/debenture.asp>.



significantly below par value. Consequently, the investment return on them is a capital gain, namely, the difference between the below-par issue price and the par value paid to the holder at maturity.

- "Inflation-indexed" bonds are another example. The coupon rate on them depends on the interest rate of the issuing country, and is a percentage of the face value of the bond. The United Kingdom popularized this form of bond in 1981 with Gilt bonds, as the late 1970s and early 1980s were a period of high inflation.<sup>14</sup> The United States Treasury introduced inflation-indexed bonds, known as Treasury Inflation-Protected Securities (TIPS), in 1997. The income and principal of TIPS is tied to the Consumer Price Index (CPI).<sup>15</sup>
- "Investment-indexed" bonds, or "I-bonds," which the United States Treasury issues.<sup>16</sup> As their name suggests, their coupon rate is linked to a specified investment index.
- European sovereign issuers, particularly Belgium and France, pioneered so-called "lottery bonds."<sup>17</sup> All lottery bonds are fixed-term bonds. But, bond holders are randomly selected for redemption at a rate higher than the par value of the bond. The purpose of these bonds is to encourage investment.
- Historically, war bonds are a significant form of bond sovereigns issue to finance expenditures associated with a war. They were popular, and it was considered a patriotic duty to purchase them, during the Second World War.

In sum, like the private sectors in non-Muslim developed countries, many non-Muslim sovereign governments have been creative in engineering debt securities to attract investor interest and thereby meet important financing needs.

<sup>14</sup> *Inflation-indexed Bond*, WIKIPEDIA, posted at [http://en.wikipedia.org/wiki/Inflation\\_linked\\_bond](http://en.wikipedia.org/wiki/Inflation_linked_bond). Observe that a bond holder likely would want to sell a fixed-rate bond if the currency in which the bond is denominated is rapidly inflating, as inflation cheapens the value of the fixed-rate coupon payments. However, in these inflationary circumstances, there likely would be few buyers.

The discussion herein ignores the distinction between real interest rates (which are corrected for inflation) and nominal (or money) interest rates (which are not corrected for inflation). Essentially, the real interest rate is the nominal interest rate minus the rate of inflation. See PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, *ECONOMICS* 509 (New York, New York: McGraw-Hill/Irwin, 18th ed., 2005) (emphasis original). [Hereinafter, SAMUELSON & NORDHAUS.]

<sup>15</sup> See SAMUELSON & NORDHAUS, *supra*, at 509; BODIE ET AL., *supra*, at 302.

<sup>16</sup> United States Department of the Treasury, *I-Savings Bonds FAQs*, posted at [www.savingsbonds.gov/indiv/research/indepth/bonds/res\\_ibonds\\_faq.htm](http://www.savingsbonds.gov/indiv/research/indepth/bonds/res_ibonds_faq.htm).

<sup>17</sup> *Lottery Bond*, WIKIPEDIA, posted at [http://en.wikipedia.org/wiki/Lottery\\_Bond](http://en.wikipedia.org/wiki/Lottery_Bond).

Such instruments raise the more general issue of whether a bond issuance runs afoul of applicable gambling laws. For example, consider a "catastrophe bond," which ElectroLux issued, the final payment of which depended on whether an earthquake occurred in Japan. Similarly, Winterthur issued a bond the payments on which depended on severe hailstorms in Switzerland. Issuers of such bond are attempting to transfer the risk of a catastrophe from themselves to investors, and must pay investors higher coupon rates for assuming the risk. But, are they consistent with rules on gambling? Consider, too, a hypothetical bond the interest rate on which is linked to the performance of an athletic team, such as the success of the Kansas Jayhawks Basketball Team.

## [E] Indenture and Covenants

As a legal matter, a bond is memorialized through an indenture with covenants. An "indenture" is a formal debt contract between the issuer and bond holder wherein the terms of the bond issuance are established.<sup>18</sup> The clauses of the indenture agreement are known as "covenants." Thus, the covenants contain the rights and obligations of the issuer and bond holder. Most significantly, the par value, coupon rate, and maturity date of the bond are set out in covenants. They also cover matters like collateral, further borrowing, restrictions on dividend payments to stock holders, sinking funds (*i.e.*, a pool of cash to allow the issuer to repurchase a fraction of outstanding bonds each year, possibly at a special call price), and callability and putability.

In the United States, Contract Law governs the agreement and relationship between these parties. Importantly, modifying the terms of the indenture is more difficult than in a normal, non-financial contract. That is because amendments potentially could affect all holders of a bond issuance. Consequently, after bonds are floated (that is, issued), to alter the terms and conditions in a covenant of an indenture, approval by a majority, or sometimes super-majority, of bond holders is required.<sup>19</sup>

## [F] Callability and Putability

A key type of covenant concerns option-like features for a bond-holder. There are two basic types of options:

- Call options — the right, but not the obligation, to buy an instrument at a specified price, known as the "strike price," on or before a defined expiry date, known as the "exercise date."
- Put options — the right, but not the obligation, to sell an instrument, at a strike price on or before the exercise date.

Thus, there are two option-like features for a bond: callability and putability.

"Callability" allows a bond issuer to repay the bond prior to maturity on defined call dates, and thereby retire the entire class of bonds.<sup>20</sup> Typically, if this option exists, the issuer must repay the bond at par value. Alternatively, some callability options require repayment at a premium, that is, above the par value price. That typically only happens if the bond is a high-yield one. Why might an issuer want to repay early? The answer concerns financing costs. If the coupon payments plus the nominal value payment hampers the financing needs underlying the issuance of that bond, then the issuer may decide to call the bond.

"Putability" is the converse of callability. Putability gives a bond holder the right, but not the obligation, to require the issuer to pay the bond before maturity

<sup>18</sup> See BODIE ET AL., *supra*, at 318-320.

<sup>19</sup> *Bond (Finance)*, *supra*.

<sup>20</sup> See BODIE ET AL., *supra*, at 309-310 (including the treatment of the measure of "yield to call," which values a callable bond by taking into account the possibility it is called before maturity).

on put dates. In this circumstance, the price to be paid for the bond is its "strike price." The strike price typically is fixed.<sup>21</sup> But if it is fixed, then why would a bondholder seek to put the bond? If the strike price exceeds the market value of the bond (that is, the secondary market trading price at which the investor could sell the bond), then it is financially rational for the bond holder to exercise the put option.<sup>22</sup>

Regarding call and put dates, there are four categories commonly referred to in the finance vernacular.<sup>23</sup> A Bermudan call has several call dates, typically coinciding with coupon dates. A European call has only one call date.<sup>24</sup> An American call can be called at any time before maturity of the bond.<sup>25</sup> A death put, or survivor's option, allows the beneficiary's estate to put the bond.

### [G] Secondary Market Trading

Subsequently, that is, after issuance in the primary market, bonds are traded in the secondary market. Many investors do not buy a bond in an IPO with the intention of holding it until maturity. Rather, they sell the bond, and buy other bonds — that is, they trade them. Their trading activity creates liquidity in the bond market, which refers to the near-constant presence of buyers and sellers who are ready, willing, and able to trade bonds. That is, a financial asset like a bond "is said to be *liquid* if it can be converted into cash quickly and with little loss in value," whereas an illiquid asset is one "for which no well-established market exists."<sup>26</sup>

The price at which a bond is traded may be over par (*i.e.*, above the par value) or under par (*i.e.*, below par value). The difference between the secondary market trading price of a bond and its par value reflects the supply and demand for the bond. If demand in the secondary market is high, then investors bid up the price of the bond over par, whereas if demand is low, then the price slumps under par. A bond trading on the secondary market above par is said to sell at a premium, whereas one selling for below par is at a discount to par.

What determines investor demand for a bond, and thus affects the secondary market price? In non-Islamic banking systems, interest rates prevailing in the economy are a key factor. There is an inverse relationship between interest rates and secondary market bond prices: if interest rates rise, bond prices fall, and *vice versa*. That is, the formula by which the secondary market bond price is set adduces the inverse relationship between this price and the interest rate, which

<sup>21</sup> See *Strike Price*, WIKIPEDIA, posted at [http://en.wikipedia.org/wiki/Strike\\_price](http://en.wikipedia.org/wiki/Strike_price). [Hereinafter, *Strike Price*.]

<sup>22</sup> For a more technical description of determining if the strike price exceeds the market value, see *Strike price*, *supra*.

<sup>23</sup> See *Bond (Finance)*, *supra*.

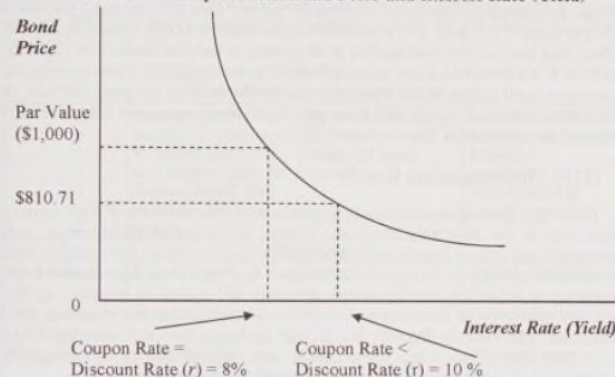
<sup>24</sup> See FRANK J. FAROZZI, *BOND MARKETS, ANALYSIS, AND STRATEGIES* 546 (Upper Saddle River, New Jersey: Prentice Hall, 5th ed., 2004). [Hereinafter, *FAROZZI*.]

<sup>25</sup> See *FAROZZI*, *supra*, at 546.

<sup>26</sup> SAMUELSON & NORDHAUS, *supra*, at 507 (emphasis original).

also is known as the "yield." Diagram 29-1 depicts this inverse relationship.<sup>27</sup> Interest rates, of course, are a macro-economic variable characteristic of non-Muslim banking systems. Additional factors affecting demand are issuer-specific, such as the creditworthiness of the issuer.

Diagram 29-1:  
Inverse Relationship between Bond Price and Interest Rate (Yield)



By convention, secondary market bond prices are listed as a percentage of the par value of the bond in question, whatever that figure is.<sup>28</sup> For example, a bond with a par value of \$1,000 that sells at par in the secondary market would be selling at 100 percent of par. Its price, therefore, would be 100. That also is true of a bond with a par value of \$5,000 that sells at par — its price is listed as 100. The advantage of this convention is that it allows investors to compare directly the secondary market prices of bonds with different par values. (Note that it is a historical convention of the United States Treasury to price Treasury securities in terms of thirty-seconds (1/32) of a dollar. For example, a price of 102.01 means 102 1/32.)

Accordingly, suppose a \$1,000 corporate bond issued by the Garmin GPS company in Kansas City lists on the secondary market at 90, and a \$1,000 municipal bond issued by the city of Lawrence, Kansas is priced at 95. The Garmin bond is selling at a steeper discount to par than the Lawrence bond. Because of the inverse relationship between the price of a bond and its yield, the steeper discount connotes the Garmin bond has a higher yield than the Lawrence bond. What would the secondary market price of the two bonds be? The answer is straightforward: simply multiply the par value of each bond by the listed price:

<sup>27</sup> This Diagram is adapted from BOOIE ET AL., *supra*, at 305.

<sup>28</sup> See William C. Spaulding, *Bond Pricing*, posted at [http://thismatter.com/money/bonds/bond\\_pricing.htm](http://thismatter.com/money/bonds/bond_pricing.htm).



Secondary Market Price of Bond	=	Par Value of Bond	x	Percentage of Par Value at which Bond Trades
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Thus, the Garmin bond would sell for \$900 (the product of \$1,000 and 90 percent), and the Lawrence bond sells for \$4,750 (the product of \$5,000 and 95 percent).

In the secondary market for non-Islamic bonds, premiums and discounts relative to par sometimes are expressed in terms of "points." One point equals 1 percent of the par value of the bond. For a bond with a face value of \$1,000, 1 point equals \$10. Thus, with the Garmin bond trading at 90 percent of par, the discount is 10 points, or \$100. For a bond with a face value of \$5,000, 1 point equals \$50. Consequently, the Lawrence bond selling in the secondary market for 95 is at a 5 point discount, or \$250 (the product of 5 and \$50) from par value. Here, again, the central role of interest in conventional finance is evident.

### [H] International Bonds

Generally, sovereigns issue bonds denominated in the currency of their country. But, that is not invariably the case. Indeed, in an era of globalization, both sovereign and private issuers seek to attract investment funds from outside their geographic borders. To do so sometimes means floating a bond denominated in the currency of a foreign country, which obviously will appeal to investors in that country, and even to investors in the home country of the issuer, and in third countries, who seek to diversify the foreign exchange rate risk associated with their portfolios. Thus, when the economic and political climate is appropriate, sovereign and private issuers offer bonds in foreign currencies.

Technically, there are two kinds of international bonds: "foreign bonds" and "Eurobonds." "Foreign bonds" are floated by an issuer:

from a country other than the one in which the bond is sold. The bond is denominated in the currency of the country in which it is marketed. For example, if a German firm sells a dollar-denominated bond in the U.S., the bond is considered a foreign bond. These bonds are given colorful names based on the countries in which they are marketed. For example, foreign bonds sold in the U.S. are called *Yankee bonds*. Like other bonds sold in the U.S., they are registered with the Securities and Exchange Commission. Yen-denominated bonds sold in Japan by non-Japanese issuers are called *Samurai bonds*. British pound-denominated foreign bonds sold in the U.K. are called *bulldog bonds*.<sup>29</sup>

In brief, a "foreign bond" is issued by a foreign issuer in a host country market.

In contrast, a "Eurobond" is issued by a home-country entity outside of its home jurisdiction:

. . . Eurobonds are bonds issued in the currency of one country but sold in other national markets. For example, the Eurodollar market refers to dollar-denominated bonds sold outside the U.S. (not just Europe), although

London is the largest market for Eurodollar bonds. Because the Eurodollar market falls outside of U.S. jurisdiction, these bonds are not regulated by U.S. federal agencies. Similarly, Euroyen bonds are yen-denominated bonds selling outside Japan, Eurosterling bonds are pound-denominated Eurobonds selling outside the U.K., and so on.<sup>30</sup>

Table 29-1 summarizes examples not only of foreign bonds and Eurobonds, but also international bonds that defy easy categorization, such as where an issuer from one country floats bonds denominated in a foreign currency in the market of a third country.

Table 29-1:  
International Bond Descriptions

Name of Bond	Denominated Currency (i.e., currency in which par value and coupon rate is denominated, and in which trading occurs)	Issuer Nationality (i.e., country of origin of bond issuer)	Investment Market (i.e., principal financial market(s) in which bond is issued)
<b>Eurobonds</b>			
Eurodollar	U.S. Dollar	Any	Outside United States
Eurosterling	Pound sterling	Any	Outside United Kingdom
Euroyen	Japanese Yen	Any	Outside Japan
<b>Foreign Bonds</b>			
Kangaroo	Australian Dollar	Non-Australian	Australia
Maple	Canadian Dollar	Non-Canadian	Canada
Samurai	Japanese Yen	Non-Japanese	Japan
Yankee	U.S. Dollar	Non-U.S.	United States
Bulldog	British Pounds	Non-British	United Kingdom
Matrioshka	Russian Ruble	Non-Russian	Russia
Arirang	Korean Won	Non-Korean	Korea
Panda	Chinese Renminbi (Yuan)	Non-Chinese	China
<b>Other International Bonds</b>			
Shogun	U.S. Dollar (or other non-Yen currency)	Non-Japanese	Japan
Kimchi	U.S. Dollar (or other non-Korean Won currency)	Non-Korean	Korea
Formosa	Non-New Taiwan Dollar	Non-Taiwanese	Taiwan
State of Israel	Multiple Currencies	Israeli — Development Corporation of Israel	Israel

<sup>29</sup> BODIE ET AL., *supra*, at 301 (emphasis original).

<sup>30</sup> BODIE ET AL., *supra*, at 301.

### § 29.03 PRESENT VALUE, PRICE, AND YIELD OF NON-MUSLIM BONDS

In conventional bond finance, interest rates, and the risk that interest rates price, play a role so important it cannot be overstated. To begin, the current price of a bond is determined by aggregating the total coupon payments until maturity with the present value of the bond upon maturity.<sup>31</sup> A coupon payment is determined by multiplying the par value by the coupon rate.<sup>32</sup> So, a bond with a par value of \$5,000 and coupon rate of 5 percent has an annual coupon payment of \$250. This calculation assumes the coupon rate is paid annually. If paid semi-annually, then this figure is halved to \$125, and then doubled to get the annual payment.

Of course, a bond issuer makes the coupon payment annually or semi-annually until the bond matures. That means the bond must have a value greater than the figure of a single coupon payment (unless all payments except the last one have been made). For instance, if the \$5,000 par value bond has a life of 15 years, and it is only year 5 in that life, then there are 10 years more of coupon payments forthcoming. The bond holder would not sell the bond on the secondary market for a mere \$250, but rather for a much higher price that reflects the value today of a stream of annual income of \$250 over the next 10 years — as well as the lump-sum repayment of principal upon maturity.

As intimated, "present value," also known as "present discounted value," is a critical concept in non-Muslim finance, and interest is indispensable to this concept. To determine that present value, a mathematical equation is used — namely, a present value, or present discounted value, formula. The "present value" of a bond, or indeed of any asset denominated in United States dollars, is:

the dollar value today of the time stream of income generated by that asset. It is measured by calculating how much money invested today would be needed, at the going [i.e., market] interest rate, to generate the asset's future stream of receipts.<sup>33</sup>

The formula used to calculate present discounted value, or current price, of a bond, determines the current price of the number of expected coupon payments remaining until maturity, and weights each expected payment by an appropriate interest rate. Significantly, the formula also includes the present value of the redemption payment, that is, the payment by the issuer to the bond holder of the par value upon the maturity of the bond.

The interest rate in the formula used to discount the value of the stream of coupon payments, and redemption payment, is critical. It reflects the time value of money. This time value is the common sense idea that the bond holder can invest the coupon payment she receives in an interest-bearing asset. For instance, when she obtains a \$250 payment in year 21, she will not put the cash under her mattress. Rather, she will put the \$250 in her bank account, which (hypothetically) pays 3 percent on the balance in the account. Or, to view the transaction from the

standpoint of today, she appreciates that a sum less than \$250 given to her today would yield \$250 in the future, because she would invest that sum in an interest-bearing account, and it would grow in amount to \$250.

What, then, is the formula for the present discounted value of an expected future earnings stream of interest payments plus the redemption at par value? Conceptually, the formula is:

$$\text{Bond Price} = \text{Present Value of Coupon Payments} + \text{Present Value of Par Value}$$

Expressed in mathematical terms, it is:

$$\text{Bond Price} = \frac{\text{Coupon}}{1+r} + \frac{\text{Coupon}}{(1+r)^2} + \frac{\text{Coupon}}{(1+r)^3} + \dots + \frac{\text{Coupon}}{(1+r)^n} + \frac{\text{Par Value}}{(1+r)^n}$$

Or, using the following variables:

- $P$  = current price, that is, the price of the bond on the secondary market.
- $t$  = number of coupon payments remaining from today until maturity.
- $C$  = annual coupon payment.
- $r$  = the discount rate, that is, the market interest rate used to discount coupon payments and par value.
- $M$  = maturity value, that is, the par value paid by the bond issuer to the bond holder when the bond matures.
- $T$  = the time period when the payment is to be received, that is, the maturity date.<sup>34</sup>

The formula becomes:

$$P = \frac{C}{1+r} + \frac{C}{(1+r)^2} + \frac{C}{(1+r)^3} + \dots + \frac{C}{(1+r)^t} + \frac{M}{(1+r)^T}$$

Observe that the par value ( $M$ ) is discounted by the same interest rate as the coupon payments. Thus, the last term on the right-hand side of the equation is the present value of a lump sum payment,  $M$ . Because of the time value of money, an expected lump sum payment is not presently worth as much as it will be when paid in hand in the future. All the other terms on the right-hand side are the present value of an annuity (i.e., of a steady stream of payments).

<sup>34</sup> See FABIUZZI, *supra*, at 21. If the stream of payments differs, and there is no repayment of principal, i.e., if what is being measured is the present discounted value of a variable stream of income, then the formula becomes:

$$P = \frac{N_1}{1+r} + \frac{N_2}{(1+r)^2} + \frac{N_3}{(1+r)^3} + \dots + \frac{N_T}{(1+r)^T}$$

In this formula,  $N_1$ ,  $N_2$ , and so forth represent net receipts (which may be positive or negative) received by the asset holder in each time period,  $t$ . See SAMUELSON & NORDHAUS, *supra*, at 506. Of course, the discount rate,  $r$ , is essential to the computation, again illustrating the central role interest plays in non-Muslim finance.

<sup>31</sup> See FABIUZZI, *supra*, at 21.

<sup>32</sup> See FABIUZZI, *supra*, at 20.

<sup>33</sup> SAMUELSON & NORDHAUS, *supra*, at 506.



Consider a simple example. Assume a \$1,000 par value bond has a 1 year life, and pays a coupon rate of 5 percent once during its life. Suppose also that the interest rate is 10 percent. Thus, if the investor holds the bond until maturity, the investor will obtain the \$50 coupon payment (5 percent of the par value), and get back her initial \$1,000 purchase price. What should an investor pay to purchase this bond when it is initially floated? Common sense suggests the answer must be less than \$1,050, because paying that amount or more would mean the investor receives no return on the investment, and indeed loses money. Common sense also suggests the answer must be less than \$1,000. That is because the market interest rate is 10 percent. The investor could take her \$1,000, purchase a financial instrument bearing an interest rate of 10 percent, and thereby obtain \$100 in interest income. Using the above formula, the correct answer is as follows:

$$\begin{aligned} P &= \frac{C}{1+r} + \frac{C}{(1+r)^2} + \frac{C}{(1+r)^3} + \dots + \frac{C}{(1+r)^T} + \frac{M}{(1+r)^T} \\ P &= \frac{50}{1+0.10} + \frac{1,000}{(1+0.10)^1} \\ P &= \frac{50}{1.10} + \frac{1,000}{(1.10)^1} \\ P &= 45.45 + 909.09 \\ P &= 954.54 \end{aligned}$$

Thus, it is financially rational for the investor to pay \$954.54 today for the right to receive a 5 percent coupon payment and return of principal 1 year from today.

Note two points about this simple example. First, if the par value of the bond is changed to \$1,050, then the present value of the bond is exactly \$1,000.<sup>35</sup>

Second, suppose the market interest rate and the coupon rate are the same — 5 percent. Then, assuming a par value of \$1,000, the present value of the bond is the same as its par value, namely, \$1,000:

$$\begin{aligned} P &= \frac{C}{1+r} + \frac{C}{(1+r)^2} + \frac{C}{(1+r)^3} + \dots + \frac{C}{(1+r)^T} + \frac{M}{(1+r)^T} \\ P &= \frac{50}{1+0.05} + \frac{1,000}{(1+0.05)^1} \\ P &= \frac{50}{1.05} + \frac{1,000}{(1.05)^1} \\ P &= 47.62 + 952.38 \\ P &= 1,000 \end{aligned}$$

This variation illustrates a basic point: whenever the market interest rate and coupon rate are the same, the present value of a bond at the start of its life is the same as its par value. If an issuer seeks to sell its bonds at par value, it must select a coupon rate that "very closely approximates market yields."<sup>36</sup> If the coupon and discount rates differ, then the IPO price will deviate from par value. Indeed, typically, a bond issuer tries to set the coupon rate as close as possible to the market rate. That way, the IPO price of the bond will equal its par value.

<sup>35</sup> See SAMUELSON & NORDHAUS, *supra*, at 506.

<sup>36</sup> BODIE ET AL., *supra*, at 300.

Now consider the valuation formula with respect to a bond with a par value of \$5,000, a fixed coupon rate of 5 percent paid annually, but with a 5-year maturity. Suppose the coupon rate is the same as the market interest rate used for discounting, i.e.,  $r$  is 5 percent. What is the value of the bond when it is issued, before any coupon payments are made? In these circumstances, the answer should be that the present value of the bond is its par value. Inputting these numbers into the above equation, the current price of this bond is:

$$\begin{aligned} P &= \frac{250}{1+0.05} + \frac{250}{(1+0.05)^2} + \frac{250}{(1+0.05)^3} + \frac{250}{(1+0.05)^4} + \frac{250}{(1+0.05)^5} + \frac{5,000}{(1+0.05)^5} \\ P &= \frac{250}{1.05} + \frac{250}{(1.05)^2} + \frac{250}{(1.05)^3} + \frac{250}{(1.05)^4} + \frac{250}{(1.05)^5} + \frac{5,000}{(1.05)^5} \\ P &= \frac{250}{1.05} + \frac{250}{(1.10)} + \frac{250}{(1.16)} + \frac{250}{(1.22)} + \frac{250}{(1.28)} + \frac{5,000}{(1.28)} \\ P &= 238.10 + 227.27 + 215.52 + 204.92 + 195.31 + 3,906.25 \\ P &= 4,987.37, \text{ or in effect } \$5,000 \text{ with the difference accounted for by rounding.} \end{aligned}$$

In other words, for the right to receive a 5 percent annual coupon rate for 5 years, and the return of the \$5,000 lump sum investment at the end of the 5th year, an investor would be willing to pay par value today.

The above formula can be simplified to a succinct time-series equation using the Greek letter " $\Sigma$ " (*sigma*), which means "sum of." Accordingly:<sup>37</sup>

$$\begin{aligned} P &= \frac{C}{1+r} + \frac{C}{(1+r)^2} + \frac{C}{(1+r)^3} + \dots + \frac{C}{(1+r)^T} + \frac{M}{(1+r)^T} \\ P &= \sum_{t=1}^T \frac{C}{(1+r)^t} + \frac{M}{(1+r)^T} \end{aligned}$$

The formula can be expressed in an alternative manner, based on the insight that all of the terms on the right-hand side of the equation, except the last one, are the present value of an annuity (i.e., of a stream of payments). The formula for an annuity is:

$$\text{Value of Annuity} = \frac{1}{r} \times [1 - 1/(1+r)^T]$$

Accordingly, the formula becomes:<sup>38</sup>

$$\text{Price} = C \times 1/r \times [1 - 1/(1+r)^T] + M/(1+r)^T$$

Manifestly, in all expressions of the formula, the interest rate,  $r$ , is a crucial determinant of the price of a bond.

The simplified formula can be used to ascertain what happens to the price of a bond when the coupon rate and discount rate differ, and thereby highlight the inverse relationship between bond prices and market interest rates. If the discount rate does not equal the coupon rate, then a bond does not sell at par value. For

<sup>37</sup> See BODIE ET AL., *supra*, at 304.

<sup>38</sup> See BODIE ET AL., *supra*, at 304.

instance, if the market interest rate rises above the coupon rate, say to 10 percent, then the par value falls:

At a higher interest rate, the present value of the payments to be received by the bond holder is lower. Therefore, the bond price will fall as market interest rates rise. This illustrates a crucial point in bond valuation. When interest rates rise, bond prices must fall because the present value of the bond's payments is obtained by discounting at a higher interest rate.

...

In . . . secondary markets [such as the NYSE and OTC], bond prices move in accordance with market forces [of supply and demand, which in turn reflect in part analysis of the creditworthiness of the issuer of a bond.] The bond prices fluctuate inversely with the market interest rate.

The inverse relationship between price and yield is a central feature of fixed-income securities. Interest rate fluctuations represent the main source of risk in the bond market. . . .

[Moreover, a] . . . general rule in evaluating bond price risk is that, keeping all other factors the same, the longer the maturity of the bond, the greater the sensitivity of its price to fluctuations in the interest rate.<sup>39</sup>

Intuitively, the longer an investor ties up money in a bond, the greater the loss the investor suffers when the price of that bond falls relative to alternative interest-bearing assets that offer higher returns. That is why short-term bonds are considered safer than long-term bonds — namely, a lower price risk associated with interest rate volatility.

The safest of all such short-term bonds is the United States Treasury Bill (T-Bill), as there is no risk of default.<sup>40</sup> The distinction between T-Bills and Treasury Bonds (T-Bonds) is maturity: T-Bills are short term, and T-Bonds are medium- or long-term. But, there is no risk of non-payment, because the American government could print money, or raise taxes, to pay off obligations owed on these debentures:

The safest assets in the world are the securities of the U.S. government. These bonds and bills are backed by the full faith, credit, and taxing powers

<sup>39</sup> BODIE ET AL., *supra*, at 304, 306. This insight also is stated as follows:

Bonds with shorter maturities generally offer lower yields to maturity than longer term bonds.

*Id.* at 322. This relationship, namely, between YTM and term to maturity, is plotted on a graph and called the "yield curve," or "term structure of interest rates." YTM is plotted on the vertical (y-) axis, and maturity date is plotted on the horizontal (x-) axis. Financial media publish yield curves regularly. The most commonly observed yield curve is one that is rising (upward sloping), whereas a downward-sloping yield curve is called an "inverted" yield curve. A rising yield curve is considered normal, as it indicates that investors demand a risk premium on a long-term bond (i.e., a "liquidity premium," meaning an extra return as compensation for the greater risk of a long-term bond), and/or expect long-term interest rates to be higher than short-term rates (perhaps because of anticipated central bank monetary policy). See *id.* at 322-327. The yield curve is yet another illustration of the centrality of interest rates in non-Muslim finance.

<sup>40</sup> On default risk, determinants of the safety of a bond, and bond ratings, see BODIE ET AL., *supra*, at 316-318.

of the government. Intermediate in risk are borrowings of creditworthy corporations, states, and localities. Risky investments, which bear a significant chance of default or nonpayment, include those of companies close to bankruptcy, cities with shrinking tax bases, or countries like Argentina with large overseas debts and unstable political systems.<sup>41</sup>

In brief, United States Treasury securities are seen as "riskless" for this reason, and the coupon rate associated with them is the "risk-free" rate.

Nevertheless, the fact that an investor must tie up funds a T-Bond for a longer period than with a T-Bill leads to another general observation. The longer the tenor of a bond or other interest-bearing asset, the higher coupon rate that asset must pay. That is because investors, who are loaning their funds to the issuer of the debt security, "are willing to sacrifice quick access to their funds only if they can increase their yield."<sup>42</sup>

Refer to Diagram 29-1. As an example of what happens when the coupon rate and market interest (discount) rate differ, consider a 30-year maturity bond with a par value of \$1,000 and an 8 percent coupon.<sup>43</sup> The payments are made semi-annually, so there are 60 total payments. Thus,  $T = 60$ , and  $C = \$40$  (one-half of \$80, which is the annual coupon rate, derived from the product of \$1,000 and 8 percent). The coupon rate is 8 percent annually, or 4 percent semi-annually. But, suppose market interest rate rises to 10 percent, or 5 percent semi-annually. Then, the bond price falls from the par value of \$1,000 to \$810.71, i.e., a decline in value of \$189.29. This change is evident from the following formula:

<sup>41</sup> SAMUELSON & NORDHAUS, *supra*, at 506.

<sup>42</sup> See SAMUELSON & NORDHAUS, *supra*, at 506.

<sup>43</sup> See BODIE ET AL., *supra*, at 304.



$$\begin{aligned}
 P &= \sum_{t=1}^{60} \frac{40}{(1+.05)^t} + \frac{1,000}{(1+.05)^{60}} \\
 P &= 757.17 + 53.54 \\
 P &= \$810.71
 \end{aligned}$$

Intuitively, the decline makes sense: if the market interest rate rises above the coupon rate, then investors can earn a higher interest rate — 10 percent instead of 8 percent (or 5 percent instead of 4 percent every 6 months) — in a different financial instrument that pays that higher rate. Investors will sell the 8 percent coupon bond, and buy the 10 percent asset. The selling activity will push down the price of the bond.

Conversely, when interest rates fall, bond prices rise, because the payments associated with the bond are discounted at a lower rate. Here, too, this result makes common sense. Investors will seek to purchase the bond paying a coupon of 8 percent, because that rate is higher than the interest earned from other interest-bearing instruments available in the market.<sup>44</sup> Investors will sell those instruments, and buy the 8 percent bond. That buying pressure will push up the price of the 8 percent bond.

In sum, there is an inverse relationship between bond prices and bond yields. The term "yield," or more specifically "current yield," is a measure of "the cash income provided by the bond as a percentage of bond price."<sup>45</sup> The current yield does not include possible capital gains or losses, that is, price increases or decreases of a bond, over the life of the bond. That measure is known as the "yield to maturity," or "YTM," which is the total return from a bond over its full life. The YTM is the "discount rate that makes the present value of a bond's payments equal to its price."<sup>46</sup>

There are two noteworthy variations on the present value formula. First, consider a consol bond, that is, one with no maturity. For any such perpetual asset with a constant yield forever, the present value is simply:<sup>47</sup>

$$P = \frac{C}{r}$$

For instance, a bond that pays a coupon of \$100 per year in perpetuity is worth \$2,000 based on a discount rate of 5 percent.

Second, when the formula for the present value (price) of a bond is applied to a zero-coupon bond, the discount is made only to its par value. That is because there are no annual or semi-annual coupon payments. However, the number of years to

<sup>44</sup> This discussion implicates the more general topic of bond pricing over time, the distinction between (1) interest income from coupon payments and (2) capital gains or losses, and secondary market pricing of a bond after it has been outstanding for several years since its IPO. For a treatment of that topic, see BOEDE ET AL., *supra*, at 312-314.

<sup>45</sup> BOEDE ET AL., *supra*, at 306.

<sup>46</sup> BOEDE ET AL., *supra*, at 306-307. See also *id.* at 310-312 (distinguishing YTM from "realized compound yield") and 320-322 (concerning YTM and default risk).

<sup>47</sup> See SAMUELSON & NORDHAUS, *supra*, at 506.

maturity is doubled in the calculation.<sup>48</sup> The mathematical expression is:

$$P = [M / (1+r)^{2n}]$$

Thus, suppose an investor considered selling or purchasing a zero-coupon bond with a nominal value of \$5,000 and a 15-year maturity date, and this purchase occurs on the 5-year anniversary of its issuance. Using this revised formula, the current price of this bond is \$1,884.66.

The more exotic the measure on which the coupon rate of a bond is based, the more risk that the current price unexpectedly may change over the life of the bond. There are four common risks investors consider. First, as time passes, *i.e.*, as a bond approaches maturity, current price likely will increase. That is because the par value payable at maturity is not discounted as greatly.<sup>49</sup> Second, "if the Treasury rate does not change, but the spread to Treasuries for all corporate bonds changes (narrows or widens), corporate bond prices will change."<sup>50</sup> Third, if the creditworthiness of the issuer of the bond changes, the current price, or at least how much a prospective purchaser is willing to pay for that bond, changes accordingly.<sup>51</sup> Fourth, if the benchmark interest rate of an economy changes, the price of a bond is affected. For instance, if the Federal Reserve increases a key interest rate, such as the Fed Funds rate, then the price of a bond decreases.

What is the relationship with the price of a bond and its yield, that is, "the yield for financial instruments with comparable risk and features [?]"<sup>52</sup> As indicated, the current price of a bond equals the present value of the expected cash proceeds from the bond. The yield of a bond, however, is inversely related to the price of the bond.<sup>53</sup>

As the required yield increases, the present value of the cash flows decreases; hence, the price decreases. The opposite is true when the required yield decreases: the present value of the cash flows increases and, therefore, the price of the bond increases.<sup>54</sup>

When the coupon rate exceeds the bond yield, the bond sells at a premium.<sup>55</sup> If the coupon rate is equal to yield, then the bond sells at its par value.<sup>56</sup> If the coupon rate is less than yield, then the bond sells at a discount.<sup>57</sup>

<sup>48</sup> See RICHARD S. WILSON & FRANK J. FAROZZI, *CORPORATE BONDING STRUCTURES & ANALYSIS* 246 (New Hope, Pennsylvania: Frank J. Farozzi Associates, 1996). [Hereinafter, WILSON & FAROZZI.]

<sup>49</sup> See WILSON & FAROZZI, *supra*, at 248.

<sup>50</sup> WILSON & FAROZZI, *supra*, at 249.

<sup>51</sup> See WILSON & FAROZZI, *supra*, at 249.

<sup>52</sup> WILSON & FAROZZI, *supra*, at 243 (emphasis original).

<sup>53</sup> WILSON & FAROZZI, *supra*, at 246.

<sup>54</sup> WILSON & FAROZZI, *supra*, at 246.

<sup>55</sup> See WILSON & FAROZZI, *supra*, at 247.

<sup>56</sup> See WILSON & FAROZZI, *supra*, at 247.

<sup>57</sup> See WILSON & FAROZZI, *supra*, at 246.

The current yield of a bond is the ratio of its annual dollar coupon interest to the current price of the bond.<sup>58</sup> For example, a 30-year maturity bond with an 8 percent coupon and par value of \$1,000 that sells at a current price of \$1,276.76 has a current yield of:<sup>59</sup>

$$\begin{aligned} \text{Current Yield} &= \frac{\text{Annual Coupon Interest Payment}}{\text{Current Bond Price}} \\ \text{Current Yield} &= \frac{80}{1,276.76} = 0.0627 = 6.27 \text{ percent per annum.} \end{aligned}$$

Evidently, this bond sells at a premium over par value, and its coupon rate exceeds the current yield. (It also can be shown that the YTM for this bond is 6.09 percent.) This fact illustrates a general point: for a premium bond (i.e., one selling above par), the coupon rate is greater than the current yield (and, the current yield is greater than the YTM). Conversely, for a discount bond (i.e., one selling below par), the coupon rate is less than the current yield (and, the current yield is less than the YTM).

To summarize, observe the central role interest and interest rates play in conventional finance:

- Money has a time value.
- That time value is computed using a present discounted value formula.
- The discount rate is indispensable to the formula.
- The coupon rate paid on interest-bearing assets is intimately and directly connected with the risk associated with them: lower risk, lower return; higher risk, higher return.

Simply put, non-Muslim banking and finance is unthinkable without interest and risk. In sharp contrast, pure Islamic banking and finance is unthinkable with them. The *Shari'a* prohibits *riba*, but devises a substitute for it — profit sharing — and disciplines exposure to *gharar*.

## § 29.04 DEFINING “ISLAMIC” BONDS (\$UKUK)

### [A] Overview

Islamic bonds, called “*sukuk*” (sometimes transliterated simply as “*sukuk*”), are a highly significant instrument in Islamic finance. Indeed, interest in Islamic bonds, evidenced by the value and volume of IPOs, and by secondary market trading, has been growing rapidly in the past three decades. By no means is enthusiasm for *sukuk* confined to Muslims and Muslim countries. Rather, it is global. None other than Her Majesty's Government, as early as April 2007, confirmed the possibility it might issue sovereign, sterling-denominated debt as *sukuk*.<sup>60</sup> Prominent multinational banks, such as the Hong Kong Shanghai

<sup>58</sup> See WILSON & FAROEZ, *supra*, at 250.

<sup>59</sup> See BOHRE ET AL., *supra*, at 308.

<sup>60</sup> See Mushtak Parker, *U.K. Government Serious About Sukuk*, ARAB NEWS, 27 April 2007, posted at

Banking Corporation (HSBC), have engaged in many *sukuk* transactions, as issuers, underwriters, and investors. In other words, it is not strange to see banks in non-Muslim countries enter into bond transactions that comply with the *Shari'a*, or provide complying bonds to their customers.

What are *sukuk*? Table 29-2 summarizes the key differences between conventional, non-Islamic bonds, and *sukuk*. Loosely translated, the term “*sukuk*” means “Islamic bonds,” the singular being “*sakk*” (Islamic bond). More precisely, the term refers to Islamic bonds approved under the *Shari'a*. Note the term “*sukuk*” does not refer to securitization. That is because securitization — in the conventional non-Muslim sense of the term — is prohibited under Islamic Law. In conventional non-Muslim parlance, “securitization” refers to a transaction in which an issuer issues debt securities to investors by combining individual financial assets (such as mortgage loans) into a pool that serves as collateral for those debt securities. As explained further below, the assets are owned by an “originator,” which bundles identical contracts (again, such as mortgage loans) and sells them to a special purpose entity.

Economically, “*sukuk*” involve a highly similar transaction, but there are two critical distinctions. First, “*sukuk*” do not involve a fixed rate of interest paid to investors. That is obviously necessary in order to respect the rule against *riba* (interest). Second, “*sukuk*” are not debt securities. Rather, they are technically referred to as “certificates of participation.” That is, “*sukuk*” are certificates of participation, for which investors pay the offering price in an initial public offering (IPO), and which are issued to the investors against a pool of assets. To put it succinctly, the basic structure of any *sukuk* deal is money-against-assets.



Table 29-2:

Summary of Differences between Conventional Non-Islamic Bonds and *Shukuk*

Topic	Conventional Non-Islamic Bonds	<i>Shukuk</i>
<b>Definition</b>	A long-term debt obligation issued by a borrower, which may be a private or public entity.	A certificate that is evidence of participation in an underlying asset, which may be issued by a private or public entity.
<b>Economic Nature of Relationship between Issuer and Investor</b>	Debtor-Creditor. The issuer is a debtor/borrower/obligor. The investor is a creditor/lender/obligee. The issuer is a borrower of funds, and thus indebted to the lenders of those funds, which are the investors in the bond. The borrower/debtor is legally obliged to repay the lender/creditor of those funds. That legal obligation is for both the initial capital investment (principal), and a rate of return (interest) specified by the debt instrument. The relationship is potentially adversarial insofar as the borrower/debtor fails to make good on its obligation, or takes steps that jeopardize its ability to do so.	Partnership. The issuer and investor are partners with shared interests and outlook. The issuer of the certificates borrows funds from the investors that purchase those certificates in an IPO. Thus, economically, investors are providing financial capital to the issuer to fund a specified project.
<b>Religious and Moral Nature of Relationship between Issuer and Investor</b>	Not an explicit part of the issuer — investor relationship.	The investors are on the same side as the issuer. The relationship between the issuer and investors is one of partnership in a shared venture, and not (in theory, at least) supposed to be adversarial. The issuer and investor all share in the gains from a successful project. The investors expect to receive back their full initial capital investment, and also hope to share in any profits generated by the project made possible by the funds they advanced to the issuer of the certificates when they bought them.

Topic	Conventional Non-Islamic Bonds	<i>Shukuk</i>
<b>Repayment of Initial Capital Investment (Principal)?</b>	Yes (assuming to untoward events, such as insolvency of the issuer and lack or failure of any guarantees or insurance).	Yes (assuming to untoward events, such as insolvency of the issuer and lack or failure of any guarantees or insurance).
<b>Return to Investor</b>	Interest, as specified in the legal documentation for the bond.	No interest permitted, because of the rule against <i>riba</i> .  Indeed, the certificate must not be a debt instrument that creates an obligation to pay interest or any fixed return. Rather, the return to the investor is a share in the profits generated by the project funded by the proceeds from the issuance of the certificates.

**[B] Derivatives, the Financial Crisis, and *Shari'a***

This definitional limitation is a significant contrast with conventional non-Islamic finance. As the global financial crisis triggered by the September 2008 collapse of Lehman Brothers highlights, asset securitization — including of sub-prime mortgage loans — is common on Wall Street. For decades, Wall Street financiers have securitized a wide variety of underlying asset pools, from credit card receivables to the future earnings stream of prominent rock and roll musicians. MBSs and other asset-backed securities are first-level derivatives, in that their value is based on an underlying asset pool.

A “derivative” is a generic term referring to any financial instrument whose price or value is derived from, or dependent on, an underlying asset or pool of assets. By definition, ordinary common stock is excluded from the term, otherwise it could be reasoned that shares in a company are a “derivative” because their worth (the share price) depends on the assets of the company that issued them. Similarly, bonds — traditional debt instruments — are excluded from the term. Thus, illustrations of “derivatives” include forwards, futures, options, and swaps. Depending on the derivative, it may be traded on an organized exchange, or it may be traded OTC. Futures and certain options are exchange-traded, while forwards, swaps, and other options are traded OTC. Asset-backed securities qualify as “derivatives,” and tend to be traded OTC.

In respect of an asset-backed security, the underlying asset pool may consist of residential mortgages, and the securities issued that are backed by this pool (meaning payments of principal and interest from mortgagors are passed through to holders of the securities) are called “residential mortgage-backed securities,” or “RMBs.” Throughout the non-Muslim world, at least up until the sub-prime crisis of the fall of 2008, RMBs were popular. Indeed, as is now well known, they were popular to an irrational degree.

Sub-prime mortgage assets were used to back many issuances of RMBs. Yet, because those assets were sub-prime, *i.e.*, the mortgage debtors had little ability to make timely payments of principal and interest, the default risk on the mortgages was high. In turn, the RMBs backed by sub-prime loans carried a huge credit risk (the risk that investors would not receive timely payments owed to them because of the default of sub-prime borrowers). To make matters worse, rating agencies over-rated the value of those loans, by under-estimating their credit risk. Using what is known as "portfolio theory," the rating agencies assigned high ratings to RMBs backed by sub-prime mortgages, such as "AAA," as if they were backed by prime mortgages. By September 2008, the grave situation was exposed, and banking supervisors and regulatory authorities — which apparently had blessed, directly or indirectly, many of the suspect transactions and transactors — struggled to cope.

To mitigate against credit risk, *i.e.*, to provide credit enhancement and thereby gain favor with rating agencies, supervisors, and regulators, Wall Street financiers developed and provided insurance to back the first-level derivatives like RMBs. One such insurance contract was known as a "credit default swap" (CDS). Financiers engineered it to guarantee against the default of MBSS based on sub-prime mortgages. In general, a "swap" is a form of financial insurance to transfer exposure to the risk of credit default from one party, which does not want to bear that risk, to another party, which is willing to take on the risk, but in exchange for a fee from the first party. Essentially, the second party is betting that the worst-case scenario of credit default will not materialize, so that it will have earned the fee income, but not had to pay out on the insurance. The first party is concerned enough about the risk materializing that it is willing to part with the fee, especially if paying it saves it from a total loss.

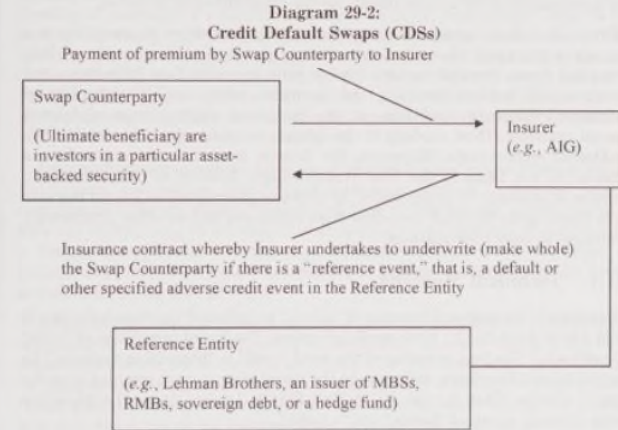
As for CDS contracts, they were issued by the American Insurance Group (AIG) and other now disgraced Wall Street financial institutions. Diagram 29-2 presents a simplified version of a CDS transaction. Under a CDS, an "investor," which really is an insurer like AIG, insures a "swap counterparty." In essence, this counterparty ultimately is the holder of an MBS, such as a pension or mutual fund, or an individual — in effect, the investor in the securities being insured. The insurance is against a "reference event," which is a default on a credit obligation by a specified "reference entity." The reference entity typically is a financial institution, a hedge fund, or an issuer of asset-backed securities (such as RMBs backed by sub-prime loans). The investor/insurer receives a fee for providing this guarantee from the swap counterparty.

In reality, in 2008, Lehman Brothers was a reference entity. The reference event pertained to a peculiar kind of financial instrument, namely, a CDO. A CDO is a debt security backed by a pool of bonds, loans, and other assets, including sub-prime assets. The touchstone of the CDO is that the pool consists of un-like assets, *i.e.*, it is a heterogeneous mix of assets that entail vastly different degrees of credit risk. In a traditional MBS flotation, the underlying mortgage pool consists of thousands of identical mortgages, *e.g.*, 30 year mortgages paying a 6 percent interest rate.

The reference event on the AIG-issued CDSs for the Lehman CDOs was default on sub-prime mortgages in the asset pool underlying those CDOs. When Lehman

Brothers collapsed in September 2008, in part because of the sub-prime defaults, AIG was legally obliged, under the CDS contracts it had issued, to pay out to cover the losses. As the crisis exposed, other reference entities and attendant reference events were Fannie Mae and default on CDOs it issued, and Freddie Mac and default on CDOs it issued.

Amazingly, the amount of CDSs issued in respect of the reference entity can be far greater than a particular bond issuance. For example, an issuance of RMBs may have a market value of U.S. \$1 billion, but an insurer may have issued CDSs in which Lehman Brothers is the reference entity that cover a total potential amount of \$50 billion. Indeed, this kind of incongruity existed, and exacerbated the financial crisis of the fall 2008.



With reference to the *Shari'a*, the key point to appreciate is that first-level derivative transactions, such as MBSs and RMBs, and the insurance contracts to back them, such as CDSs, are not encompassed by the term "*shukuk*." Moreover, critically, they generally are forbidden (*haram*). The term "*shukuk*" is confined narrowly to the good, old-fashioned conventional bond, but one that comports with Islamic legal and moral precepts. That also is true with respect to second-level derivatives, such as collateralized mortgage obligations (CMOs). A CMO is backed by a pool of asset-backed securities (the first-level derivative), and those securities, in turn, are backed by a pool of underlying assets, such as sub-prime mortgage loans. *A fortiori*, second-level derivatives are not covered by the term "*shukuk*" and are generally *haram*.

Simply put, first- and second-level derivatives run afoul of Islamic legal rules on *gharar* (uncertainty) and *riba* (interest). It is important to qualify this broad



statement. Every derivative must be looked at on its own merits. It is an over-simplification to say Islamic Law condemns every conceivable kind of derivative security. After all, Islamic financiers are no less clever than their Wall Street counterparts in devising structures to allay at least some concerns about *gharar* and *ribā*. Moreover, they should be encouraged to do so, so that Islamic finance continues to offer fresh and innovative products.

This definitional point, and the prohibition under the *Shar'ā* against some of the financial instruments that played a major role in the financial market meltdown of the fall 2008, led some observers to question whether Islamic finance was not superior to conventional non-Muslim finance. By "superior," they tended to mean the absence of risky derivatives and insurance contracts from their financial markets insulated them from the worst effects of the financial collapse. However, they were countered by a stark reality. As the crisis unfolded, it spread.

Financial markets tend to be de-coupled during good times, as securities in a particular market perform on the basis of issuer and local market conditions. But, during bad times, financial markets tend to move in synch. Fear links them, and spreads across borders instantly, and securities prices tumble regardless of fundamental economic conditions, or the purported righteousness of Islamic financial practices. Thus, markets in the Islamic world fared poorly, as did their non-Muslim counterparts. Moreover, the Islamic markets were exposed to a vulnerability not found in the New York, Chicago, London, or Tokyo markets: excessive dependence on commodities. As oil prices plummeted, so too did markets in the Gulf region, and their non-diversified economies had no other comparative advantages to buoy their markets.

### [C] Technical Meaning

To return to the technical meaning of "*šukuk*," as indicated the term is the plural of the Arabic word "*šakk*." Both words are nouns. The literal translation of "*šakk*" is "certificate." The legal meaning of the word "*šakk*" is "financial instrument." In practical financial parlance, reference to the plural term is more common than the singular version. That is, just as on Wall Street, Islamic financial transacting parties typically speak of "bonds," not "a bond."

To amplify the discussion, as to the legal meaning of "*šukuk*," two scholars offer the following pithy definition.

Plural of the Arabic word *Sakk* meaning certificate, reflects participation rights in the underlying assets.<sup>61</sup>

The italicized clause is the key to understanding what *šukuk* are. *Šukuk* are a financial instrument through which a transfer of ownership occurs. The underlying property, the ownership of which is transferred, may be an asset of an existing project, a leased object, a sleeping partnership (*muḍārabah*), or participation in a business (*mushārahah*). This list is not exclusive. Notably, the certificates may be "asset based," meaning they are secured by cash flows generated by the underlying property, but not "asset backed," and thus not collateralized by "hard" assets.

<sup>61</sup> Iqbal & Mirakhor, *supra*, Glossary at xiii (emphasis added).

Moreover, *šukuk* are negotiable instruments of equal value — equal, that is, on the day they are issued to the value of the underlying assets to which they relate. Therefore, an investor in a bond becomes an owner of part of the assets in question, or a participant in the business in question. The equality of these bonds exists only at the time of issuance. After the IPO of the bonds, the investor-owner has the right to sell them for more or less than the amount she initially paid for them. The sale price on the secondary market will depend on supply and demand conditions for the bonds, as well as the credit condition of the underlying asset or business.

### [D] Clearing and Settlement in Secondary Markets

Secondary market trading of any financial instrument raises the matter of clearing and settlement. "Clearing" refers to the correct recordation and timely transfer of ownership of a security from seller to buyer. "Settlement" refers to the correct and timely payment for the security by the buyer to the seller. These functions are critical to the smooth operation of any financial market. They are akin to the plumbing in a building — few people take notice, and simply assume it operates, unless and until there is a problem. Like persons in a building who rely on its plumbing, financial market participants expect their trades will be registered and paid for with alacrity and without error.

Intermediary organizations, known as "clearing houses," stand between sellers and buyers, and provide clearing and settlement services to financial market participants. Different clearing houses specialize in clearing and settling trades of different instruments. In the case of international *šukuk* offerings, Clearstream is a leading international clearing and settlement house. It is domiciled in Luxembourg. Euroclear, based in Brussels, is another clearing house for equity and debt, including Islamic bonds.

Interestingly, clearing houses are supervised or regulated in some fashion, depending on the house, and typically must maintain adequate capital in the event of insolvency of a seller or buyer of securities. Also of interest is the legal fact that, for many financial instrument trades, the counterparty of the seller is the clearing house, and the counterparty of the buyer is the clearing house. That is, the security is sold by the seller to the clearing house, and then by the clearing house to the buyer, with funds for the purchase flowing in the opposite direction. For present purposes, the key point to keep in mind is that *šukuk* are so prominent in international finance that they have attracted the attention and services of major clearing houses outside of the Muslim world.

## § 29.05 COMPARING ISLAMIC BONDS AND NON-MUSLIM SECURITIZATION

### [A] Typical Transactions

As the above discussion indicates, *šukuk* are not debt instruments. They are alternative financial products approved by Islamic legal scholars (*fuḳahā*) for the purpose of a conventional securitization. However, conventional non-Muslim securitizations typically involve payment of interest (*ribā*) from a bond issuer to

investors, which is forbidden. Muslim scholars essentially substitute such payments through *shukuk*. Two scholars explain how, as follows:

The idea behind *Sukuk* is simple. The prohibition of interest virtually closes the door for a pure debt security, but an obligation that is linked to the performance of a real asset is acceptable. In order words, the *Shariah* accepts the validity of a financial asset that derives its return from the performance of an underlying real asset. The design of *Sukuk* is very similar to the process of securitization of assets in conventional markets where a wide range of asset types are securitized. The asset types include mortgages, auto loans, accounts receivables, credit card payoffs, and home equity loans. Just as in conventional securitization, a pool of assets is built and securities are issued against this pool. *Sukuks* are participation certificates against a single asset or a pool of assets.

Formally, *Sukuk* represent proportionate beneficial ownership of an asset for a defined period when the risk and the return associated with cash flows generated by underlying assets in a pool are passed to the *Sukuk* holders (investors). *Sukuk* is similar to a conventional bond as it is also a security instrument that provides a predictable level of return. However, a fundamental difference between the two is that a bond represents pure debt of the issuer but a *Sukuk* represents, in addition to the risk on the credit-worthiness of the issuer, an ownership stake in an existing or well-defined asset or project. Also, while a bond creates a lender/borrower relationship, the relationship in *Sukuk* depends on the nature of the contract underlying the *Sukuk*. For example, if a lease (*Ijarah*) contract underlies a *Sukuk*, then it creates a lessee/lessor relationship, which is different from the typical lender/borrower relationship.<sup>62</sup>

The first paragraph of this explanation discusses conventional non-Islamic securitization. The second paragraph contrasts the conventional arrangement with *shukuk*.

A better appreciation of the two above-quoted paragraphs is possible through appropriate Tables and Diagrams. Accordingly, Tables 29-3 and 29-4 lay out, in a Step-by-Step manner, the two distinct transactions. Diagrams 29-3 and 29-4 follow each Table and summarize the transactions. There are key distinctions between the issuance of conventional non-Islamic asset securities and *shukuk*, particularly concerning interest payments (*riba*) associated with a pool of assets in question. But, there also are similarities.<sup>63</sup>

The Tables and Diagrams are conceptual in nature. Therefore, two major caveats must be kept in mind when studying them. First, not every non-Islamic or *shukuk* follows each and every one of the steps above precisely, in the same order as outlined above. To some degree, every deal is unique.

Second, in both the non-Islamic and *shukuk* cases, the Steps do not always proceed in the algorithmic manner suggested by the Diagram and Table. For

example, when issuing *shukuk*, the SPM may obtain credit enhancements earlier in the transaction than Step 6. After all, investors would like to know as soon as possible what enhancements, if any, are available, and the IPO cannot be priced properly without resolving this matter. As another example, Steps 3 and 4 in a *shukuk* issuance may occur more or less contemporaneously. That is because the SPM needs funds from the IPO (Step 4) to purchase the underlying asset or pool (Step 3).

Table 29-3:  
Conventional Non-Islamic Asset Securitization

Step Number in Overall Transaction	Elements of Each Step
1	<p><b>Creation of an Asset on the Balance Sheet of a Commercial Bank (or Other Financial Institution) through a Loan Transaction</b></p> <p>The asset could be a mortgage loan, home equity loan, auto loan, credit card loan, or other kind of account receivable.</p> <p>The asset of the lending bank, known as the "originator," is a liability for the borrower, which may be a business or individual.</p> <p>The loan requires the borrower to make regular payments of principal and interest.</p> <p>In both a <i>shukuk</i> transaction and a conventional non-Muslim asset-backed security transaction, the underlying asset or pool generates a stream or revenues, i.e., a cash flow.</p> <p>However, in contrast to a <i>shukuk</i> deal, in a conventional non-Muslim asset-backed security deal, the underlying asset or pool generates revenues that involve interest, as well as principal, streams. In a <i>shukuk</i> deal, any interest payments would be <i>riba</i>, and, therefore, forbidden (<i>harām</i>).</p>
2	<p><b>Creation of a Special Purpose Vehicle (SPV)</b></p> <p>The SPV is created by a bank (or other financial institutions), but as a separate entity, and on a non-recourse basis. The SPV is a distinct corporation, and if it were to default on its obligations, its creditors would have no recourse to the parties that created it.</p> <p>The bank that creates the SPV provides financial capital to it.</p> <p>The key benefit of the independence of the SPV from the bank that creates it is that the SPV is able to obtain its own credit rating. It does not automatically receive the credit rating of the entity that originally owned the asset or pool.</p> <p>For instance, if that bank had bad debt, in addition to the asset or pool, then its credit-rating might be downgraded. The SPV would not be tainted by the bad debt. Thus, any financial instruments — such as asset-backed securities — issued by the SPV (discussed below) carry their own credit-rating, not that of the bank that created the SPV.</p>

<sup>62</sup> Iqbal & Mirakhor, *supra*, at 177-178.

<sup>63</sup> Table 29-4 and Diagram 29-4, with respect to *shukuk*, are drawn from Iqbal & Abbas, *supra*, at 177-181.



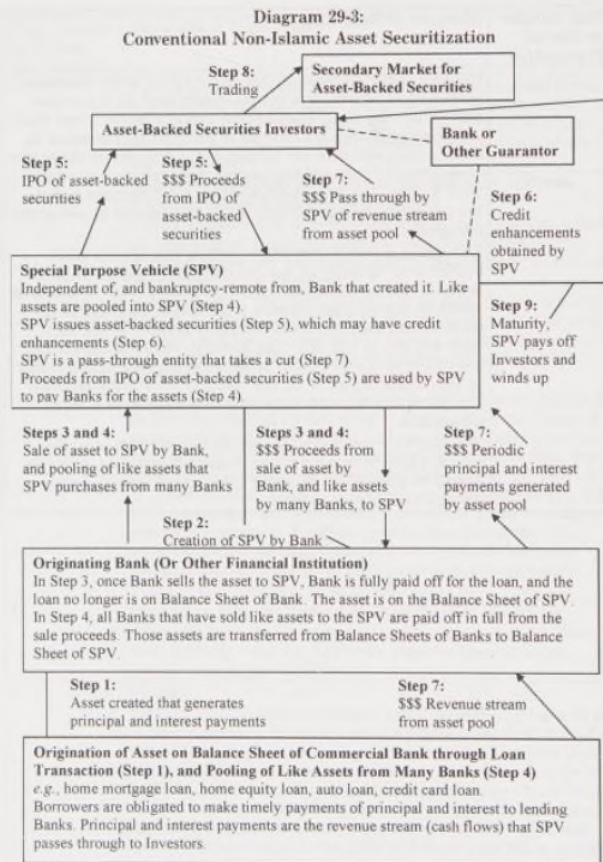
Step Number in Overall Transaction	Elements of Each Step
	<p>In brief, the independence of the SPV is a credit enhancement for prospective asset-backed security investors (discussed below), in that they have greater certainty and predictability about the cash flows from the asset or pool that underlies that security.</p> <p>Moreover, as a distinct legal entity, the SPV is bankruptcy-remote. That is, the insolvency of the bank that created it does not affect that of the SPV.</p>
3	<p><b>Sale of the Asset by the Lending Bank to the SPV</b></p> <p>The lending bank that originated the asset, i.e., the underlying loan, sells that loan to the SPV. At that point, the originating bank is fully paid off by the SPV for the loan, and the loan is no longer on the balance sheet of the bank. Rather, the loan is an asset of the SPV.</p> <p>The SPV uses its initial capital funding to purchase the loan, as well as to pool assets (below).</p> <p>The bank informs the borrower to make payments of principal and interest to the SPV, or other designated institution that will channel the payments to the SPV.</p> <p>When an originating bank is paid for the loan by the SPV, it is thereby re-liquified. That is, the bank gets cash for the asset it sold, and the bank can use this cash to create a new loan.</p>
4	<p><b>Pooling of Assets by the SPV</b></p> <p>Assets that are like one another are pooled into the SPV. That is, all of the originators (lending banks) of identical contracts sell them to the SPV (as in Step 3). For example, the SPV might acquire home mortgage loans paying 7 percent interest over a tenor of 30 years made to prime borrowers, the principal value of which is U.S. \$250,000 or less. The process of pooling assets together is known in Wall Street parlance as "repackaging."</p> <p>Accordingly, all banks that sell like assets to the SPV for pooling are paid off in full from the sale proceeds. Those assets then are transferred from the balance sheet of the originating banks to the balance sheet of the SPV. To use the common Wall Street parlance, the assets formerly owned by the originators are bundled and sold to the SPV.</p> <p>Technically, there may be an intermediate step in which the lending banks sell their assets to a single, separate institution, which serves as the "originator," and which then repackages and bundles the assets for onward sale to the SPV. However, the term "originator" more precisely applies to the financial entities that created — or originated — the assets in question, such as banks that made mortgage loans.</p>

Step Number in Overall Transaction	Elements of Each Step
	<p>Regardless of the exact transactional structure, the key point is that the underlying pool of assets generates a regular stream of revenues. For example, mortgagors make payments of principal and interest on their home loans to the SPV, car owners make payments of principal and interest on their car loans to the SPV, and credit card holders make payments of principal and interest on their credit card debt to the SPV.</p>
5	<p><b>IPO of Asset-Backed Securities by the SPV</b></p> <p>The SPV is the issuer of securities that are backed by the revenue stream from the underlying pool of assets.</p> <p>The investors may be individuals or institutions, and may be located anywhere in the world. Investors purchase the asset-backed securities from the issuer at the offering price.</p>
6	<p><b>Credit Enhancement</b></p> <p>Investors, in both the primary and secondary market for asset-backed securities, will examine the credit quality of those certificates. The higher the risk of default on them, the higher return the investors will expect. Thus, to lower the cost of capital, the SPV will seek to obtain credit enhancements from reliable, reputable third parties.</p> <p>The credit enhancements may take the form of a guarantee issued by a commercial or investment bank, along with a strong credit rating from a well-regarded rating agency.</p> <p>Thus, the asset-backed securities may receive one or both of the following types of credit enhancements, which reduce the credit risk to investors (i.e., the risk of default associated with the securities):</p> <ol style="list-style-type: none"> <li>(1) Rating by a credit-rating agency, such as Moody's or Standard &amp; Poors. Investors will demand a higher interest premium on the securities if the credit rating is low.</li> <li>(2) Insurance, for example, by a derivative such as a CDS of the kind that the infamous insurance giant AIG provided. Investors will demand a higher interest premium on the securities if they are uninsured.</li> </ol> <p>The essence of the guarantee is that a third-party guarantor, such as a bank, agrees to make payments to holders of asset-backed securities in the event of default on the revenue stream from the underlying asset or pool. For example, if the pool consists of auto or home loans, and the auto or home owners cannot meet their obligations, then the SPV lacks revenue from them to pass through to the certificate holders. The guarantor steps in and makes the necessary payments.</p> <p>An alternative guarantee structure is where the bank agrees to buy or replace the underlying asset or pool from the entity that owns it.</p> <p>Of course, in exchange for the guarantee, the bank charges a fee.</p>

Step Number in Overall Transaction	Elements of Each Step
	For institutional investors, such as pension (retirement) funds, it is essential that the asset-backed security be guaranteed. That is, the terms under which such investors operate often prohibit them from purchasing financial instruments that are not guaranteed.
7	<p><b>Receipt of Principal and Interest Payments by Investors Holding the Asset-Backed Securities</b></p> <p>The SPV serves as a pass-through vehicle, meaning that principal and interest payments from borrowers on the underlying loan transaction are paid into the SPV, pass through it, and are transmitted to the investors.</p> <p>In contrast to a <i>shukuk</i> transaction, in an asset-backed security deal, the cash flows generated by the underlying asset or pool of assets and passed through to investors involve interest payments. In a <i>shukuk</i> transaction, interest would be forbidden (<i>haram</i>) as <i>riba</i>.</p> <p>To be sure, the interest rate paid by borrowers is not identical to the rate received by investors. If it were, then the issuer of the securities (the SPV) would make no profit. Rather, the issuer takes a "cut" when it passes through payments from borrowers. For example, the borrowers might pay an interest rate of X percent (e.g., a home mortgage rate of 6 percent), and the SPV passes through to investors Y percent (e.g., an investment return of 5 percent). X will be greater than Y, and the difference will be the cut (e.g., 1 percent). In brief, the income stream from the asset pool backing the securities is greater than the cash payouts to the investors.</p>
8	<p><b>Secondary Market Trading of Asset-Backed Securities</b></p> <p>The asset-backed securities may be bought and sold by investors, typically OTC, i.e., not on an organized securities exchange such as the NYSE.</p>
9	<p><b>Maturity</b></p> <p>Asset-backed securities will have a defined maturity (as well as events of default). When the maturity date is reached, the SPV winds up. It does so by paying back the security holders their original capital investment or other appropriate amount. In effect, the SPV retires the securities. The SPV may obtain funds for this purpose from the original entity that owns the underlying asset or pool. That entity may sell the asset or pool, and transfer the proceeds to the SPV, which uses the funds to pay off the investors.</p>

Step Number in Overall Transaction	Elements of Each Step
	<p>Unlike a <i>shukuk</i> transaction, the amount paid to the investors in asset-backed securities is not pre-determined. It is possible that an investor in an asset-backed security incurs a loss vis-à-vis the original capital contribution made by that investor. In other words, investors are subject to the vagaries of the market in respect of the underlying asset or pool, which might not fetch a price high enough to pay them off. Examples include the sub-prime mortgage crisis and MBSs backed by sub-prime mortgages.</p> <p>Also unlike a <i>shukuk</i> transaction, typical non-Muslim asset backed security deals do not involve a "put" option (i.e., and option to sell an underlying asset, whereas a "call" option is an option to buy an asset). Under a put option, investors in an asset-backed security would be legally entitled to sell back their security to the SPV that issued it, for a pre-determined price such as the face value of the security. That option would be exercisable up to, or at, the maturity date of the security. The put option typically does exist with respect to a <i>shukuk</i> transaction.</p> <p>Once the SPV retires the asset-backed securities, it is dissolved. There is no need for its continued existence, as it has served its purpose as an issuer of the certificates and pass-through vehicle for payments.</p>





**Table 29-4:**  
***Shukuk***

Step Number in Overall Transaction	Elements of Each Step
1	<p><b>Identification of Asset or Pool of Assets for Securitization</b></p> <p>An entity seeks to raise financial capital. The entity could be a commercial bank, non-bank financial institutions, or non-financial business (such as an agricultural or industrial enterprise).</p> <p>Typically, the entity may seek funding from the IPO of <i>shukuk</i> to purchase the asset or pool. In some cases, the entity already may own and control the asset or pool, and seeks funding to improve the nature or character of that asset or pool.</p> <p>Indeed, in many instances, the entity is the originator (creator) of the asset or pool. In such cases, the entity is properly and precisely called the "originator" or "originating bank."</p> <p>The asset or pool could be tangible, such as an air or sea port, building (e.g., house, apartment complex, office tower, or stadium), highway, or agricultural or industrial land. Or, the asset could be intangible, such as a financial instrument. Whether tangible or intangible, the asset may be pooled with other assets. Homogenous assets (e.g., the same kind of financial instruments) may be pooled. However, heterogeneous assets (e.g., a tangible and a non-tangible asset) may not be pooled.</p> <p>The entity seeks to securitize the asset or pool of assets. Critically, the asset or pool generates a stream of revenues — a cash flow — but these revenues do not involve interest payments, which would be <i>ribā</i>, and, therefore, forbidden (<i>harām</i>).</p>
2	<p><b>Creation of a Special Purpose <i>Mudārabah</i> (SPM)</b></p> <p>The entity seeking to securitize the asset or pool of assets creates an SPM. That entity also capitalizes the SPM.</p> <p>The SPM is a separate legal entity from the entity that creates it, and from the issuer (discussed below) of the <i>shukuk</i>. It may or may not be affiliated with the creating entity, but its only purpose is to receive and hold the asset or pool.</p> <p>The key benefit of the independence of the SPM from the entity that creates it is that the SPM is able to obtain its own credit rating. It does not automatically receive the credit rating of the entity that originally owned the asset or pool. For instance, if that entity has bad debt, in addition to the asset or pool, then its credit-rating might be downgraded. The SPM is not tainted by the bad debt. Thus, any financial instruments — such as asset-backed securities — issued by the SPM (discussed below) carry their own credit-rating, not that of the entity that created the SPM.</p>
3	<p><b>Transfer of Assets or Pool to SPM</b></p>

Step Number in Overall Transaction	Elements of Each Step								
	<p>The entity owning the asset or asset pool transfers that asset or pool to the SPM. The sale of the asset or asset pool is at a pre-determined price.</p> <p>At this juncture, the asset or pool no longer is on the balance sheet of the original entity, but rather is on the balance sheet of the SPM. As a result, the asset or pool backs issuance by the SPM of <i>sukuk</i> certificates (Step 4). (Note the possibility that the certificates are asset-based, not asset-backed, and thus collateralized by the cash flows from the assets, but not the assets themselves.)</p> <p>As in the case of conventional non-Muslim securitization, when an originating bank is paid for its asset by the SPM, that bank is thereby re-liquefied. That is, the bank gets cash for the asset it sold, and the bank can use this cash to acquire a new asset, including creation of a new loan.</p> <p>Further, the asset or pool is immune from any financial difficulties that the entity that previously owned them might suffer. As a distinct legal entity, the SPM is bankruptcy-remote. That is, the insolvency of the entity that created it does not affect that of the SPM.</p> <p>In brief, the independence of the SPM is a credit enhancement for prospective <i>sukuk</i> investors (discussed below), in that they have greater certainty and predictability about the existence of "hard" assets, or a pool of "hard" assets, to back the certificates. In turn (as per Step 7), these "hard" assets will generate cash flows for the <i>sukuk</i> investors.</p>								
4	<p><b>Issuance of certificates (<i>Sukuk</i>)</b></p> <p>As in Step 3 above, the SPM purchases the underlying asset or pool from the entity that created it. The SPM pays for the purchase by issuing participation certificates — the <i>sukuk</i>. Thus, the asset side of the balance sheet of the SPM contains the asset or pool. The liability side of the ledger contains the certificates (akin to a note payable). In brief:</p> <table border="1"> <thead> <tr> <th colspan="2">SPM BALANCE SHEET (SIMPLIFIED)</th></tr> <tr> <th>Assets</th><th>Liabilities</th></tr> </thead> <tbody> <tr> <td>Underlying asset or pool of assets (purchased from original creating entity) <i>e.g.</i>, <i>ijāra</i> (lease) contracts</td><td><i>Sukuk</i> (certificates issued to investors)</td></tr> <tr> <td colspan="2">The value of the participation certificates equals the price of the asset or pool sold to the SPM. Each certificate represents an undivided share in the ownership of the asset or pool from the entity that originally owned and controlled that asset or pool.</td></tr> </tbody> </table>	SPM BALANCE SHEET (SIMPLIFIED)		Assets	Liabilities	Underlying asset or pool of assets (purchased from original creating entity) <i>e.g.</i> , <i>ijāra</i> (lease) contracts	<i>Sukuk</i> (certificates issued to investors)	The value of the participation certificates equals the price of the asset or pool sold to the SPM. Each certificate represents an undivided share in the ownership of the asset or pool from the entity that originally owned and controlled that asset or pool.	
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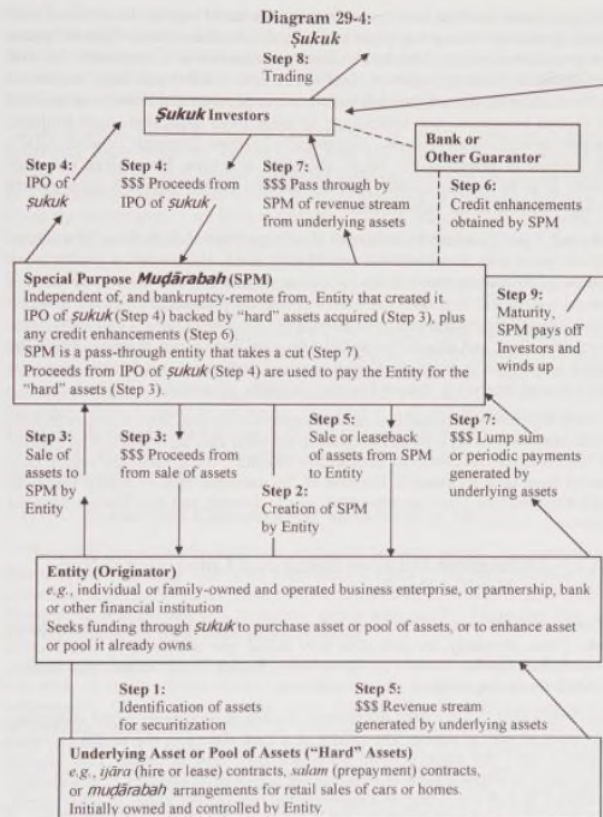
Step Number in Overall Transaction	Elements of Each Step						
	<p>The purchasers of the certificates are investors, the <i>sukuk</i> investors. The funds they provide to the SPM in exchange for the certificates are used by the SPM to buy the asset.</p> <p>By holding a certificate (<i>sakk</i>), an investor has an ownership stake in the underlying asset or pool. That stake is a joint one. All of the investors, along with the SPM, are joint owners of the asset or pool.</p>						
5	<p><b>Sale or Leaseback of Assets from SPM</b></p> <p>The SPM sells the asset or pool back to the original entity with which they were associated. Alternatively, the SPM leases the asset or pool to that entity (meaning the SPM is a lessor, and the entity is the lessee).</p> <p>In exchange, the SPM receives a future payment, namely, the sale price of the asset or pool. Alternatively, the SPM receives future periodic lease payments. Herein is the key point of this Step: the revenue stream generated by the underlying asset or pool flows into the SPM, and flows from the original entity or other buyer or lessee.</p> <p>In other words, in terms of accounting, the purpose of the sale or leaseback is to re-structure the balance sheet of the SPM. As indicated in Step 4, before the sale/leaseback, and after issuance of the <i>sukuk</i> (certificates), the asset side of the Balance Sheet of the SPM contains the underlying assets or pool, and the liability side contains the certificates. To pay the investors in the <i>sukuk</i>, the SPM needs not the "hard" assets or pool. Rather, the SPM needs the revenue stream generated by those assets or pool. Thus, by selling the assets or pool, and receiving the income from them, the SPM acquires the revenue stream. It then passes the revenues through to the holders of <i>sukuk</i>, functioning as a pass-through vehicle. Of course, the SPM deducts a minor sum to cover its administrative, insurance, and debt servicing costs.</p> <p>Accordingly, after this Step, the Balance Sheet of the SPM looks as follows:</p> <table border="1"> <thead> <tr> <th colspan="2">SPM BALANCE SHEET (SIMPLIFIED)</th></tr> <tr> <th>Assets</th><th>Liabilities</th></tr> </thead> <tbody> <tr> <td>Future payment or periodic payments generated by underlying asset or pool of assets (sold or leased back to original creating entity) <i>e.g.</i>, rental payments from lessees on <i>ijāra</i> (lease) contracts</td><td><i>Sukuk</i> (certificates issued to investors)</td></tr> </tbody> </table>	SPM BALANCE SHEET (SIMPLIFIED)		Assets	Liabilities	Future payment or periodic payments generated by underlying asset or pool of assets (sold or leased back to original creating entity) <i>e.g.</i> , rental payments from lessees on <i>ijāra</i> (lease) contracts	<i>Sukuk</i> (certificates issued to investors)
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Step Number in Overall Transaction	Elements of Each Step
	It may appear at first glance that it is odd for the SPM to purchase the assets for the pool in Step 3, and then sell (or lease) them in Step 5. However, the purchase in Step 3 is necessary, because prospective investors in the <i>shukuk</i> are disinclined to purchase certificates of a shell company (one with no assets) that is legally distinct from the original entity. In other words, putting the asset or pool on the Balance Sheet of the SPM is an important inducement for investors to purchase the certificates. Then, after their investment, their concern is obtaining an investment return, which requires that the SPM have liquid ( <i>i.e.</i> , cash or near-cash) assets. The asset or pool may not be liquid — it could be an <i>ijara</i> contract, or a machine. Thus, in Step 5, the SPM sells the asset or pool in exchange for a liquid asset.
6	<p><b>Credit Enhancements</b></p> <p>Investors, in both the primary and secondary market for <i>shukuk</i>, will examine the credit quality of those certificates. The higher the risk of default on them, the higher return the investors will expect. Thus, to lower the cost of capital, the SPM will seek to obtain credit enhancements from reliable, reputable third parties.</p> <p>The credit enhancements may take the form of a guarantee issued by a commercial or investment bank, along with a strong credit rating from a well-regarded rating agency.</p> <p>The essence of the guarantee is that a third-party guarantor, such as a bank, agrees to make payments to <i>shukuk</i> holders in the event of default on the revenue stream from the underlying asset or pool. For example, if the pool consists of auto or home loans, and the auto or home owners cannot meet their obligations, then the SPM lacks revenue from them to pass through to the certificate holders. The guarantor steps in and makes the necessary payments.</p> <p>An alternative guarantee structure is where the bank agrees to buy or replace the underlying asset or pool from the entity that owns it.</p> <p>Of course, in exchange for the guarantee, the bank charges a fee.</p> <p>For institutional investors, such as pension (retirement) funds, it may be essential that the <i>shukuk</i> be guaranteed. That is, the terms under which such investors operate often prohibit them from purchasing financial instruments that are not guaranteed.</p>
7	<b>Periodic Payments to <i>Shukuk</i> Investors (Revenue Streams from Underlying Asset or Pool Passed Through by SPM)</b>

Step Number in Overall Transaction	Elements of Each Step
	<p>During the life of the <i>shukuk</i>, the SPM passes through payments received from the borrowers or other obligors on the underlying asset or pool. For example, if the pool consists of <i>ijara</i> contracts, then the lease payments from lessees are received by the SPM, and passed by it to the certificate investors. The SPM makes these payments periodically, much like a coupon (<i>i.e.</i>, interest) payment on a conventional, non-Islamic bond.</p> <p>However, there is a critical difference in the two types of instruments. An issuer of a conventional, non-Islamic bond is legally obligated to make principal and interest payments regularly, on schedule, to bond holders. That is true regardless of the status of the asset, pool, or project that underlies the bond (unless, of course, the issuer goes bankrupt).</p> <p>In sharp contrast, the SPM that issued the <i>shukuk</i> makes payments to investors only if the underlying asset or pool generates revenue. In other words, only if the securitized asset produces a revenue stream do the investors get paid. (The exception is if an event triggering a guarantee occurs.) Thus, for example, if the <i>shukuk</i> is lease-based, then the SPM passes through the lease payments to the investors. But, if the lessees default on their rental payment obligations, then the SPM passes through nothing to the investors (again, unless a guarantee is triggered).</p> <p>To be sure, assuming the underlying asset or pool generates revenue, the payment received by the SPM from borrowers or other obligors is not identical in amount to the payment the SPM passes through to investors. If it is, then the issuer of the securities (the SPM) makes no profit. Rather, the issuer takes a "cut" when it passes through payments from borrowers. For example, the borrowers might pay a profit return of X (<i>e.g.</i>, a home installment payment of U.S. \$100,000), and the SPM passes through to investors Y (<i>e.g.</i>, an investment return of \$90,000). X will be greater than Y, and the difference will be the cut (<i>e.g.</i>, 10 percent). In brief, the income stream from the asset pool backing the <i>shukuk</i> is greater than the cash payouts to <i>shukuk</i> investors.</p>
8	<p><b>Secondary Market Trading</b></p> <p>Investors from a primary issuance of <i>shukuk</i> may choose to sell their certificates on the secondary market. The new holders step entirely into the position vacated by the sellers, and enjoy both pro rate ownership of the underlying asset or pool as reflected in their certificate holding, and full legal entitlement to investment returns.</p>

Step Number in Overall Transaction	Elements of Each Step
	As with secondary market trading of non-Islamic bonds, the secondary market price of <i>shukuk</i> varies according to two broad categories of factors: the certificate, and the market. As to the certificate, the nature and quality of the issuer and any guarantee will be relevant, as will be the terms, tenor, and remaining life of the certificates, and expectations of profitability from the underlying asset or pool. As to the market, the factors affecting pricing will relate to the forces of supply and demand, and domestic and international economic and political conditions. Note that depending on the secondary market, trading may be restricted in some way by government regulation. One example is a minimum holding period (explained below) following an IPO.
9	<p><b>Maturity</b></p> <p><i>Shukuk</i> will have a defined maturity (as well as events of default). When the maturity date is reached, the SPM winds up. It does so by paying back the certificate holders their original capital investment or other appropriate amount. In effect, the SPM retires the certificates. The SPM may obtain funds for this purpose from the original entity that owns the underlying asset or pool. That entity may sell the asset or pool, and transfer the proceeds to the SPM, which uses the funds to pay off the investors.</p> <p>Note that the amount paid to the investors is pre-determined, so that they do not incur a loss vis-à-vis their original capital contribution. In other words, the investors are not subject to the vagaries of the market in respect of the underlying asset or pool, which might not fetch a price high enough to pay them off.</p> <p>Note also that many <i>shukuk</i> deals involve a "put" option (i.e., an option to sell an underlying asset, whereas a "call" option is an option to buy an asset). Under the put option, the certificate investors can sell the <i>shukuk</i> back to the SPM that issued the <i>shukuk</i> for a price equal to the face value of the certificates. This option is exercisable at the maturity date of the <i>shukuk</i>.</p> <p>Once the SPM retires the <i>shukuk</i>, it is dissolved. There is no need for its continued existence, as it has served its purpose as an issuer of the certificates and pass-through vehicle for payments.</p>



## [B] Similarities Between *Shukuk* and Conventional Non-Muslim Bonds

Looking generally at non-Islamic bonds and *shukuk*, three similarities are evident. First, both products exist to fit and fill the needs of markets, specifically, of savers and borrowers. Savers of funds look for a return on their savings through investing them. Borrowers — such as individuals and businesses seeking to expand



their operations through leverage — require increased capital. Islamic and non-Islamic bonds are among the types of financial instruments that channel finance from providers to users of funds. Put simply, both are loan instruments. In turn, the individuals, small and medium sized enterprises (SMEs), and large businesses use the funding for growth through investment in physical and human capital, land and natural resources, new technology, or labor force expansion. Such projects, repeated throughout an economy, lead to gains in Gross Domestic Product (GDP). This process of private-sector credit allocation is critical for modern economic growth. It is to be emphasized that the *Shari'a* readily supports such growth through (*inter alia*) the *shukuk* device.

Second, liquidity is important in both Muslim and non-Muslim financial markets. Like an investor in a conventional non-Muslim bond, the holder of a *sakk* has a right to trade that instrument. Yet, potential buyers are not keen to invest in a financial instrument that does not have a broad, deep secondary market in which they can re-sell the instrument. The greater the number of buyers and sellers that are ready, willing, and able to buy or sell a financial instrument, the more liquid the market is for that instrument. Consequently, Islamic and non-Islamic countries have a shared interest in financial market liquidity generally.

Third, whether a financial instrument is governed by the *Shari'a* or non-Muslim secular law, there is an inverse relationship between risk and return. The greater the degree of risk perceived by prospective investors, the greater the return they demand from that instrument. Because of the universal risk — return trade-off, credit enhancement plays an important role in Islamic and non-Islamic financial markets.

### [C] Differences Between *Shukuk* and Conventional Non-Muslim Bonds

There are three salient differences between *shukuk* and conventional, non-Islamic bonds. First, obviously, by definition only *shukuk* are condoned by the *Shari'a*. Conventional bonds issued by American, British, and other non-Muslim corporations do not comport with Islamic Law.

Second, a *sakk* is not a debt instrument. Rather, it represents a part ownership in an asset or pool of assets. The holder of a *sakk* shares in the profits or losses associated with the asset or pool on which that *sakk* is based. This kind of arrangement is characteristic of conventional non-Muslim equity, i.e., of a stock in a company. But, it is not true of a conventional non-Islamic bond. In other words, the holder of a *sakk* is somewhat akin to a shareholder, whereas a conventional bondholder is a creditor of the issuer of the bond. The creditor may be a secured party, with the security lying in the assets of the issuer. But, the creditor is not an owner of those assets.

Third, and following from the second point, an issuer of *shukuk* is not obligated to return a fixed profit to the investor. That feature resembles a conventional, non-Muslim stock. The stock issuer does not guarantee a fixed dividend to the stock holder. In contrast, the issuer of a conventional, non-Muslim bond or asset-backed security does have a contractual obligation to repay principal and interest to bond

holders. True, that issuer does not guarantee a return to them of a fixed profit connected to the assets of the issuer or assets backing the security. But, the issuer defaults on the bond if it fails to make timely payment of principal and interest. In the case of *shukuk*, profits — if they arise — are generated from underlying business transactions, namely, the asset or pool underlying the *shukuk*.

For example, consider an *ijāra shukuk*, that is, bonds based on a pool of underlying lease contracts. Profits come from the tenants who pay rent on the rented property, or from lessors who make lease payments on the loaned objects. In a *mudārabah shukuk*, profits come from the proceeds of trading in the area for which the instruments have been established. That is, they come from commercial transactions in which the working partners (*mudārib*) of the *mudārabah*, for which they received a loan from the sleeping partner (*rabb al-māl*). Yet, in neither the *ijāra shukuk* nor the *mudārabah shukuk* does the *shukuk* issuer guarantee by contract any financial return to the investors.

Indeed, as a legal matter, to guarantee a fixed return would be considered *ribā*. The presence of *ribā* would transform the debt instrument (*shukuk*) into a loan transaction that is forbidden (*harām*). A demand by a lender that a borrower guarantee a fixed interest payment would entail *ribā*, and thereby would be forbidden. That demand is an act by the lender that potentially oppresses the borrower. By expecting the borrower to pay up a sum certain, when in fact there is uncertainty as to whether the borrower can repay, the lender puts all of the risk (*gharar*) on the borrower.

### [D] *Shukuk* and Conventional Non-Muslim Stocks

The prior discussion highlights a similarity between *shukuk* and conventional shares of stock, namely, that each represents a claim of partial ownership in an underlying asset or pool, and that neither guarantees its holder a fixed return. However, it is important not to equate *shukuk* with equity. There are four key differences between these financial instruments.

First, investors generally regard *shukuk* as stable, low-risk securities. That is not true with all stocks. Some stocks are rather steady in their price and dividend performance. Others, however, are quite volatile. The Wall Street concept to differentiate the two kinds of stocks is “beta” (sometimes abbreviated by the Greek letter B). “Beta” is a measure of the volatility of a stock. A high beta stock is one that is risky, particularly in terms of capital losses, but offers the possibility of high capital gains and thereby high returns. Specifically, a stock with a beta value of more than 1 historically moves (in terms of price) more than the relevant index for the market on which the stock is traded. (By definition, the beta value of the market equals 1.) It is considered an aggressive stock, and the higher the beta value, the more aggressive. Conversely, a stock with a beta value of less than 1 historically moves less than the market, and is considered defensive. It offers the possibility of lower returns than a high beta stock, but the certainty of those lower returns is greater than with a high beta stock. The point is *shukuk* are, or at least perceived as, rather mundane. For many investors, such as pensioners and charitable trusts, a boring security, one that is defensive, is precisely what excites them.

Second, the life of *šukuk* is finite. That is, Islamic bonds have a fixed maturity date. The contract relating to the *šukuk* clearly spells out the due date. In contrast, conventional equity has no fixed lifespan. In theory, the life of a stock is coterminous with the life of the company that issues it. Of course, in practice, from time to time, depending on market and other conditions, some companies do engage in stock swaps, changing (and thereby retiring) one class of security for another.

Third, *šukuk* are a supplementary means of finance for an enterprise, whereas conventional shares represent the paid-in capital of a company. An enterprise — that is, a *sharikah* (a partnership or association organized under the *Shari'a*) — that issues *šukuk* already has a primary source of capital. That source is the capital contributions from partners. Issuance of Islamic bonds is an additional source of funds for the *sharikah*, in the way that floating bonds is a supplementary source of finance for a corporation operating on non-Muslim principles.

Finally, there can be different classes of equity, but not of *šukuk*. As explained below, there are different types of *šukuk*, with the differences relating to the asset or pool that underlies the certificates. But, for any one type of *šukuk*, there is only one class of certificates. That is why, at the IPO, each certificate has equal value — and equal legal rights and obligations — with all other certificates in that IPO. In contrast, a non-Muslim corporation may issue two or more categories, or classes, of equity. For example, it will issue common stock, and also may issue preferred stock (which may be convertible into underlying ordinary shares, and may be issued on the basis of common stock, not as a distinct IPO). The company also may issue convertible bonds, that is, a bond-equity hybrid in which the bond is convertible to specified number of shares at a conversion price.<sup>64</sup> While the IPO price of any one specific equity instrument will be the same, the prices of common and preferred stock, and convertibles, will differ. Put succinctly, there is no such thing as “common *šukuk*,” “preferred *šukuk*,” or “convertible *šukuk*.”

<sup>64</sup> Examples of hybrid securities include preferred stock, convertible bonds, and moving strike convertible bonds (MSCBs). Many hybrid securities are privately placed, not issued through an IPO. Consequently, during the global economic crisis that began in 2008, when valuations of exchange-traded securities tumbled, the private market for hybrids remained robust. Of course, for holders of ordinary (common) stock, hybrids pose at least three problems. Hybrids dilute ordinary shareholders and their voting rights, can lead to an actual or apparent transfer of control, and sometimes lack transparency.

## Chapter 30

### FINANCE (TAMWEEEL): TYPES AND RISKS OF ISLAMIC BONDS (ŠUKUK)

Anyone who lives within their means suffers from a lack of imagination.

Oscar Wilde (1854-1900, Irish writer)

#### SYNOPSIS

##### § 30.01 PRIVATELY-ISSUED ŠUKUK

[A] Secondary Market Restrictions

[B] Nine Types

##### § 30.02 INNOVATIONS AND CHALLENGES FOR PRIVATELY-ISSUED ŠUKUK

##### § 30.03 RISKS ASSOCIATED WITH ŠUKUK

[A] Distinction Between “Asset-Backed” and “Asset-Based”

[B] Credit Risk

[C] Legal Risk

[D] *Shari'a* Risk

##### § 30.04 SOVEREIGN ŠUKUK

[A] Need for Sovereign *Šukuk*

[B] How Sovereign *Šukuk* Work

##### § 30.01 PRIVATELY-ISSUED ŠUKUK

There are various types of Islamic bonds (*šukuk*). One threshold distinction is the nature of the issuer: is it a private entity, or is it a public body, such as a government? A variety of private bodies, including financial and non-financial business associations of all kinds, issue *šukuk*. Likewise, many governments issue *šukuk*. This category is known as “sovereign *šukuk*,” to reflect the legal status of the issuer — a sovereign entity.

The obvious denominator common to both private and sovereign *šukuk* is that they are *Shari'a* compatible transactions. In consequence, except for *salam šukuk* (a privately issued bond, discussed below), investors have the right (subject to local financial market regulations) to sell their bonds at the prevailing market price. As market conditions change, the secondary market price is almost certain to be different from the IPO price. Certainly, the IPO price for a *sakk* is identical for the same type of instrument being floated, i.e., at the IPO all *šukuk* of the same class have the same unit value.



### [A] Secondary Market Restrictions

Of the nine types of Islamic bonds (*shukuk*) discussed below, there is no secondary market for three of them — *salām shukuk*, *istiṣnā' shukuk*, and *murābaḥa shukuk*. Secondary market trading of these three instruments is considered incompatible with the *Shari'a*. In limited circumstances, secondary market trading of two other kinds of *shukuk*, namely, *muzāra'ah shukuk*, and *musāqāḥ shukuk*, is deemed contrary to the *Shari'a*. As a practical investment matter, any restriction on secondary market trading is vital.

A financial asset that cannot be sold or bought after an IPO is less attractive to prospective investors than one with the possibility of subsequent trading. That is because the funds of the investor are locked into that instrument, with no possibility of escape in a secondary market, for the entire life of that instrument. There is no possibility of realizing a short-term capital gain, or even of a capital loss, the latter event being useful to offset gains under some tax law regimes. In Wall Street parlance, the instrument is illiquid — there is no post-IPO market of ready, willing, and able buyers and sellers. Consequently, investors are likely to eschew a financial instrument with no secondary market, in favor of one which permits post-IPO purchases and sales. When they do, the ramifications for the issuer cannot be ignored. The issuer must offer a better return on an instrument that has no secondary market than on one that does (*ceteris paribus*, i.e., all other factors being equal), so as to compensate investors for the liquidity risk, that is, the risk that they bear in not being able to turn the instrument into cash until its maturity.

Why, then, would Islamic Law squelch a secondary market for certain kinds of *shukuk*? The answer in respect of each of the types is explained more fully below. The general precept, which applies to all *shukuk*, is set out in a *Shari'a* ruling from the *Fiqh* Council of the Organization of Islamic Countries (OIC). The OIC is the leading international forum for Muslim nations, in which all of them participate, and the Council is its supreme jurisprudential body. Its rulings, while not binding on all Muslim nations, are highly respected by most of them. The *Fiqh* Council ruling states:

[A] bond or note can be sold at a market price provided that the composition of the group of assets, represented by the bond, consists of a majority of physical assets and financial rights, as compared to a minority of cash and interpersonal debts.<sup>1</sup>

The *Fiqh* Council is counseling against trading *shukuk* that are backed by cash or debt-like financial instruments. Note carefully that the Council is not ruling against secondary market trading of all debt instruments. Whether secondary market buying and selling is acceptable under the *Shari'a* depends on the design of the debt instrument. On the one hand, suppose the instrument is backed mainly by hard assets — physical things — and financial rights. Then, such trading is acceptable. On the other hand, suppose the asset or pool underlying the debt instrument

consists mainly of cash, or of debts between parties (i.e., promises to pay, or IOUs). Then, such trading is not agreeable.

Why is trading not agreeable in the latter case? The answer is that such trading could run afoul of the rule against *ribā*. That is because *shukuk* not backed by a majority of hard assets essentially is money. Trading money for money involves *ribā*, where the values are unequal, such as where an investor buys *shukuk* at one price, and sells it at a higher price. In sum, as a sacred legal system, Islamic Law exalts religious and moral teaching over economic rationality. While there are sound financial reasons to promote a secondary market, the *Fiqh* Council is duty-bound to subordinate those reasons if and when they conflict with that teaching.

### [B] Nine Types

Indubitably, it is a simplification to declare there are nine principal types of privately issued *shukuk*. The market for Islamic bonds is not static. Financial engineering technology, along with dynamic market conditions, lead to innovations. That said, there are nine prominent types of *shukuk*. All nine of them are permissible under the *Shari'a* throughout the Muslim world. The types of *shukuk* discussed below are found in Islamic financial markets such as Bahrain, Doha, Dubai, Kuwait, Riyadh, and Kuala Lumpur, as well as in certain non-Islamic markets, such as London, Hong Kong, and Tokyo.

#### (1) *Ijāra Shukuk* (certificates of ownership of leased assets)

These *shukuk* are based on the contract of *ijāra*, which is a conventional agreement for the hiring or leasing of a good or service. Thus, the asset or pool that underlies the bonds is one or more lease agreements. The *shukuk* channel rental payments from the party or parties leasing a good or service to the investors in the *shukuk*.

What, precisely, does the certificate — each *sakk* — represent? The answer is a partial ownership interest in the asset that is the object of the *ijāra* contract or contracts. For instance, if the *ijāra* contracts are for the lease of aircraft, or for apartments, then the *shukuk* investors are part owners of the planes, or of flats, respectively.

A critical purpose of the issuance of *ijāra shukuk* is to provide financing for a party that ultimately seeks to own the aircraft or apartments. That party is the issuer of the certificates. The purchase price paid by the *shukuk* investors at the time of the IPO flows to the issuer. The issuer uses the funds to lease the aircraft or apartments from a manufacturer or developer, respectively. The issuer then puts the aircraft or apartments to productive use, carrying passengers on commercial flights, or renting out the flats to expatriates and tourists. The issuer takes some of the earnings from these uses (e.g., airplane ticket revenues or rental payments from tenants) to pay back the *shukuk* investors. When the issuer has paid off all the investors, then it becomes the full owner of the airplanes or flats.

<sup>1</sup> Quoted in ZAMIR IQBAL & ABBAS MIRAKHOR, AN INTRODUCTION TO ISLAMIC FINANCE THEORY AND PRACTICE 181 (Singapore: John Wiley & Sons (Asia) Pte Ltd, 2007). [Hereinafter, Iqbal & Mirakhor.] Unfortunately, Professors Iqbal and Mirakhor do not cite the specific source or date of this ruling.

In three key respects, *ijāra shukuk* are flexible instruments, which makes them particularly attractive to investors.<sup>2</sup> First, the timing of the cash flows to *shukuk* investors need not be exactly coincident with the timing of rental payment by lessees for the asset or assets they are leasing. A delay in the underlying rental payments need not hold up the pass through of returns to investors.

Second, the life of *ijāra shukuk* can last as long as the leased property is in existence and usable by the lessee. The maturity of the bonds can be any period up to and including the full, practically usable life of the asset that is the object of the *ijāra* contract. Note the importance of the usable life of the asset. If the user of the leased property can no longer benefit from the asset, then there is no reason for that user to make rental payments. In turn, cash flows supporting the payments to investors would cease.

Third, assuming the underlying contracts are for the lease of a good or goods, the *Shari'a* does not require that the property that is the object of the *ijāra* contract actually exist at the time the *ijāra* contract is created.

For example, suppose Emirates Airlines leases 10 new Boeing 777 aircraft. The leases are made via *ijāra* contracts between Emirates Airlines and Boeing. The aircraft are under construction at facilities in Wichita, Kansas and other locations. Before construction of the aircraft is complete, and delivery is made to Emirates Airlines, *ijāra shukuk* are issued. These *shukuk* are based on the *ijāra* contracts between Emirates Airlines and Boeing. Even though the aircraft are still being built, the issuance of the bonds is permissible. Presumably, the Airlines makes payments to Boeing under the lease contracts, even before completion and delivery of the aircraft. These payments are a sufficient security on which to premise the IPO of the *shukuk*.

To be compliant with the *Shari'a*, *ijāra* must satisfy four conditions. First, the *ijāra* contract or contracts must comply with Islamic Contract Law. For instance, an IPO of *shukuk* based on *ijāra* contracts that are lease agreements for casinos would be forbidden (*harām*). That is because gambling is forbidden.

Second, the use of the assets must comply with the *Shari'a*. It would be *harām* to issue *shukuk* based on *ijāra* contracts in which multi-purpose, non-specific buildings are leased, but the buildings are used by the lessee as casinos. Here, the lease contract is permissible, but the use to which the property is put — gambling — is impermissible, namely, gambling.

Third, the leased asset or assets must yield a benefit to the user who pays the rent for hiring them. If the user paid rent but obtained no benefit from the property, then the *ijāra* arrangement would be dubious, even fraudulent. This requirement does not mean the lessee actually uses the asset, or that the lessee gains a certain threshold level of benefit. It simply means that the asset is potentially beneficial for the party that pays the rent. Hence, *ijāra shukuk* could be based on contracts to rent beach-front holiday apartments, regardless of whether any of the renters actually stay in the apartments, or enjoy the beach.

<sup>2</sup> See IQBAL & MIRAKHOR, *supra*, at 182.

Fourth, the owner of the property that is the object of the *ijāra* contract must be responsible under that agreement for performing all necessary maintenance on the property. The owner, or owners, is none other than the *shukuk* investors. Yet, this requirement protects the *shukuk* holders. It ensures the property is in a condition suitable for the lessee to benefit from it, and in turn helps avoid disputes with the owner. For instance, if the owner of beach-front apartments does not repair them after a natural disaster, then they may be uninhabitable. Renters would withhold payments, which in turn would compromise the pass-through of returns to *shukuk* investors.

## (2) *Salam Shukuk* (certificates for deferred delivery contracts)

*Salam* contracts are pre-payment agreements whereby a buyer pays for the object of the contract, and receives delivery at a later date. They are short-term contracts, in that generally, the time gap between payment and delivery is between 3 months to one year. Each certificate represents a partial ownership interest in the object of the underlying *salam* contract or contracts.

An important purpose of *salam shukuk* is to provide financing to the buyer in the underlying *salam* contract. The buyer is obliged to pre-pay for goods yet-to-be delivered. The goods may be a commodity such as aluminum, copper, crude oil, or natural gas. Or, they could be a manufactured product, such as cars.

But, where does the buyer get the funds to make that pre-payment? The answer is the funds raised from the IPO of the *salam shukuk*, i.e., the initial purchase price paid by the *shukuk* investors. Put succinctly, the IPO provides the financial capital for the buyer. Of course, the *salam shukuk* investors get something in return, namely, their certificates represent part ownership in the underlying goods that are to be delivered to the buyer. That is, the goods become commodities owned jointly among the holders of the *shukuk*. Only when the buyer has paid off the investors in the *salam shukuk* does that buyer take full ownership of the underlying asset that was the object of the *salam* contract.<sup>3</sup>

Technically, the underlying *salam* transactions may take either of two forms. Both forms involve deferred delivery of the object of the contract. The delivery date must be specified in the contract, indicating that the object will be delivered at the promised date. The difference between them is in the exact payment terms. First, a *bay' al-salam* (spot sale) contract requires immediate payment of the full purchase price. That is, the buyer pays the entire price to the seller of the good upon finalization of the contract. Second, a *bay' al-mu'ajjal* (deferred delivery) contract requires immediate payment, but not of the full purchase price. The buyer pays either in a lump sum at a contractually-identified later date (but one that is

<sup>3</sup> Note the Bahrain Monetary Agency (BMA) was a pioneer of *salam shukuk*. The BMA advocated a transactional structure in which an SPM would issue certificates to investors, and use the proceeds from the issuance to purchase a commodity through a *salam* contract. The SPM was never intended as the ultimate beneficiary of the commodity. Rather, that beneficiary (such as an oil refinery in respect of crude oil) agreed, after the *salam* contract was arranged, to buy the commodity from the SPM on the date of delivery set in the *salam* contract. Investors in the *salam shukuk* would receive an amount based on the agreed cost of financing the purchase of the commodity. See IQBAL & MIRAKHOR, *supra*, at 184-185.



still before the delivery of the good), or pays in installments according to a schedule prescribed in the contract.

*Salam shukuk* are commonly floated financial instruments. In part, their popularity stems from the fact that many commodities are not readily available, or cannot be made so without financial capital, at the time a buyer and seller reach an agreement. As indicated above, the buyer needs financing to afford the commodity. Conversely, the seller needs payment from the buyer in order to produce, refine, and deliver the object of the contract. Investors in the *salam shukuk* effectively finance the needs of the buyer and seller on the underlying *salam* contract. In return for doing so, the certificate holders become joint partial owners in the underlying arrangement, and remain as such until the buyer has paid off their investment in the arrangement.

To comply with the *Shari'a*, *salam shukuk* must meet two basic conditions. First, the underlying *salam* contract or contracts must be consistent with Islamic Contract Law. It would be unlawful, for instance, for the contracts to call for delivery of a forbidden (*harām*) product, such as alcohol, pork, or pornographic materials.

Second, there is no secondary market for *salam shukuk*. It is not permissible for an investor to sell, negotiate, or otherwise transfer the certificates to any other party until the good that is the object of the *salam* contract has been delivered by the seller in that contract to the buyer. (Conversely, it is unlawful for a prospective buyer to purchase a *salam shukuk* before the delivery of the good.) One explanation is that a *salam* contract embodies a debt, namely, the debt of the seller to deliver the object of the contract. The *salam shukuk* are rather remote, i.e., delinked from, the risk-return ratio associated with this underlying object. Instead, the certificates are akin to a debt security. Allowing trading in *salam shukuk* could introduce an incentive to indulge in *ribā* in the debt of the seller to the buyer to deliver the good.<sup>4</sup>

Perhaps a clearer and more cogent reason there is no secondary market concerns ownership. It is generally forbidden (*harām*) to sell an object one does not own. That is the heart of the rationale against short-selling. *Salam shukuk* certificates represent ownership interests. But, if the underlying object of a *salam* contract has not been delivered, then the investor does not own anything until delivery. Selling the *salam shukuk* would be tantamount to the investor selling a thing the investor does not yet own.

As a related matter, it would be improper to sell the certificates not only before the good (e.g., cars, the purchase of which is financed by the IPO of the *salam shukuk* is delivered to the buyer (e.g., a car dealer), but also after the buyer itself starts to use or re-sell the good (e.g., the dealer re-sells the cars to retail buyers). Only in the brief period (if there is one) between the time the buyer takes delivery of the good and re-sells the good is there a window in which to engage in secondary market trading of the *salam shukuk*. In sum, investors in *salam shukuk* — unlike any

<sup>4</sup> See Iqbal & Mirakhor, *supra*, at 184. This rationale remains unclear, yet apparently no better one is readily available.

other type of Islamic bond investors — have to hold their instruments until they mature.

### (3) *Istisnā'* *Shukuk* (certificates in manufacturing)

*Istisnā'* *shukuk* are issued on the basis of proceeds from the manufacture of one or more products. *Istisnā'* *shukuk* holders have an ownership interest in the product that is being manufactured. For that interest, they pay a price, namely, the IPO price of the certificates. The revenues generated by the IPO are channeled to the manufacturer, to finance production. Once production is complete, the manufacturer sells the product to a third party, or to the public, thus generating proceeds. These sale proceeds are passed through to the *istisnā'* *shukuk* investors to pay off their investment, with a return.

Secondary market trading in *istisnā'* *shukuk* runs contrary to the *Shari'a*. The certificates are backed by a debt-like instrument, namely, the underlying *istisnā'* contracts, not by a physical assets or financial rights. By their nature, those contracts are an inter-personal debt, namely, of the manufacturer to the purchaser of an item to be produced by the manufacturer. Hence, trading in *istisnā'* *shukuk* after their IPO would raise concerns about money-for-money transactions and *ribā*.

### (4) *Murābaḥa* *Shukuk* (certificates in a *murābaḥa* operation)

The purpose of issuing *murābaḥa shukuk* is to finance banks that engage in *murābaḥa* transactions with consumers. The basic idea of a *murābaḥa* arrangement is a deal with the prohibition on *ribā*. The arrangement is one of sale and repurchase, which has the economic effect of being a non-interest bearing loan, because the contract is one for resale plus a stated profit.

For example, a consumer seeks to buy a home or car, goes to her bank, which buys the home or car for her, and sells it to her. She repays the bank in installments both the price the bank paid to acquire the home or car, plus a return or profit for the bank. How does the bank finance its initial acquisition of the home or car? One funding mechanism is *murābaḥa shukuk*. A bank issues these certificates to investors, receiving from them the IPO price. The bank uses the revenues from the offering of certificates to buy the home or cars (or, in practice, many homes and cars). As and when the customer of the bank makes installment payments, a portion of those payments is passed through to the investors. Until the final payments are made, the investors are joint owners of the underlying home or car, along with the bank. Upon final payment from the customer, the customer takes full ownership of the home or car.

Secondary market trading in *murābaḥa shukuk* is considered contrary to Islamic Law, specifically, the rule against *ribā*. Plainly, the asset or pool underlying *murābaḥa* certificates are cost-plus pricing transactions, namely, a sale with a promise to repurchase. The asset (e.g., home) or consumer good (e.g., car) that is the subject of the *murābaḥa* arrangement is not what backs the *shukuk*. That asset or good serves as security for the bank for the arrangement it enters into with a borrower. If the borrower defaults on its installment payments, then the bank has ownership of the asset or good, and can sell the item to be made whole. As for the

certificate, it is backed by an inter-personal debt, or more accurately, the debt of a person to an institution: the promise of the borrower to repay the bank not only the initial cost of the item, but also the profit amount stated in the *murābahah* contract the borrower signed with the bank. The certificate holders expect to receive a portion of that profit. Thus, a *murābahah shukuk* is supported by the cash of the borrower, or its promise to make good on its indebtedness. Trading in such *shukuk* would amount to trading money-for-money, and potentially violate the rule against *ribā*.

#### (5) *Mushārakah Shukuk* (certificates in project finance)

*Mushārakah* certificates are *shukuk* issued to establish or finance a project. The project becomes the property of the holders of the *shukuk*. The underlying project is structured as a *mushārakah* contract, which is similar to a *muḍārabah* arrangement, with a key difference: both parties (lender and borrower) contribute funds to finance the project, and if the project loses money, then both parties suffer a loss in proportion to their investment contributions.<sup>5\*</sup>

The *Mushārakah* bonds are managed on the basis of either general *sharikah* (partnership), or through a *sharikah al-muḍārabah*. Thus, a *mushārakah* arrangement is not a distinct form of partnership under the *Sharī'a*. Rather, the arrangement covers any project, including major infrastructure development such as the construction of air and sea ports, bridges, dams, power stations, roads, sewage treatment facilities, and water supply. In non-Muslim finance, the well-known term analogous to *mushārakah* is "project finance."

Thus, the IPO proceeds from *mushārakah shukuk* fund the partnership (whatever its form) that is actively engaged in that project. The project, when complete, is expected to generate revenues, such as tolls from a bridge, user fees from ports, and tariffs for power and water. Those revenues are passed through to the certificate investors. When the investors are all paid off, in terms of both their initial investment and a margin (such as sharing in some of the revenues from the project), then ownership of the project transfers from the investors to the partnership. Until then, the *shukuk* holders are joint owners, with the partnership, of the project. After full payment, the *shukuk* are retired.

#### (6) *Muḍārabah Shukuk* (certificates in a *muḍārabah* partnership)

*Muḍārabah shukuk* are also sometimes referred to as "*muḍāradah*" bonds. That is because Islamic legal scholars (*fukahā*) from the Ancient Schools of Mecca and Medina, along with the *Mālikī* School (the second oldest of the *Sunni* Schools, and an outgrowth of these Ancient Schools, founded by *Imām Mālik*, who came from Medina) eschew the term "*muḍārabah*."

Regardless of the appellation, in this type of *shukuk*, capital is provided by the *rabb al-māl*, i.e., the investor(s), commonly referred to as the sleeping partner(s). In exchange for contributing funds, the *rabb al-māl* receive *muḍārabah*

certificates. Consequently, the *rabb al-māl* are bond holders, or more accurately, certificate holders.

Conversely, the issuer of the certificates is (are) the working partner(s) (*muḍārib*). In effect, the *muḍārib* is an entrepreneur seeking capital for a particular project. In that respect, *muḍārabah shukuk* are analogous to a conventional, non-Muslim revenue bond. Such a bond is designed to finance a specific project, and it is backed only by revenues expected to be generated from the project upon completion.

Note an alternative structure also is possible. The issuer could be a third party that appoints a *muḍārib*, that is, workers, to manage the partnership. Under either structure, it is critical to appreciate that the investors (*rabb al-māl*) have no recourse to the *muḍārib*. That is, absent fraud, the entrepreneur is not personally liable to them if the project fails to generate revenue.

The same rules and requirements of *sharikah al-muḍārabah* apply to a *muḍārabah* partnership that backs this type of *shukuk*. The funding obtained by the *muḍārib* from the issuance of *shukuk* is put to use in the *muḍārabah* partnership. If and when profits are earned by the partnership, then the certificate holders receive a portion of them. When the venture is terminated, the partnership assets are sold, the proceeds used to pay off the certificate holders, and the *shukuk* retired.

#### (7) *Muzāra'ah Shukuk* (sharing cropping certificates)

*Muzāra'ah shukuk* are issued for the use of financing a project organized under the *Sharī'a* as a *muzāra'ah* association, that is, an agricultural sharecropping venture. The holder(s) of the certificates become partners in the farming enterprise. Typically, they would be the owners of a parcel of farm land. Practically speaking, that means the landowner — certificate holders have the right to a share of the crops from the land, as well as rights as joint owners of that land.

As for the tenant farmer who work the land, she use proceeds from the issuance of the *shukuk* to finance planting, growing, fertilizing, and harvesting operations, or other complementary farm activities. When the maturity date of the *muzāra'ah shukuk* arrives, the certificates are retired. The *muzāra'ah* arrangement that underlies the issuance of *muzāra'ah shukuk* is governed by the usual rules as any *sharikah al-muzāra'ah*.

Note that in certain *muzāra'ah shukuk*, the holders of the certificates do not own the land that is the subject of the sharecropping arrangement. In such cases, secondary market trading of the *muzāra'ah shukuk* is considered incompatible with Islamic Law. As per the ruling of the OIC *Fiqh* Council (quoted above), the certificates are backed not by a majority or hard assets, namely, real estate. Rather, the certificates are backed by the promise of the tenant farmer(s) to repay the indebtedness through the sharecropping arrangement. That is, the *shukuk* are debt-like instruments. Secondary market trading of them would amount to trading money-for-money, thus raising concerns about *ribā*.

\* See BRIAN KETTEL, FREQUENTLY ASKED QUESTIONS IN ISLAMIC FINANCE 71 (Chichester, West Sussex, United Kingdom: Wiley, 2010).



(8) *Musāqāh Shukuk* (irrigation certificates)

*Musāqāh shukuk* are certificates issued to raise funds for an irrigation project. The same conditions of *sharikah al-musāqāh* apply here. The purpose of this type is to finance in the project of watering farms. Partners in the underlying *musāqāh* arrangement — namely, the owner of agricultural property to be irrigated, and the worker(s) who provide(s) irrigation goods and services — receive shares of the outcome. They anticipate that outcome is an increased quantity and quality yield from the irrigated farm land. Upon maturity of the *shukuk*, the investors are paid off and the certificates retired.

Note that in certain *musāqāh shukuk*, holders of the certificates do not own the land that is the subject of the irrigation project. In such cases, secondary market trading of the *musāqāh shukuk* is incompatible with Islamic Law. Pursuant to the ruling of the OIC Fiqh Council (quoted above), the certificates are backed not by a majority or hard assets, namely, real estate. Rather, the certificates are backed by the promise of the tenant farmer(s) to repay the indebtedness through the yield from the irrigation project. Accordingly, the *shukuk* are debt-like instruments. Secondary market trading of them would amount to trading money-for-money, thus raising concerns about *ribā*.

(9) *Mughārasa Shukuk* (agricultural seed planting certificates)

*Mughārasa shukuk* are certificates issued to finance the planting of trees or other farm-related products. That planting is done on the basis of a type of contract known as "*mughārasa*." This kind of contract is one for planting, but specifically of agricultural commodities. This specification does not mean the subject matter of the contract need be narrow. Any kind of lawful crop may be the subject of a *mughārasa* contract. Obvious examples are cotton, dates, oranges, and wheat. A less obvious example might be seeding a large tract of land for trees that later will be used for timber, and milled into lumber for construction purposes. Arguably, aquaculture (i.e., harvesting certain kinds of fish for consumption) might qualify.

The issuer of *mughārasa shukuk* is the owner (or owners) of land that is the subject of a *mughārasa* contract. The purpose of the issuance is for the owner to finance planting operations under that contract. The investors — the *shukuk* holders — become partners with the landowner in the venture. Their certificates represent a joint ownership stake in the items planted, and also in the land on which those items are planted. The underlying *mughārasa* contract lays out their rights and duties as joint owners. Investors in the certificates receive a share of the profits from the revenues resulting from the agricultural products, the seeding of which their initial investments funded. Upon maturity of the *shukuk*, the investors are paid off and the certificates retired.

## § 30.02 INNOVATIONS AND CHALLENGES FOR PRIVATELY-ISSUED *SHUKUK*

The list above of nine types of Islamic bonds is not exclusive. Through the ingenuity of financial professionals, new, *Shari'a* compliant *shukuk* are being, and will continue to be, developed to suit changing market needs. Indeed, failure to innovate

likely would lead to the decline of Islamic finance, either in absolute terms or in comparison with conventional non-Muslim finance.

One example of new Islamic financial technology is noteworthy. It spotlights a difference of opinion among *Shari'a* scholars in the Far East and Middle East, and thereby points to an observation made later on — the attractions of Kuala Lumpur, Malaysia as an Islamic financial center:

*Shukuk* based on *Bai' Bithaman Ajil* (BBA) is an innovation of the Malaysian market. The contract is based on a sale of an asset to the investors, with a promise by the issuer to buy the asset back in the future at a pre-determined price, which includes a margin of profit as well. Therefore, the issuer gets immediate cash against the promise to buy back at the purchase price, plus a pre-agreed profit, which creates an obligation to be released over an agreed period. The issuer issues securities (*shukuk*) to the investors to reflect this financing arrangement. Investors expect to earn a return equal to the pre-agreed profit.

This structure is not very popular with the Middle Eastern investors, because of a debatable *Shari'a* issue, which does not accept [*sic*] the tradability of debt created through [the] BBA arrangement. In addition, some BBA issuances in Malaysian markets are based on financial assets — an objectionable practice in the eyes of *Shari'a* scholars in the Middle East.<sup>6</sup>

The international disagreement is healthy. Innovation in finance comes not from self-satisfied complacency and lazy acceptance, but rather from non-violent struggle and reasoned argument. That is true whether or not the drive for profit is subordinated to religious and moral doctrine.

There are still other illustrations of new technology in respect of *shukuk*. For instance, Islamic bonds may be backed by agreements that create the right of one or more parties to use an existing or described future asset, the services of a particular party, or of specified services to be provided in the future. The certificates could represent an ownership interest in the right to use a current or soon-to-be-built scientific laboratory, the performances of a famous singer, or even satellite launch facilities.

To achieve continued growth through innovation requires addressing certain challenges that the market for *shukuk*, both private and sovereign, face. One problem discussed at the outset is the lack of secondary market trading for certain kinds of Islamic bonds. A corollary issue is that where secondary market trading does exist, the values and volumes are thin. That is, for *shukuk* for which secondary market trading is permissible, the activity level is not robust. Prospective investors like to see a highly liquid secondary market for a financial instrument they are considering buying. That is, they prefer an instrument for which there is strong secondary market demand. For some *shukuk*, however, demand is weak. Consequently, the spread between bid and ask prices (i.e., what buyers offer to pay, and what sellers ask as payment) is large. The weakness in demand is due to a number of factors, one

<sup>6</sup> Iqbal & Mirakhor, *supra*, at 184.



of which may be low levels of supply. In other words, by increasing the supply of Islamic bonds, investors may be persuaded they can be traded easily in a broad, deep retail market.

A second problem concerns the inchoate asset securitization market in many Muslim countries. In the discussion above, frequent reference is made to an asset or pool of assets that underlie an issuance of Islamic bonds. In reality, most offerings (up to at least 2007) have been backed by a single real asset, not a large pool of assets. That practice is adequate for a large issuer, such as a large business association or a government. But, it is ill-suited for small and medium-sized enterprises (SMEs), including some banks, which simply do not own or have access to a single large asset. They would like to raise capital on a small or medium-sized scale, but the assets they have to back a bond offering may be not large enough to make a *shukuk* transaction financially viable. For them, the solution is asset securitization. They need to be able to sell assets on their balance sheet to entities willing to re-package and pool their assets with other like assets. Yet, securitization among Islamic banks has not occurred to a significant degree. In other words, modestly-sized Islamic banks need to engage to a greater extent in asset securitization so that they can remove assets from their balance sheet, and thereby enhance the liquidity of their portfolios.

A third problem concerns the pricing of *shukuk*. From the perspective of a business association or sovereign entity seeking funding, a bottom-line question is cost: how much will the issuer have to pay investors to get their funds? With conventional non-Muslim bonds, the answer is the interest rate, and the higher that rate, the higher the cost of funds. With Islamic bonds, the answer is cast in terms of sharing in a stream of collateralized cash flows, i.e., profit sharing in respect of revenues generated by the underlying asset or pool. From the perspective of investors, the bottom-line question involves a risk-return trade off: how much of a return is required in relation to the risk associated with holding the bond? The intersection point of the issuer and investor interests is, in effect, the equilibrium, market-clearing agreement between the two sides.

Conventional non-Muslim bonds are priced in relation to a risk-free rate, which is the rate associated with United States Treasury securities. That is, the cost of funding to issuers, and the returns to investors, are gauged against an instrument that is seen as having no serious credit or other risks, because of the full faith and credit backing of the American government. Sometimes, the funding costs and returns are measured against a widely-quoted market interest rate. One such rate is the Fed Funds rate, which is the interest rate banks charge to other banks for loans, i.e., it is an inter-bank rate in the United States, specifically on short-term, usually overnight, loans of balances, called "federal funds," which depository institutions hold in accounts at their local Federal Reserve Bank. Another such rate is LIBOR, the interest rate in the London wholesale (i.e., inter-bank) dollar market. LIBOR is comparable to the Fed Funds rate, but pertains to offshore dollar-denominated unsecured loans between banks. Still another such rate is EURIBOR, the Euro Inter-Bank Offered Rate, which is a wholesale rate for unsecured euro loans between banks. The Fed Funds rate, LIBOR, and EURIBOR are quoted daily.

Thus, a conventional, non-Muslim bond may be said to offer an interest rate of "200 basis points above LIBOR." Each basis point is one-one hundredth of a percent (0.01 percent). Thus, this statement means the bond pays 2 percent above LIBOR. This statement may pertain to the fixed (coupon) rate, if the bond pays such a rate. Alternatively, if the bond offers a floating rate, then the statement may refer to that rate, which varies inversely with the price of the bond.

Islamic bonds, too, are measured against the same indexes of market interest rates. For example, issuers ask how much above LIBOR it will cost them to float an offering of *shukuk*. Prospective investors ask how much they will obtain above LIBOR from buying the *shukuk*. These questions do not imply the *shukuk* pay an interest rate — manifestly, as *Shari'a* compliant instruments, they do not. Rather, these questions indicate the bottom-line trade-offs that issuers and investors — be they Muslim or non-Muslim — must consider when making hard financial choices.

Generally speaking, conventional non-Muslim bonds and *shukuk* have been competitive with one another in terms of pricing. Stated differently, the spreads — the return they offer vis-à-vis an appropriate index — are relatively similar. Given that markets for conventional, non-Muslim bonds are more liquid than those for *shukuk*, that competitiveness is an accomplishment for Islamic bonds. The challenge for Islamic bonds is to continue to be competitive in this respect, without losing their distinctive character as instruments that comport with a religious and moral paradigm. Doing so will require greater transparency among market participants and governmental authorities, and greater efficiency and reduced transactions costs in securities markets. In turn, transparency and efficiency are hallmarks of the rule of law, thus its advancement is essential if Islamic bonds are to flourish in a globally competitive environment.

### § 30.03 RISKS ASSOCIATED WITH *SHUKUK*

#### [A] Distinction Between "Asset-Backed" and "Asset-Based"

Any *shukuk* offering is structured to avoid the Islamic prohibition on interest (*riba*). Prospective investors should not be lulled into complacency that because the offering comports with the *Shari'a*, they are free of uncertainty. Ethical satisfaction does not mean financial risk minimization.

Of great importance in the *shukuk* market is the distinction between an "asset-backed" versus and "asset-based" security. The former category implies that the participation certificates reflect an ownership interest in "hard" assets that underlie the *shukuk*. The latter category means that the certificates embody an ownership interest in the cash flows generated by the underlying assets, but not the assets themselves. In other words, asset-backed *shukuk* are collateralized with property, but asset-based *shukuk* are collateralized with the income stream from property.<sup>7</sup> The key consequence occurs in the event of a default: holders of an asset-backed *shukuk* can lay claim on specific assets that have been pooled in a

<sup>7</sup> As many as 90 percent of *shukuk* are not collateralized by real property. See *Shukuk It Up*, TUE ECONOMIST, 17 April 2010, at 82-83 (quoting Anouar Hassoune of Moody's: "Many *shukuk* holders have a



special purpose vehicle (such as a special purpose *muḍārabah*), whereas holders of an asset-based *shukuk* cannot do so.

This distinction became apparent, and internationally renowned, in the fall 2009, when \$24 billion of *shukuk* issued by Dubai World and its subsidiary, Nakheel, a troubled property developer in Dubai, United Arab Emirates (UAE) required restructuring. Dubai World and Nakheel had run up too much debt, and could not make payments on schedule to holders of its *shukuk*. Ultimately, Abu Dhabi stepped in to shore up damaged investor confidence, and a restructuring deal, without a UAE government bailout, was agreed to in March 2010. The episode taught investors the Nakheel *shukuk* did not represent ownership claims on real property in Dubai, but rather on cash flows from income generated by that property. With the global economic downturn, that income flow was a trickle. The certificates were asset-based, not asset-backed. Had there been a default, creditors (i.e., *shukuk* investors) could not have looked for relief to specific underlying assets, which in any event declined in value with the Dubai property market crash.

### [B] Credit Risk

With an asset-based *shukuk*, property underlying the certificates is not truly sold to the special purpose vehicle created for the transaction. Rather, the assets remain on the balance sheet of the issuer, such as Nakheel. Hence, prospective investors ought to scrutinize the balance sheet (and income statement) of the issuer. After all, should they decide to invest in the *shukuk*, they take on three credit risks:

- First, the risk that the underlying assets might not generate income for them.
- Second, the risk that the assets themselves are or turn sour.
- Third, the risk that the issuer might default on the certificates.

Consequently, prospective investors ought to demand clarity and transparency from the issuer.

In particular, prospective investors must engage in due diligence to uncover who owns what assets, the quality of those assets and reliability of income streams from them, and what they can look to in the event of default to get repaid. The need for them to do so was apparent not only in the Nakheel *shukuk* case, but also in two other instances, which involved actual defaults in 2009-2010: *shukuk* issued by East Cameron Partners, an American oil and gas producer, and Saad Group, a Saudi conglomerate.<sup>8</sup> East Cameron was a poor credit risk, with a CCC+ rating when it issued *shukuk*, and Saad Group was alleged to have engaged in fraud.

perception that they hold a security that is collateralized. In 90% of cases, that is incorrect.”). [Hereinafter, *Shukuk It Up*.]

<sup>8</sup> See *Shukuk It Up*, *supra*.

### [C] Legal Risk

Questions about credit risk intimate another risk investors in any *shukuk* offering (whether asset-based or asset-backed) take on: legal risk. “Legal risk” is the uncertainty created by rules potentially applicable to a transaction, or the lack of such rules. In practice, many *shukuk* deals are governed by the law of England. That is not a surprise, given the well-developed commercial laws of that country and the premiere international financial status of London. Yet, the assets backing or basing *shukuk* are located outside England, such as in Persian Gulf countries. If a default occurs, and a case is brought in English court, how can investors be sure that any judgment in their favor will be enforced in a foreign jurisdiction?

Of course, this problem is not unique to *shukuk*. Rather, it arises whenever there is a divergence between the country whose law is chosen to govern a security and the country in which assets related to that security are located. In other words, as *The Economist* rightly stated: “Enforceability is an issue in any cross-border transaction.”<sup>9</sup>

### [D] *Shari’a* Risk

Still another risk demanding the attention of prospective *shukuk* investors, which is peculiar to Islamic finance, is dubbed “*Shari’a* risk.” It is the uncertainty that an issuer will not make timely payments to *shukuk* holders on the ground that the transaction is not truly compliant with the *Shari’a*. This matter ought to be one sorted out well in advance of a public offering of certificates. It seems disingenuous of an issuer to argue later on that it lacks the legal capacity to perform its obligations because, in retrospect, the transaction offends Islamic Law.

Nevertheless, this argument was made by Investment Dar, a Kuwaiti investment firm that defaulted on *shukuk* it issued in 2010, principally because it was too dependent on short-term debt for funding its operations.<sup>10</sup> Note that while the epithet “*Shari’a* risk” obviously arises in an Islamic context, the possibility a counterparty will not carry through on its duties, invoking the argument it lacks legal capacity to do so, is a generic one, not unique to Islamic finance.

## § 30.04 SOVEREIGN *SHUKUK*

### [A] Need for Sovereign *Shukuk*

Official public bodies issue debt instruments to finance their operations. Famous examples in non-Muslim countries are the United States government, which issues three basic types of Treasury securities to finance the public deficit, namely, Treasury bills (T-bills), which are short-term instruments, generally with a maturity of less than one year; Treasury notes (T-notes), which are medium-term instruments, typically with a maturity of between two and five years; and Treasury bonds, which are long-term securities with a maturity in excess of 10 years, and as

<sup>9</sup> *Shukuk It Up*, *supra*.

<sup>10</sup> See *Shukuk It Up*, *supra*.

long as 30 years. American Treasuries are regarded by the international financial community as the safest investment vehicles in the world, a tribute to the relative strength of the American economic and political system, and the certainty and predictability afforded by the legal system. Thus, interest rates associated with Treasuries are known as the "risk free" rates. The United Kingdom, of course, is another well-known, highly-regarded issuer of bonds. Known as "gilts," Her Majesty's Treasury (HMT) routinely issues these securities to finance the public sector borrowing requirement (PSBR), *i.e.*, the British government deficit.

Muslim countries are no exception in terms of needing to finance gaps between tax revenues and government outlays. Debt certificates — *shukuk* — are an important tool for them to do so, and one that comports with the *Shari'a*. In fact:

The market for the *shukuk* was originated by government entities. Although the market is still dominated by the sovereign issues, gradually corporate [*i.e.*, business associations'] issues are also emerging. In terms of total amount outstanding, the current ratio (as of 2007) between sovereign and corporate *shukuk* is 3.5 to 1. With a growing market for *shukuk*, many conventional rating agencies, including Standard & Poors (S&P) and Fitch [*i.e.*, FitchRatings], have started to rate select issues. For example, S&P has now designed a methodology to rate *ijara*-based *shukuk*. In another positive development, Dow Jones has announced plans to constitute a *Shukuk* Index to monitor the performance of this market. [The Dow Jones Citigroup *Shukuk* Index was launched in Kuala Lumpur on 17 March 2006. It was the world's first Islamic bond index.] Another particularly encouraging sign in the *shukuk* market is that it is no longer the sole preserve of specialist Islamic issuers or investors. For example, 48% of a recent sovereign issue was subscribed for by conventional [non-Muslim] investors, including 24% by institutional investors, 11% by fund managers, and 13% by central banks and government institutions.<sup>11</sup>

Thus, for example, the governments of Bahrain, Kuwait, Malaysia, Pakistan, Qatar, and the United Arab Emirates (UAE) have issued *shukuk*, as has the Islamic Development Bank (IDB).<sup>12</sup> As the above passage implies, sovereign *shukuk* offerings helped advance the market for private businesses to float Islamic bonds.

As the above passage also suggests, sovereign issuers are not confined to governments of Muslim countries. Likewise, the investment banks that design, and the agencies that rate, sovereign *shukuk* offerings need not be Muslim. In June 2004, the Saxony — Anhalt State Properties of Germany raised €100 million through an IPO of *shukuk* with a 5-year tenor and spread of 1 percent over the EURIBOR index. Its advisors were CitiGroup and the Kuwait Finance House (KFH), and it had an AA rating from S&P and an AAA rating from Fitch. In April 2005, the World Bank issued U.S. \$760 million of *shukuk* with a 5-year maturity (and no defined spread against an index). Financial advisors to the World Bank were the CIMB Group (incorporated in Malaysia in 1974, and headquartered in Kuala Lumpur) and ABN Amro Bank Berhad (based in Kuala Lumpur, and which since late 2007 has been

part of the Royal Bank of Scotland Berhad).

With IPO and secondary market interest in *shukuk* among Muslims and non-Muslims alike, it should not be surprising that stock exchanges outside of Muslim countries list Islamic bonds. The first European stock exchange to list *shukuk* was the Luxembourg Stock Exchange. All major *shukuk* offerings are listed on this Exchange. As of September 2008, there were fourteen different *shukuk* listings on that Exchange, with a total market value of \$5.5 billion. In brief, the sovereign *shukuk* market is a truly an ecumenical one, which is fitting in an era of globalization.

Indonesia is a prominent example of a Muslim country using *shukuk* to finance its operations. In 2008, the Indonesian government passed Law Number 19, which recognizes sovereign *shukuk* as a lawful financial instrument. The previous law had defined a "bond" as a long-term debt security that paid interest to holders of that security. That definition did not work for *shukuk*. First, *shukuk* are not long-term debt instruments. Rather, they are certificates of participation. Second, because of the rule against *riba*, *shukuk* do not involve any interest.

Thus, Law Number 19 defined "sovereign *shukuk*" as an issuance by the state of commercial paper based on the *Shari'a*. That definition clearly implies the purpose of sovereign *shukuk* is to raise funds for the issuing government on a basis that complies with Islamic Law, and thereby involves sharing of profits, or provision of a fee or margin, to investors, as well as repayment of capital investments to them. Note that the reference to "commercial paper" is interesting, because in Wall Street parlance that term refers to short-term promises to pay (IOUs) issued by prime corporate borrowers, and the issuers attract investors by paying them interest on top of principal. Note, too, that in Indonesia, an *Ulema* Council exists. Its activities include the issuance of *fatwas*, *i.e.*, well-thought out rulings, on *Shari'a* topics, including issues pertaining to *shukuk*.

## (B) How Sovereign *Shukuk* Work

At bottom, every *shukuk* issuance involves certificates of participation against assets. In a sovereign *shukuk* deal, the underlying assets are state-owned assets that are engaged in certain kinds of transactions. The defining feature, therefore, of public *shukuk* is government ownership of the asset pool used to back the certificates. What kinds of transactions are permissible (*halal*)? That is, what are the activities in which state-owned assets backing a sovereign *shukuk* floatation may be engaged?

The answer is the same as the list that is permissible for private *shukuk* offerings. This list includes, but is not limited to, the following *halal* transactions:

- *Mudārabah*, *i.e.*, a profit-sharing partnership between a sleeping partner (*rabb al-māl*) and working partner(s) (*mudārib*), with profits generated by a project using state-owned assets, with the sleeping partner funding the project, and the working partners engage in the project through their work. For example, a government may issue *shukuk* to raise funds for its Ministry of Finance by establishing a social security trust fund. Note that in a sovereign *mudārabah shukuk* transaction, the issuer is the *mudārib*, and the bondholder(s) is (are) the *rabb al-māl*.

<sup>11</sup> Iqbal & Mirakhor, *supra*, at 185-186.

<sup>12</sup> See Iqbal & Mirakhor, *supra*, at 187-188, Table 8.1A, Sovereign *Shukuk*.



- *Mushārakah*, i.e., project finance whereby proceeds from an IPO of *shukuk* are used by a partnership to fund establishment or development of an infrastructure or other major public works project. For instance, a government may issue *mushārakah shukuk* to raise funds so that its Ministry of Transportation can upgrade a railway network.
- *Murābaḥah*, i.e., a sale and repurchase arrangement, which has the economic effect of being a non-interest bearing loan, because the contract is one for resale plus a stated profit. For example, a government may issue *murābaḥah shukuk* to raise funds for its Ministry of Housing, so that it may help citizens buy homes.
- *Salam*, i.e., deferred delivery contracts. For instance, a government may issue *shukuk* to raise funds for its Ministry of Energy to purchase a commodity such as oil or natural gas at a favorable price, with delivery six months hence. (In effect, the underlying transactions would be forward energy contracts.)
- *Istisnāʾ*, i.e., a contract for manufacturing one or more objects. For example, a government may issue *istisnāʾ shukuk* to raise funds for its Ministry of Commerce, which seeks to build a steel plant.
- *Ijārah*, i.e., a contract for the hiring or leasing of a good or service. For instance, in August 2008, the government of Indonesia issued sovereign *ijārah shukuk* with a ten-year tenor, maturing in August 2018. The yield on these *shukuk* (as of May 2009) was roughly 11 percent.

Thus, sovereign *shukuk* may be *muḍārabah shukuk*, *mushārakah shukuk*, *murābaḥah shukuk*, *salam shukuk*, *istisnāʾ shukuk*, or *ijārah shukuk*. Differences turn simply on how the underlying pool of state assets is put to use. Note, therefore, that state-owned assets may not be engaged in the production or distribution of immoral goods or services, such as non-*halal* foods or gambling, or conventional interest-bearing financial transactions.

Logistically, the basic transaction to create a sovereign *shukuk* of any of the aforementioned types is quite similar to that for a floatation of private *shukuk*. The differences are relatively minor, and pertain to the involvement of the government issuer and the pool of state-owned assets. Accordingly, the basic outline of steps is as follows:

- A government establishes a Special Purpose Vehicle (SPV).
- For an *ijārah shukuk*, the SPV purchases state assets from the government, thereby taking beneficial title to those assets. The SPV then hires or leases out the assets, collects rental income from the users of the hired or leased assets, and passes this income through to the holders of *shukuk* certificates.
- For all other types, the issuer government and SPV enter into a *muḍārabah* agreement. The issuer of the *shukuk*, which is the SPV (explained below), is the working partner (*muḍārib*), and the government is the sleeping partner (*rabb al-māl*). The state assets are the subject of the partnership, from which profits are generated and passed through by the SPV to investors in the *shukuk*.

- In the case of *muḍārabah shukuk*, there may be two levels of *muḍārabah* partnership. The first level is as explained above. The second level is a *muḍārabah* arrangement between the SPV as issuer and the investors as bondholders. The SPV is the working partner (*muḍārib*). The bondholders are the sleeping partners (*rabb al-māl*). The bondholders are entitled to receive a share of profits generated by the underlying assets.
- The government issues a purchase undertaking, whereby the government agrees to buy back the state-owned assets when the *shukuk* mature.
- The SPV issues *shukuk* to investors through an IPO, which may be listed on a prominent stock exchange, such as the Luxembourg Stock Exchange. Technically, then, from a legal perspective, it is the SPV that is the *shukuk* issuer. However, in common financial parlance it is said the government is the issuer, because it owns and operates the SPV.
- The IPO generates proceeds — the purchase price of the certificates — that the SPV passes through to the government. The government then uses those proceeds for the project that is the purpose of the *shukuk* floatation.
- The government leases the asset that underlies the *shukuk* from the SPV. Thus, the government pays rent to the SPV. This rental fee is distributed by the SPV to the *shukuk* holders.
- On the maturity date for the *shukuk*, the SPV sells back the underlying assets to the government. The government, of course, pays for the assets. The SPV passes through this payment to the investors, thereby paying off and retiring the certificates.

In sum, the design, issuance, and trading of sovereign *shukuk* are relatively straightforward, and closely akin to that of private *shukuk*. Functionally, sovereign *shukuk* serve the funding needs of governments, a role by no means limited to Muslim countries, and have an increasingly prominent profile in global financial markets.

## Chapter 31

### FINANCE (*TAMWEEL*): INSURANCE (*TAKAFUL*) AND MONEY TRANSFERS (*HAWĀ LAH*)

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Religion is insurance in this world against fire in the next.

Anonymous.

#### SYNOPSIS

##### § 31.01 CONVENTIONAL NON-ISLAMIC INSURANCE PRODUCTS

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- [B] Government Insurance Products
- [C] Private Insurance Products
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##### § 31.02 DEFINING “*TAKAFUL*”

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##### § 31.05 HOW MODERN *TAKAFUL* WORKS

##### § 31.06 *HAWĀ LAH* BANKING TRANSACTIONS

- [A] Definition of “*Hawālah*” and Sources for Permissibility (*Mubāh*)
- [B] Three Conditions
- [C] Hypothetical *Hawālah* Transactions
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##### § 31.01 CONVENTIONAL NON-ISLAMIC INSURANCE PRODUCTS

###### [A] Definition

At bottom, insurance is a mechanism to allocate risks among parties. Risk is inherent in any human endeavor.<sup>1</sup> Through the ages, insurance developed to transfer and distribute that risk. Thus, insurance companies arose to cover the risk of a party willing to make regular payment, which is most often the case, to

<sup>1</sup> See generally, PETER L. BERNSTEIN, *AGAINST THE GODS — THE REMARKABLE STORY OF RISK* (New York, New York: John Wiley & Sons, 1998) (chronicling the history of risk and risk management).



minimize or eliminate that risk. In brief, to buy insurance is to enter into "an agreement in which one party (the insurer), in exchange for a consideration provided by the other party (the insured), assumes the other party's risk and distributes it across a group of similarly situated persons, each of whose risk has been assumed in a similar transaction."<sup>2</sup>

To be sure, most, if not all, commercial contracts allocate risks between its parties in some manner. A simple contract of sale allocates risk between buyer and seller. A difficulty encountered from the outset is the definitional concern regarding what is "insurance." In *Jordan v. Group Health Associations* the United States Court of Appeals for the District of Columbia Circuit stated that a contract is an insurance contract, as distinct from a non-insurance commercial contract, if the principal object and purpose of it is the assumption and distribution of risk.<sup>3</sup> The rationale for its holding is:

[t]hat an incidental element of risk distribution or assumption may be present should not outweigh all other factors. If attention is focused only on that feature, the line between insurance or indemnity and other types of legal arrangement and economic function becomes faint, if not extinct.<sup>4</sup>

Though decided in 1939, *Jordan* still is a leading authority for determining what qualifies as an insurance contract.<sup>5</sup> More recently, in 1987 in *Griffin Systems v. Washburn*, the Illinois Court of Appeals articulated the four elements of an insurance contract:

(1) [A] contract between an insurer and insured that exists for a specific period of time, (2) an insurable interest possessed by the insured, (3) consideration in the form of a premium paid by the insured to the insurer, and (4) the assumption of risk by the insurer who agrees to indemnify the insured for potential loss resulting from specified perils.<sup>6</sup>

Yet, even the identification of these four elements has not settled the issue of whether a contract is an "insurance" contract in the United States.

A significant complicating factor is bifurcated regulation of the insurance industry between the federal government and the states. In *United States v. South-Eastern Underwriters Association*, the United States Supreme Court "held that insurance transactions were subject to federal regulation under the Commerce Clause,"<sup>7</sup> and thus within the sole purview of the federal government. Fear of a patchwork of regulation animates such a holding. But, insurance companies actually prefer the established — and lax — regulation of their industry by state

<sup>2</sup> ROBERT H. JERRY, II, *UNDERSTANDING INSURANCE LAW* 17 (New Providence, New Jersey: LexisNexis, 2<sup>nd</sup> ed., 1996). [Hereinafter, JERRY.]

<sup>3</sup> 107 F.2d 239 (D.C. Cir. 1939) (cited in JERRY, *supra*, at 21).

<sup>4</sup> 107 F.2d 239, 247-48 (D.C. Cir. 1939) (quoted in JERRY, *supra*, at 21).

<sup>5</sup> See JERRY, *supra*, at 21; Orice M. Williams, *Definitions of Insurance and Related Information*, Government Accountability Office Report, GAO-06-424R at 2 (23 February 2006), posted at [www.gao.gov/cgi-bin/gettrpt?GAO-06-424R](http://www.gao.gov/cgi-bin/gettrpt?GAO-06-424R). [Hereinafter, 2006 GAO Report.]

<sup>6</sup> 505 N.E.2d 1121, 1123-24 (Ill. App. Dist. 1987) (quoted in 2006 GAO Report, *supra*, fn. 2 at 3).

<sup>7</sup> JERRY, *supra*, at 57 (citing 322 U.S. 533 (1944)).

authorities.<sup>8</sup> The *McCarran-Ferguson Act* was passed in the wake of the *South-Eastern Underwriters* decision.<sup>9</sup> This *Act* gives states explicit, almost exclusive authority to regulate the business of insurance.<sup>10</sup> Thus, when litigation occurs in which the definition of "insurance" is relevant, states have latitude to define the term in the manner their legislatures and courts see fit.

## [B] Government Insurance Products

Government and private entities provide insurance coverage. The vast majority of insurance policies are privately issued. But, a prominent area of coverage by many developed country governments is health insurance.

In the United States, Medicare is available to Social Security recipients who are over 65 years of age or are disabled.<sup>11</sup> A portion of income tax paid by American citizens and residents funds this program. Medicaid also, in effect, insures health of low-income persons, though it is not technically an insurance plan.<sup>12</sup> Other United States government insurance programs cover crop insurance,<sup>13</sup> flood insurance,<sup>14</sup> bank deposit insurance,<sup>15</sup> loan and mortgage insurance,<sup>16</sup> insurance for damage caused by nuclear power-generation accidents,<sup>17</sup> insurance against political risk for businesses exporting goods overseas,<sup>18</sup> insurance against expropriation by a foreign government of American-owned assets held overseas,<sup>19</sup> and crime insurance for urban property owners unable to obtain affordable coverage.<sup>20</sup> Many of these public insurance schemes have undergone considerable revisions — particularly health care — in recent years.

<sup>8</sup> JERRY, *supra*, at 57.

<sup>9</sup> 15 U.S.C. §§ 1011 et seq. (cited in JERRY, *supra*, at 57).

<sup>10</sup> 15 U.S.C. §§ 1011 et seq. (cited in ROBERT H. JERRY, II, *UNDERSTANDING INSURANCE LAW* 57 (2d ed., 1996)). Section 1 of this *Act* states that "Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States."

<sup>11</sup> JERRY, *supra*, at 46.

<sup>12</sup> See JERRY, *supra*, at 47.

<sup>13</sup> JERRY, *supra*, at 47 (citing *Federal Crop Insurance Act*, 7 U.S.C. §§ 1501-1520).

<sup>14</sup> JERRY, *supra*, at 47 (citing *National Flood Insurance Act of 1968*, 42 U.S.C. §§ 4001-4128).

<sup>15</sup> JERRY, *supra*, at 47-48 (citing *Federal Deposit Insurance Act*, 12 U.S.C. §§ 1811-1832).

<sup>16</sup> JERRY, *supra*, at 48 (citing *National Housing Act of 1944*, 24 C.F.R. § 200.1).

<sup>17</sup> JERRY, II, *UNDERSTANDING INSURANCE LAW* 48 (2d ed., 1996) (citing *Price-Anderson Act of 1957*, 42 U.S.C. § 2210).

<sup>18</sup> JERRY, *supra*, at 48 (citing 12 U.S.C. § 635).

<sup>19</sup> JERRY, *supra*, at 48 (citing 22 U.S.C. § 2191).

<sup>20</sup> JERRY, *supra*, at 48 (citing *Urban Growth and New Community Development Act*, 42 U.S.C. § 4501).

### [C] Private Insurance Products

Though states have the latitude to define insurance in different ways, the actual, as opposed to potential, differences in definition are not great. The National Association of Insurance Commissioners has developed the Uniform Product Coding Matrix ("UPCM") to categorize insurance products. This schema applies to non-Muslim insurance products. It is vital to understanding the insurance industry and products offered, because insurance rates and policy forms are based upon the UPCM template.<sup>21</sup> Broadly, an insurance product first is classified into property or casualty products, or into life, accident or health products.<sup>22</sup> Table 31-1 further explains the UPCM.<sup>23</sup>

Table 31-1:  
Categories of Non-Muslim Insurance

Category of Insurance	Description
Property or Casualty	Coverage against loss or damage to property and liabilities to third parties resulting from such loss, damage, or other event
Life, Accident, Health, Annuity, and Credit	Continuing Care Retirement Community
	Credit Insurance
	Health Insurance
	Health Maintenance Organization
	Life Insurance
	Long-Term Care Insurance
	Medicare Supplement
	Multiline
	Viatical Settlements

Even the UPCM template does not capture all insurance policies offered in the non-Muslim world. Many policies contain significant components that fit into more than one of the above-listed categories. Table 31-2 sets out the most common such

policies.<sup>24</sup> Moreover, in its economically rational profit-seeking behavior, the insurance industry is creative. It offers an array of vehicles against nearly any risk imaginable.

Table 31-2:  
Common Forms of Non-Muslim Life Insurance Products

Product	Description
Accident	Coverage for death, dismemberment, disability, or hospital and medical care caused by or necessitated as a result of specified accidents
Credit Disability	Makes monthly loan/credit transaction payments to the creditor upon disablement of an insured debtor
Credit Life	Coverage sold in connection with loan and credit transactions to provide protection against death
Credit Insurance	Coverage of an obligation to a creditor upon the death or disablement of the insured debtor; includes coverage to protect the value of collateral for a loan
Disability Income	Coverage to compensate an insured individual for a portion of the income he or she loses because of a disabling injury or illness
Employee Benefit Liability	Liability protection for employers against employee claims such as wrongful termination or improper calculation of employee benefits from pension plans, group life, health, or disability income insurance, or accidental death and dismemberment insurance
Employers Liability	Coverage for the legal liability of employers arising out of injury to employees
Workers' Compensation	Coverage for an employer's liability for injuries, disability, or death to a person in the scope of his or her employment, without regard to fault, as prescribed by state or federal workers' compensation laws or other statutes

### [D] Investment Products

Insurance products containing an investment product and attendant risk require further attention. That is because an additional level of regulation may be needed. Some insurance products include an annuity, variable annuity, or an equity-indexed annuity. If the policy includes only an annuity, then there is not typically any investment risk, except perhaps a currency risk, because a series payments are guaranteed for a fixed term or until the death of the policyholder.<sup>25</sup> No further regulation or oversight is needed, as the investment risk is minimal.

But, if the policy contains a variable annuity — that is, an annuity based upon the performance of certain investments — then a policyholder has a substantial investment risk. As such, the United States Securities and Exchange Commission

<sup>21</sup> See 2006 GAO Report, *supra*, at 3.

<sup>22</sup> See 2006 GAO Report, *supra*, at 3.

<sup>23</sup> See 2006 GAO Report, *supra*, at 25.

<sup>24</sup> This Table is adapted from 2006 GAO Report, *supra*, at 42.

<sup>25</sup> See 2006 GAO Report, *supra*, at 36.



(SEC), plus some states, regulate this product as a "security."<sup>26</sup> If a policy includes an equity-indexed annuity pegged to, for instance, the Standard & Poors (S&P) 500, then that policy also may be further regulated, if it qualifies as a "security."<sup>27</sup> Often, these policies are less likely to be considered securities than ones containing a variable annuity. That is because policyholders incur less investment risk, as the contract for this policy usually guarantees at least a minimum return.<sup>28</sup>

A finite risk contract typically "transfer[s] less insurance risk than traditional reinsurance or insurance."<sup>29</sup> The subject of these contracts are almost always financial in nature "allow[ing] the insured to transfer to a reinsurer or insurer both insurance risk and uncertainties about the timing of certain cash flows and recognition of certain income and expenses."<sup>30</sup> The difficulty with these sorts of contracts is to determine whether risk is sufficiently transferred in order to legitimately impact the insured's financial health in a manner regulators find appropriate.

### [E] Reinsurance

In the past 30 years, reinsurance has become an increasingly prominent feature of the global insurance industry. Essentially, reinsurance is insurance for insurance companies. Reinsurance offsets risk to a primary insurer from potential liability associated with insurance policies the primary insurer has issued. Thus, an insurance company, the primary insurer, which previously issued a bundle of individual policies, collectively insures these policies with another insurance company, the reinsurer.<sup>31</sup>

Why does an insurance company choose to get reinsurance, especially if an insurance company is supposed to be an expert at appraising and pricing risk? The answer is protection, as is the case with any insurance policy. For instance, consider a primary insurance company that sells flood insurance policies to property owners in the Mississippi River Delta. The policies have common features, and the primary insurer can bundle them. The primary insurer is concerned about its potential liability to pay out on the policies if there is a catastrophic flood. This flood scenario may be a low-probability event. But, the risk to the primary insurer is that if this once-in-a-century event occurs, it may be hard-pressed to meet all the claims. The primary insurer might go bankrupt. Thus, the primary insurer purchases an insurance policy — reinsurance — for the bundled flood insurance policies it has issued. If the dreadful scenario occurs, it can call on its reinsurance as a source of funds to pay off underlying claimants.

<sup>26</sup> See 2006 GAO Report, *supra*, at 36.

<sup>27</sup> See 2006 GAO Report, *supra*, at 36.

<sup>28</sup> See 2006 GAO Report, *supra*, at 36.

<sup>29</sup> See 2006 GAO Report, *supra*, at 7.

<sup>30</sup> See 2006 GAO Report, *supra*, at 7.

<sup>31</sup> See JERRY, *supra*, at 897.

Reinsurance is not sold as a standard product.<sup>32</sup> Rather, each contract is separately negotiated. There are two sorts of reinsurance contracts: treaty and facultative:

In a treaty reinsurance contract, the reinsurer and insurer agree on which select class(es) of underlying policies of the insurer's to underwrite. In a facultative reinsurance contract, the reinsurer and insurer agree on individual underlying policies.<sup>33</sup>

While the transfer of risk is the main objective of any reinsurance contract, there is an ancillary benefit. Subject to statutory and industry regulation, a primary insurer may account for that transfer in financial statements (e.g., annual and quarterly reports, and regulatory filings), to its substantial business advantage.<sup>34</sup>

### § 31.02 DEFINING "TAKAFUL"

"*Takaful*" is an important institution in the *Shari'a*, with roots in the pre-Islamic era. Tribes on the Arabian Peninsula in the pre-Islamic period, or "*al jahiliyyah*," and after the birth of the Islamic faith, lived in a tight community. Each tribe was responsible for covering damages caused by any one of its members to any member of that or another tribe, if the harm-causing member lacked the resources to pay off the debt. The tribe provided insurance, in a financial sense, for a liable member of scarce resources.

"*Takaful*" refers to Islamic insurance. Such insurance is based on mutual guarantee and mutual responsibility. The literal meaning of "*takaful*" is "joint guarantee" or "joint responsibility." From this literal definition, the legal definition emerges:

[*Takaful* is an] [i]nsurance contract through mutual or joint guarantee.<sup>35</sup>

Essentially, then, "*takaful*" is the Arabic term for the modern American legal and financial concept of insurance, but suffused with Islamic precepts about community. The term is generic, covering all types of modern insurance contracts, such as life, health, property, and casualty.

### § 31.03 HISTORIC TYPES OF TAKAFUL

In early Islamic history, four kinds of *takaful* existed: *'aqila*, *'okd muwalat*, *daman khatr al-tariq*, and *hily*. There is one key difference between these historical categories and modern types of *takaful*? Historically, a member of a community or tribe was not required to make a monthly payment to be covered by the insurance policy. Today, a premium is demanded of an insured party in modern, but not early, times.

<sup>32</sup> See 2006 GAO Report, *supra*, at 5.

<sup>33</sup> 2006 GAO Report, *supra*, at 5.

<sup>34</sup> See 2006 GAO Report, *supra*, at 6.

<sup>35</sup> ZAMIR IQBAL & ABBAS MIRAKHOR, AN INTRODUCTION TO ISLAMIC FINANCE THEORY AND PRACTICE IN GLOSSARY xiii (Singapore: John Wiley & Sons (Asia) Pte Ltd, 2007). [Hereinafter, Iqbal & Mirakhor.]

- 'Aqila (tribal aid after wrongful killing)

"Aqila" refers to tribal aid after a wrongful killing. Payment by a tribe of blood money (*diyyah*) in a case of manslaughter is a species of *takaful*, namely, insurance for the perpetrator. The policy insures only what in modern Penal Law is classified as manslaughter. Šālih Al-Fawzān, Professor of Islamic Jurisprudence at Imām Muhammad ibn Saud University in Riyadh, Saudi Arabia, explains:

If the murder is intentionally committed, the *diyyah* is to be paid from the killer's own money, as the original rule states that the compensation for an offense is obligatory to be paid by the offender. In this regard, Al-Muwaffaq Ibn Qudāmah [a leading *Hanbali* scholar who pioneered comparative law among the Four Schools] said:

Muslim scholars unanimously [i.e., all Four Schools] agree that the *diyyah* for premeditated murder is obligatory to be taken from the murderer's wealth according to the original rule, not to be paid by the perpetrator's agnate relatives [i.e., relations on the father's side]. Allah, Exalted be He, says "... And no bearer of burdens will bear the burden of another ..." (Qur'ān: *Al-An'ām*:164 [Livestock, 6:164].)

However, this original rule — that the *diyyah* is to be paid from the perpetrator's own money — is inapplicable in the case of manslaughter. This is because cases of manslaughter recurrently happen and the amount of *diyyah* for killing a human being is very large. Thus, it would be unfair if the offender had to pay it alone. Therefore, wisdom necessitates that such a large amount of *diyyah* is to be paid by the offender's agnate relatives as a means of helping and supporting the offender and a way of relieving him as his case is excusable. However, in the case of premeditated murder, the murderer has no excuse for his crime, so he deserves no commutation of penalty; rather, killing him as *qisās* (legal retribution) is applicable to him. Yet, if the premeditated murderer is pardoned by the deceased's family or legal representatives, i.e., they decide not to kill him in retaliation, he is to be burdened by paying the *diyyah* alone, without his relatives' support, as a means of redeeming his life. Thus, the *diyyah* becomes obligatory for him to pay, just like the obligation of paying indemnity for damages.<sup>36</sup>

This explanation reveals the justifications for providing *takaful* in a manslaughter case, namely, frequency and justice.

Tragically, non-premeditated deaths occur every day. The value of human life is inestimable. They happen in contexts such as falling down from a ladder, scaffolding, or tree, or into a well, car and other vehicular accidents, defective products, food, or medicine, and even routine, on-the-job activities. It would be a disproportionate punishment to impose financial liability on one person, even the one legally liable for the death. A follow-on justification is that without the tribal guarantee of *diyyah*, individuals might be discouraged too strongly from taking appropriate risks in everyday personal or business life. However, a murder with malicious afore-

thought is an entirely different matter. Visiting full punishment on the murderer is just. The *diyyah* payment cannot be an insurance policy against this kind of killing. That would create a blatant moral hazard problem, encouraging the intentional taking of lives under any pretext.

In sum, *'aqila* is analogous to the contemporary concept of an insurance policy against wrongful death. It could well be that the *Sharī'a* concept of *'aqila* is an intellectual or practical origin for the contemporary policy. The responsibility of a tribe is to bear the payment of *diyyah*, but not in an instance of pre-meditated murder. The only conditions for the perpetrator to be covered by the policy of the tribe, as it were, and thereby to trigger the liability of the insurer (tribe), are (1) manslaughter is committed, and (2) the death of another is caused by a member of the tribe. Significantly, the victim may be from another tribe, or from the same tribe.

- 'Akd *Muwalat* (mutual contract)

What happens if a person converts to Islam, but belongs to no tribe, and has no family? This situation occurred in the early days of Islam when people migrated from Mecca to Medina (during the *Hijra*) and embraced Islam, leaving their material possessions in Mecca. Concern arose about how to help them. Such persons were in need, perhaps to repay a debt or deal with a liability. The solution that developed was a mutual contract, called "*'akd muwalat*," ("*Muwalat*" means "mutual" or "alliance," and "*'akd*" is "contract.") Under it, the convert to Islam would go to another person and arrange for financial help from that person in the event of a debt or liability. The contract provided for mutual assistance, and even inheritance. So, the convert would step in and aid the other person, if that other person could not fulfill a debt or other legal obligation. In essence, "*'Akd muwalat*" was a reciprocal insurance policy against financial exigency.

However, Islamic *fukahā'* were deeply skeptical of this kind of contract. That is because, under *Sharī'a* Inheritance Law, only a family member (a blood relation) is entitled to be a beneficiary. Note that under *surah* 33, *ayah* 5 of the Qur'ān, adoption is prohibited under Islamic Law, but one person may sponsor another. Jurists agreed *'akd muwalat* is forbidden (*harām*). Accordingly, this early form of *takaful* died out long ago.

- *Daman khatr al-tariq* (surety for the safety of the road)

A third historical kind of insurance used in Arabia and Middle East was known as "*daman khatr al-tariq*." Literally, "*daman*" is a verb meaning "to guarantee," "*khatr*" is a noun meaning "danger" or "risk," and "*al-tariq*" is a noun meaning "the road." Put together, "*daman khatr al-tariq*" means an insurance against dangers from traveling.

In former times, one party would issue a guarantee to a traveler that the road or route the traveler planned to take would be safe. Technically, the party providing the guarantee was — in modern American legal parlance — a "surety," not an "insurer." That is because this party provided the guarantee out of pride, and usually did not receive a fee for the guarantee. (Recall that a "surety" generally receives no compensation from the beneficiary, whereas an "insurer" receives a fee

<sup>36</sup> DR. ŠALIH AL-FAWZĀN, A SUMMARY OF ISLAMIC JURISPRUDENCE, vol. 2 at 552 (Riyadh, Kingdom of Saudi Arabia: Al-Maiman Publishing House, 2005). [Hereinafter, AL FAWZĀN.]



or premium.) Also in a technical sense, the party was a "surety" as distinct from a "guarantor," because this party was primarily liable for performance of the obligation of another. (Recall that a "guarantor" is secondarily liable. Liability is triggered if the beneficiary — typically a debtor — does not satisfy its obligations to a creditor.)

The obligation against which the surety was liable was for safe passage. The surety arrangement covered any damages incurred by the traveler while en route. The potential damages were bodily or property harm caused by attacks by hostile persons. Thus, the surety was primarily liable to the traveler for the performance of third parties, namely, that the third parties would not attack the traveler. The coverage excluded breakdowns of the vehicle from normal wear-and-tear in which the traveler was voyaging. Typical beneficiaries were caravans, whether of merchants or pilgrims, going from one destination to another, like from Mecca to Damascus, Jerusalem, Yemen, or destinations in Iraq such as Basra and Kufa. The sureties were tribal leaders responsible for the governance of the land through which the travelers sought to traverse.

There is a word closely related to "*ḍaman*," namely, "*aman*." The latter term may be used as a noun and connotes a surety for safe passage, or as an adjective, as in a safe place. In modern times, "*ḍaman khatr al-tariq*" is not used. Rather, a modern insurance policy would be taken out by a traveler, as needed. However, from time to time, official governmental authorities provide an "*aman*."

For instance, during the December 2008 — January 2009 Israeli invasion of the Gaza Strip, suppose an Israeli official sought to enter Gaza City to negotiate a truce with the local authority, Hamas. Or, suppose the United Nations sought to deliver humanitarian aid to residents in Gaza and avoid any difficulties with that authority. In these instances, an insurance of (or surety for) safe passage into and out of the Gaza Strip, and of safety while there, could be given by Hamas. That insurance (surety) would be characterized as "*aman*." Another interesting example, from slightly earlier times, comes from the great desert explorations of Sir Wilfred Thesiger. In his engrossing account of crossing the Empty Quarter (*Rub' al-Khali*), *Arabian Sands* (1959), he refers to guarantees of safe passage provided by various governing tribal authorities — not all of which he obtained before embarking on his remarkable explorations.

- *Hilf* (confederation for mutual assistance)

The literal meaning of "*hilf*" is "cohort." Tribes in the Arabian Peninsula used to form confederations for mutual support. The idea was that each tribe would come to the assistance of another tribe when that other tribe was in need. The assistance not only could be financial, but also military. In contemporary times, tribal guarantees in the old-fashioned sense of *hilf* are rare. However, the basic concept of a confederation agreeing to provide mutual assistance still is used. Indeed, during the first Gulf War (1991), the allied forces (American, Bahraini, British, Saudi, etc.) marshaled against the then Iraqi dictator Saddam Hussein called themselves "*hulafa*," which is the name for the parties that came together to provide what, in effect, was a "*hilf*" on behalf of Kuwait.

In the financial sense, *hilf* was an early version of collateral and other monetary guarantee arrangements in modern financial markets such as Wall Street, whereby a group of banks agrees to assist a potentially failing bank, or help in a situation of illiquidity in the market for a particular kind of financial instrument, by anteing up funds. In the military sense, *hilf* was an early version of Article 5 of the *Charter of the North Atlantic Treaty Organization* (NATO), whereby an attack on one NATO country is considered as an attack on the rest of the NATO members, and obligates those members to come to the defense of that country.

The above discussion of the four early types of *takaful* adduces an important point. Islamic Law knew from its earliest days the concepts of insurance, suretyship, and guarantees. While these early species have died out or changed, their significance remains in two respects. First, modern kinds of insurance contracts have evolved from them. The early forms are the conceptual foundations for contemporary *takaful*. Second, through the ages, Islamic *fukahā'* have studied the early arrangements, using them as a basis for *qiyās*. They analogize to and distinguish from these arrangements to opine on the permissibility of actual or proposed new forms of *takaful*.

#### § 31.04 MODERN TAKAFUL AND DEBATE ABOUT GHARAR (UNCERTAINTY) AND RIBĀ (INTEREST)

The theme and purpose of modern *takaful* is not completely different from the historical types. The former evolved from the latter, hence this continuity is unsurprising. Underlying both is unity within the community and mutual collaboration among community members to help an injured party. That help is not just financial, but also emotional, psychological, and physical. The critical difference between early and contemporary types is modern *takaful* requires a monthly payment, a fee American Insurance Law calls a "premium," for the insured party to have policy coverage.

Indubitably, the legality of *takaful* is a hot topic among *fukahā'*. Some Muslim legal scholars declare that *takaful* should be banned, and say it is forbidden (*ḥarām*). Other scholars condone it, saying *takaful* is permitted (*ḥalāl*). *Gharar* (uncertainty) and *ribā* (interest) are the issues on which the scholars divide.

The argument is whether a *takaful* contract can be engineered to resolve the problems of *gharar* and *ribā*. If *fukahā'* conclude that an insurance product is permitted, then they do so only if two requirements are satisfied. First, the terms of maturity must be fixed and definite. The duration of the contract — the length of time of coverage of the insured by the insurer — must be set and clear. This provision is meant to prevent *gharar*. Life insurance (in the conventional American sense, as distinct from life *takaful*, discussed below) always is *ḥarām*. Only Allāh knows how long a person will live. There always is uncertainty about when a person may die. Consequently, when a life insurance contract matures, and a payout is required, is uncertain. In contrast, a *takaful* arrangement that lasts for 10 years does not involve *gharar*. The arrangement covers the insured party for that decade against specified losses. The policy lapses at the end of the decade.

Second, monthly payments received by an insurer must be invested by it in an acceptable manner. The funds cannot be invested in interest-earning assets, *i.e.*, *ribā* must be avoided. This second condition reflects the communitarian basis of *takaful*, and is redolent of arrangements to avoid *ribā* (namely, *muḍārabah* and *murābaḥah*). The idea is the insurer and insured are engaged in a joint profit-sharing enterprise for mutual gain, as is the case with a lender and borrower. It does not comport with the Islamic ideal of community for the insured to appropriate the premiums of the beneficiary for itself, and invest those premiums in interest-earning assets, the returns from which the insured exclusively keeps. (Indeed, *muḍārabah* is used in the context of a life *takaful*.)

Assuming these two conditions are met, then *takaful* is seen by some scholars as compliant with the *Shari'a*. Even then, other *fukahā'* aver that *takaful* remains forbidden, principally because they remain unconvinced that the challenges of *gharar* and *ribā* are overcome. They claim that ultimately, in some fashion, uncertainty or risk exists with any insurance contract. They also find recourse to *qiyas* is unhelpful. That is, analogies to the historic types of *takaful* do not rescue modern *takaful*. *Aqd Mucalat* (mutual contract) has long-since been banned, and the other three ancient forms — *'aqila* (tribal aid after wrongful killing), *daman khatr al-tariq* (surety for the safety of the road), *hilf* (confederation for mutual assistance) — do not involve regular, periodic payment of premiums by the insured to the insurer, as does modern *takaful*.

### § 31.05 HOW MODERN TAKAFUL WORKS

Assuming the problems of *gharar* and *ribā* are resolved, so that a *takaful* arrangement is deemed *halal*, how does the arrangement actually work in practice? Conceptually, there are three parties to the transaction:

- The insured party, also called the “participant” or “policy holder”:

This party is the one that faces a risk against which it seeks insurance. The *takaful* is the assistance it seeks to mitigate the risk. For that insurance, the participant contributes a premium — *i.e.*, money — to an operator of a fund into which the premiums are put. The premiums are fixed. That means the operator providing the insurance is not permitted to require an additional payment to cover an extra risk. That is, the operator cannot discriminate against a participant if the level of danger increases, either by raising the premiums, or terminating the *takaful* arrangement.

- The operator:

The operator is the provider of *takaful*. It is a licensed body that acts as the manager of, or trustee for, the funds. This management or trusteeship is conducted in accordance with *Shari'a* principles. Hence, for example, the operator may not place the funds in investments in financial instruments issued by producers of forbidden (*haram*) items (e.g., alcohol, pork, pork products, or pornography). Any claim by the insured party or beneficiary under the insurance contract is paid out of the funds. Note that the operator does not give a contractual guarantee to a beneficiary. (In contrast, in conventional non-Islamic insurance contracts, the

insurer guarantees the provision of benefits to the insured party, particularly in the case of death benefits.)

- The beneficiary:

The beneficiary may or may not be the same as the insured party. It depends on the precise arrangement. For example, in a *muḍārabah*, the legal heirs of the insured party are the beneficiaries.

Overall, the *Shari'a* permits two categories of *takaful*:

- (1) General *takaful*, and

- (2) Life *takaful*.

Both kinds of policies have a fixed, definite term. Common terms are 10, 15, or 20 years. It is essential that the terms be fixed and definite to avoid any *gharar* (uncertainty) as to the contract period and the attendant rights and obligations of the parties.

A general *takaful* contract is a short-term insurance policy for the benefit of the participant who establishes it. The purpose is to offset any kind of risk as defined in the contract, with the beneficiary being the participant, not a third party. In contrast, a life *takaful* contract focuses on protecting a third party, namely, one or more beneficiaries specified by the participant. The protection is against financial risk in particular. Diagrams 31-21 and 31-2 set out the structure of each kind of policy.

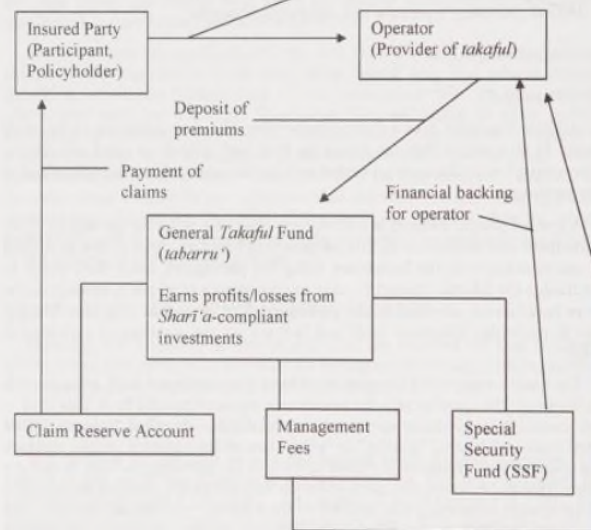
The basic arrangement in a general *takaful* is a participant pays a premium to an operator. The operator puts the premium in a general *takaful* fund. This fund — the account into which the operator puts premiums — is called “*tabarru'*.” That word means “donation,” “charity,” or “gift.” Thus, under a general *takaful* contract, the operator is not required to return *tabarru'* to the participants. That is, under a general *takaful* contract, the operator has no legal obligation to return the full value of the account supporting that contract — the *tabarru'* — to the participants. That is a stark contrast to life *takaful* arrangement, effected through a *muḍārabah* partnership, wherein the operator is obligated to return the full value of the supporting fund to the participants.

The *tabarru'* account earns profits from investments in *Shari'a* compliant assets. Those profits add to the aggregate market value of the account. Conceptually, the *tabarru'* has three sub-accounts. First, in the event a participant needs to make an insurance claim, the operator pays the claim out of the *tabarru'* account, specifically, a “Claim Reserve Account.” Second, from a Management Fees account, the operator pays itself a management or trustee fee for its services. That fee covers the salaries of its staff and its fixed and variable costs of operation. Third, a portion of the premiums go to a segregated account, sometimes called a “Special Security Fund,” or SSF. The purpose of the SSF is to provide financial backup to the operator, essentially serving as insurance against the risk the operator becomes insolvent. The size of the portion channeled to the SSF depends on the estimate by the operator of its bankruptcy risk. For instance, if an operator computes the risk

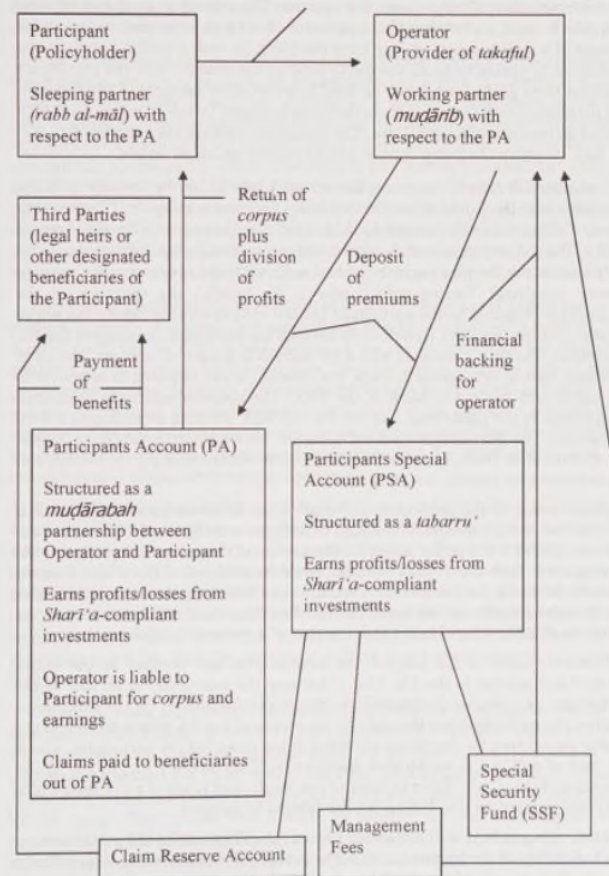


of insolvency over the next decade and determines it needs U.S. \$10 million, then it will levy on the premiums from the participants an appropriate percentage to build up the SSF to this amount. Insurance against this risk could take the form of re-insurance, known as *re-takaful*.

**Diagram 31-1:**  
**Structure of a General Takaful**  
Payment of premiums



**Diagram 31-2:**  
**Structure of a Life (Family) Takaful**  
Payment of premiums



A life *takaful* also is called a "family *takaful*." Sometimes, this second type is dubbed "life insurance." However, it is critical to understand a life *takaful* is not strictly a contract to insure the life of a participant. Rather, it is a contract for the financial protection of one or more third parties. The protection is against financial risk, which could materialize if the operator dies or is otherwise incapacitated because of a serious injury or long-term disability. In such dreadful instances, the participant is unable to make income to support his family. Thus, the participant identifies third parties, who may be legal heirs or other designated beneficiaries. The participant seeks for them, from the funds managed by the operator; protection against an unexpected financial risk. The participant chooses the maturity date, i.e., the date on which the policy expires and protection no longer exists.

Under the life *takaful*, there are two accounts into which the operator puts the premiums from the participants. The first kind of account is called the "Participant's Account" (PA), while the second kind is called the Participant's Special Account (PSA). The PA arrangement is structured as a *mudārabah* partnership. The participant is the sleeping partner (*rabb al-māl*), while the operator is the working partner (*mudārib*). Consequently, under a life *takaful*, the operator (as the *mudārib*) is obligated to the participant (as the *rabb al-māl*) to return the entire *corpus* (principal amount), as well as divide with the participant earnings of the PA. In contrast, the PSA associated with a life *takaful* is a *tabarru'* account, just as in a general *takaful* arrangement. Thus, the operator is not required to turn over to the participant the whole value of the PSA. The operator splits the premiums contributed by the participant into the PA and PSA accounts according to a fixed percentage. This percentage is defined under the life *takaful* contract. For example, the split could be 70-30, whereby 70 percent of the contributions go to the PA, and the remaining 30 percent are put in the PSA.

Claims made by the participant on behalf of the beneficiaries would be made if the risk that the life *takaful* is designed to mitigate actually occurs. The beneficiaries are entitled to the policy value (i.e., the amount of the insurance specified in the arrangement) from the PSA. The claim would be paid out of the Claim Reserve Account. After all, the point of the PSA and the Claim Reserve Account is to give the financial security to the beneficiaries when they need it. This aspect of the operation of a life *takaful* is the same as that of a general *takaful*.

However, under a life *takaful*, the beneficiaries are entitled to the entire accumulated amount in the PA. That is because the beneficiary is an heir of the participant, or obviously designated specifically as a beneficiary by the participant. In turn, the participant has the right to the *corpus* of the PA, plus a division of the profits. In essence, the beneficiaries "stand in the shoes" of the participant, who is the *rabb al-māl* in the *mudārabah* partnership. They would do so in one of two instances: (1) the Claim Reserve Account has insufficient funds to cover their claim, or (2) the participant dies before the life *takaful* terminates.

As for the participant, the operator pays a *takaful* benefit to the participant, or to a beneficiary as designated by the participant, from defined funds — specifically, the PA. This payment from the PA is made under a joint indemnity borne by the participant. Moreover, the operator and participant share profits earned by those funds. The division of profits is according to the terms of the *mudārabah* contract

(which is the same document as the life *takaful* contract). That is, the partners — operator and participant — agree *a priori* in their *mudārabah* partnership on the terms, including the ratio, for sharing profits. Note, then, there could be two or more participants in a life *takaful*, such as a few family members. Profits would be distributed to them according to the terms and conditions of the *takaful* contract.

What is the reason that in a life *takaful*, the operator puts premiums into one of two accounts, the PA (a *mudārabah* arrangement) or a PSA (a *tabarru'*)? With a general *takaful*, there is only one account — a *tabarru'*. Why, then, is the life *takaful* a relatively more complicated structure? The answer is *fukahā'* require this structure to differentiate a life *takaful*, which is permissible under the *Shari'a*, from conventional life insurance, which is common in non-Muslim countries, but which is forbidden (*harām*) under Islamic Law. Precisely because the PA is a *mudārabah* partnership, the operator/working partner (*mudārib*) and participant/sleeping partner (*rabb al-māl*) agree mutually to share profits and losses. Therefore, profit distribution in a life *takaful* is determined by the contract conditions and terms. The amount of profits depends on the investment performance or returns each year.

This kind of profit-sharing is evidence of the community-based nature and joint venture approach of *takaful*. In a conventional non-Islamic insurance contract, the insured party has no right to any portion of the profits earned by the insurance company or the investments it supervises. The only way in which an insured party participates in those profits is if it so happens to be a shareholder — that is, own stock — in the same insurance company with which it has taken out a policy. This contrast with a life *takaful* indicates the moral spirit with which the *Shari'a* suffuses the realm of insurance. Providing insurance solely for profitability, with no communitarian ethos, is contrary to that spirit.

A participant does not forfeit her paid premiums to the operator, even if she fails to act in good faith or makes some other wrongful commitment. That is because the PA is a *mudārabah* partnership, so it is terminated according to the rules governing that partnership. That termination can occur at any time, depending on the wishes of the participant and operator. The premiums effectively are a capital contribution to the partnership. If and when the partnership is terminated, then the participant is entitled to receive back that contribution. If there are insufficient funds remaining in the PA, then the participant collects a *pari passu* amount, or possibly nothing.

Obviously, when a life *takaful* matures, a participant in it is legally entitled to obtain from the PA all the premiums it paid, and which the operator deposited in the PA. In other words, if no claim is made under the life *takaful*, then the claim of the participant is against the PA — but not the PSA, because the participant is a donor to the PSA, which is a *tabarru'*; and by its nature a donation cannot be taken back by the donor. That is also true if early termination occurs. A participant who surrenders the life *takaful* policy before the expiration date of that policy has the right to receive all premiums it paid to the PA, but nothing from the PSA. In both instances — where the policy matures, or where it is ended early — the participant is entitled to a proportion of the profit from the investment returns made on her premiums.



For these scenarios, there are variations among Muslim countries. The variations occur because of applicable local financial regulations and policies. For example, in Malaysia, there can be a penalty for early termination.<sup>37</sup> A participant is charged a penalty fee if she seeks to withdraw her premiums having terminated the policy less than two years after it took effect. If she seeks to get back her premium within two to five years, she may withdraw 50 percent of her premiums without charge, and 70 percent without charge if her attempt is more than 5 years from the time she agreed to the policy.

An interesting point about the PSA, under both a general or life *takaful* arrangement, concerns the disposition of a large surplus. What happens if the PSA develops a large excess of funds, perhaps because of strong returns on *Shari'a*-compliant investments? The answer is the operator — rather than greedily claiming the entire surplus for himself — can donate some of the surplus to a charity, or deploy it to the development of social infrastructure projects. This possibility, which rests in the discretion of the operator, bespeaks the ethical impulse behind Islamic insurance products.

In sum, the Islamic system of insurance not only boasts long historical roots, but also generates considerable recent attention. Data suggest *takaful* policies are increasingly prominent, with ever-greater sales of them and assets under management:

According to some estimates, the global *takaful* industry currently [as of 2007] stands at U.S. \$550 million, with around U.S. \$1.5 billion of assets under its management, which is significantly below its true potential.<sup>38</sup>

Prospective policy holders and investors are attracted by the harmony and mutual cooperation they associate with *takaful*. Indeed, demand for *takaful* is not limited to Islamic countries. Rather, interest is worldwide, and *takaful* is marketed in some non-Muslim countries. Such figures also intimate there is room for growth of *takaful* in the global insurance market.

## § 31.06 HAWĀLAH BANKING TRANSACTIONS

### [A] Definition of “*Hawālah*” and Sources for Permissibility (*Mubāh*)

“*Hawālah*” is defined as the transference of debt from the liability of the debtor to the liability of another person.<sup>39</sup> A *hawālah* transaction involves a transfer, as distinct from a sale, of a debt obligation. Debt sales may raise problems of *ribā* (interest), as in *ribā al-jahiliyya* (defer and increase), and thereby generally are forbidden (*ḥarām*). The idea in a *hawālah* arrangement is simply to transfer the obligation in question, not its amount. In other words, the response to the question

“who pays?” shifts from one party to another, but the answer to the question “how much?” stays the same.

Why are *hawālah* arrangements permissible (*mubāh*)? Two sources of the *Shari'a* support them: the *Sunnah* of the Prophet, recorded in the *ḥadīth*, and consensus (*ijma'*) of the majority of Islamic religious and legal scholars (*ulema* and *fukahā'*, respectively). First, Muhammad condoned the transfer of debt obligations. He states:

“Procrastination (delay) in paying debts by a wealthy person is injustice. So, if your debt is transferred from your debtor to a rich debtor, you should agree.”<sup>40</sup>

Read literally, in this *ḥadīth* Muhammad does not say the debt must, or even should, be shifted from one obligor to another. Rather, it can be, as long as the relevant parties agree. Thus, the permission to do so is implicit. But, there is an explicit condition: the transfer should not cause a delay in the timely payment of the obligation. Otherwise, the creditor would be the victim of an injustice. In turn, the creditor — “you” — essentially is told to agree to the transfer.

Interestingly, the Prophet did not take a dim or pessimistic view of debt transfers, which might have led him to rule all of them unlawful. Again implicitly, he seems to have appreciated that transfers of obligations would facilitate the repayment of debt. His own considerable experience in commerce might well have inclined him to a flexible, indeed lenient, approach that would help people make good on their obligations. To be sure, some Muslim scholars take issue with debt transfers, notwithstanding this logic. They hold such transfers to be a kind of selling of debt, and hence *ḥarām*. In response to this objection, *Imām* Ibnul Qayyim argued *hawālah* is a permissible transaction because it is a kind of paying back debt. It is not selling debt, nor is it an exception to the rule against debt sales. *Imām* Qayyim stated:

Even if the transference of debts is a kind of selling of debt for another, the Lawgiver doesn't prohibit it since the principles of the *Shari'ah* necessitate the permissibility to transfer a debt from the liability of the original debtor to the liability of a new one (substitute debtor).<sup>41</sup>

Accordingly, all Four *Sunnite* Schools agree that a *hawālah* transaction is permissible, and legally valid, if it satisfies three conditions.<sup>42</sup>

In brief, they are (1) legal responsibility of the substitute debtor, (2) identical debts, and (3) consent of the original debtor. Consent of the creditor is not a condition, which follows logically from the *ḥadīths*. The Prophet did not establish creditor consent as a prerequisite. Rather, he focused on the agreement of the first and second debtors.

<sup>40</sup> THE TRANSLATION OF THE MEANINGS OF SAHIH AL-BUKHARI, ARABIC-ENGLISH by Dr. Muhammad Muhsin Khan, vol. III, book XXXVII (*Al-Hawālah* — Transference of a Debt from One Person to Another), p. 270, *ḥadīth* no. 487 (Islamic University, Medina, Kingdom of Saudi Arabia: Dar Ahya Us-Sunnah, Al Nabawiya, March 1978).

<sup>41</sup> AL FAWZAN, *supra*, vol. 2 at 80.

<sup>42</sup> See AL FAWZAN, *supra*, vol. 2 at 80-82.

<sup>37</sup> See Professor Dr. Mohammed Ma'sum Billah, *Takaful Funds — An Overview*, EUREKA HEDGE FUND MONTHLY, February 2007, posted at [www.eurekahedge.com](http://www.eurekahedge.com).

<sup>38</sup> IQBAL & MIRAKHOR, *supra*, at 123 (emphasis added).

<sup>39</sup> See AL FAWZAN, *supra*, vol. 2 at 79.

### [B] Three Conditions

First, the debt being transferred from the original debtor to the substitute debtor must become the legal responsibility of the substitute debtor. After all, the point of the transference is to shift the obligation to pay from the first to the second debtor. Hence, the transfer must mean the substitute debtor is compelled to repay the debt to the appropriate creditor. If the debt is not yet determined to be the responsibility of the substitute debtor, then its transference is not valid. That is because the substitute debtor could balk at the debt, *i.e.*, declare it has no obligation to pay, and thereby cancel the debt.

How, then, is responsibility determined? The straightforward means is consent of the substitute debtor. The substitute debtor declares that it agrees to assume responsibility for repaying the obligation. For example, suppose Hassan (the original debtor) owes U.S. \$25,000 to Commerce Bank for financing his Doctorate in Juridical Science (S.J.D.) degree at the University of Kansas. Hassan cannot transfer this debt to his father (the substitute debtor), and thereby cannot take advantage of the creditworthiness (*i.e.*, ability to repay) of his father, unless his father consents to the arrangement.

Second, a *hawālah* transfer must involve debts that are identical in kind. The Four Sunnite Schools debate what "identical" means. To the *Hanbali* School, this condition means the exchange must be Saudi *riyals* for Saudi *riyals*, or *dirhams* for *dirhams* — and, more specifically, United Arab Emirates (UAE) *dirhams* for UAE *dirhams*, not UAE *dirhams* for Moroccan *dirhams*. Additionally, the two debts must have the same time for due payment (regardless of whether it is cash or credit). In other words, *hawālah* is valid only if both are cash transactions, or both are credit transactions. For example, if the obligation of the original debtor is to pay 1 million Saudi riyals today to a certain creditor, then that obligation may be transferred to a substitute debtor, as long as the debt remains due today. That would be a cash, or spot, transaction. Changing the due date would convert the deal into a cash-credit transaction. As the Prophet warned, it would be unfair to the creditor. As another example, if the obligation is to pay 100,000 UAE *dirhams* in 30 days, then that obligation may be transferred. But, a transfer of a 100,000 UAE *dirham* debt, payable in 60 days, would be invalid. Again it would wreak the kind of injustice to the creditor against which the Prophet warned.

In contrast, the *Hanafi*, *Shāfi'i*, and *Māliki* Schools adopt a more flexible position than does the *Hanbali* School. All Four Schools require the amount of the obligation transferred to be the same. Thus, for instance, none of the Four Schools would permit an original debtor owing 100 Saudi *riyals* to transfer a debt of 110 *riyals*. *Hawālah* transfers are not meant to gain profit, which would accrue to the creditor in the amount of 10 *riyals*. But, the *Hanafi*, *Shāfi'i*, and *Māliki* Schools allow for a difference in currencies. Suppose the exchange rate between Saudi *riyals* and UAE *dirhams* is 2:1, *i.e.*, 2 Saudi *riyals* are worth 1 UAE *dirham*. Suppose, further, the original debt to be transferred is 500 Saudi *riyals*. The original debtor seeks to transfer this obligation, but in UAE *dirhams*. The three Schools hold that such transfer is permissible, if the amount of the debt remains unchanged. Given the exchange rate, equivalence would mean the substitute debtor takes on an obligation of 250 UAE *dirhams*. In essence, the *Hanafi*, *Shāfi'i*, and

*Māliki* Schools are satisfied that the test for an "identical" transfer is equality of value, regardless of the denomination of the currency. To the *Hanbali* School, formal and substantive equivalence both matter. After all, this School would counter, if currency denominations can be changed, then why not currency for credit, or currency for commodities, which would be a slippery slope toward permitting *ribā*.

Is it permissible for the original debtor to transfer only part of the obligation? In the above example of a 100 Saudi *riyal* obligation, could the debtor transfer a 90 *riyal* debt to the substitute debtor, and thereby remain "on the hook" for 10 *riyals*? The answer is yes. The creditor still is owed 100 *riyals*, at the prescribed time, and no harm is done if the payments come from two sources. Note, then, that transference of part of an obligation amounts to a modest exception, along with currency denomination, to the rule that transfers be "identical."

Third, *hawālah* transfers require the consent of the original debtor. The consent of the creditor is not required. In addition, the consent of the creditor is not necessary to transfer the debt to the credit of a wealthy party (*i.e.*, the substitute debtor) that wants to transfer immediately. In effect, early payment of the debt (pre-payment) by a substitute debtor is permitted. Based on the *hadiths* (quoted earlier), Muslim scholars deduce that the original debtor must agree on the transference of the debt. If the substitute debtor does not fulfill the debt or procrastinates in its delivery, then original debtor need not consent to the transfer in the first place. The reputation of transferees that procrastinate suffers, and *hawālah* transactions rely primarily on reputation for integrity and personal trust.

Assuming a *hawālah* transfers meets all three of these criteria, the debt transfers from the liability of the original debtor to the liability of a substitute debtor. The original debtor is absolved of any liability, which the substitute debtor assumes. The key legal consequence of this transfer of liability is the creditor is prohibited from claiming against the original debtor.

### [C] Hypothetical *Hawālah* Transactions

*Hawālah* has been a common method of transferring money in the Middle East since the 8<sup>th</sup> century A.D. In recent times, businesses and individuals have found the economic rationality in favor of *hawālah* transactions increasingly compelling: these transfers are cheap (low cost) and fast (high speed). The efficiencies are possible because such transfers skirt currency controls and other banking law regulations, do not entail bureaucratic hold-ups, and are performed by small operators with low overhead expenses.<sup>43</sup> Today, *hawālah* transfers can be completed in less than 48 hours. Often times, a *hawālah* transfer costs a low flat rate of \$50, or a commission of 1.5 percent of the amount transferred, both of which are cheaper than moving fund through the official, regulated banking system via electronic funds (wire) transfers.<sup>44</sup> Thus, for example, large numbers of migrant workers from South and South East Asia working in the Middle East and elsewhere send money to families back home through the *hawālah* method. In

<sup>43</sup> See Anna Field, "No Problem," FINANCIAL TIMES, 15 April 2008, at 7. [Hereinafter, Field.]

<sup>44</sup> See Field, *supra*.



total, over U.S. \$100 billion is transferred annually (as of 2010).

A third incentive for using *hawālah* transfers is dependability based on reputation. All such transfers depend on the honor of brokers, who are usually family members and friends, and who are fully aware that their businesses and success depends on their ability to fulfill their promises. To outsiders, it might seem risky to depend on the integrity of small "mom-and-pop" operations that may be thinly capitalized and unregulated. However, the rebuttal from *hawālah* advocates is easy: as the financial crisis of 2008 showed once again, blue-blooded, money center American and European banks, and their banking supervisors, hardly are trustworthy. Why not use a local *hawālah* transferor rather than a faceless western bank?

To illustrate a simple *hawālah* transfer, suppose Istaz, based in Tehran, Iran, is an importer of Italian leather. He proceeds to a money exchanger in Tehran, saying he would like to send \$10,000 to his leather supplier. Istaz hands over to Hakeem \$10,000, but this money does not "move" to the leather supplier, as it would through the banking system in a conventional transfer. Rather, the broker, Hakeem, calls his counterpart in Rome, Omar. Omar goes to the bank of the leather supplier in Rome and deposits \$10,000 in the account of that supplier. The supplier has been paid, and can safely ship Istaz the leather (assuming it did not export the leather already). But, Omar is "out" \$10,000, i.e., Omar holds a \$10,000 debt claim against the broker in Tehran, Hakeem. How does Omar get repaid, given that Hakeem retains the \$10,000 cash given to him by Istaz?

The answer is a separate, distinct transaction that wholly or partially offsets the first transfer. Later on, when an Iranian in Italy, called Reza, wants to send \$5,000 to his family in Iran, Reza goes through the *hawālah* process in reverse. Reza goes to a money transmitter in Rome, namely, Omar, asking to transfer \$5,000 to Iran. Reza gives Omar \$5,000. Omar then calls his correspondent in Tehran, Hakeem. Hakeem deposits \$5,000 in the account of Reza's family. Omar and Hakeem are aware of their ongoing transactional relationship, so they appreciate the off-set that just occurred: against the \$10,000 debt Hakeem owed Omar, Hakeem just paid \$5,000 of it. Over time, the debts of the brokers in Tehran and Rome cancel each other out.<sup>45</sup>

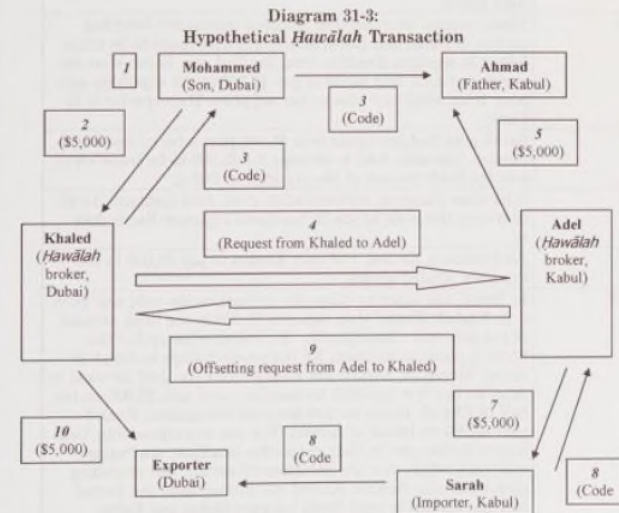
Similarly, Diagram 31-3 and Table 31-3 summarize another hypothetical *hawālah* transaction in step-by-step fashion.

#### [D] Law Enforcement Issues

While they play a significant and arguably essential role for expatriate workers seeking to transfer money to their families in their home countries in a cheap, fast, and reliable manner, *hawālah* transfers are not the favorite payments system for banking and law enforcement authorities. These authorities much prefer to have a clear paper or electronic record of every transfer of funds that is made through their banks. That way, they can trace whether funds are produced by criminal activities and are being laundered illegally, whether the funds are being sent to a

country that is the subject of international sanctions, and whether the funds are going to terrorists. Most *hawālah* transfers involve transfers of funds from legitimate sources for lawful purposes. But, understandably, the United States and other countries believe that the anonymity of the transfers and lack of documentation allows dubious transfers to evade scrutiny.

These concerns are all the heightened with international narcotics and arms smuggling, financial embargoes against Iran and North Korea, and counter-terrorism efforts following the 11<sup>th</sup> September 2001 attacks. In this climate, the United States and many western countries have employed more stringent standards for international money transfers, particularly in respect of reporting and record-keeping requirements. Those regulations raise the cost of a money transfer through official banking channels, creating even a greater disincentive for a lowly-paid Pakistani construction worker in Dubai to use the transfer services of the Bank of America or Standard Chartered Bank. Of course, the added regulations increase the incentive for evasion. For instance, with sanctions placed against Iran, Iranian businesses have resorted to *hawālah* to complete money transfers.



<sup>45</sup> See Field, *supra*.

Table 31-3:  
Steps in Hypothetical *Hawālah* Transaction

Step Number	What Happens
1	Mohammed is an Afghan who works in Dubai, UAE. He wants to send \$5,000 to his father, Ahmad, in Kabul, Afghanistan.
2	Mohammed hands over \$5,000 to his local <i>hawālah</i> broker, whose name is Khaled. Mohammed also pays a modest flat fee or low-percentage commission to Khaled.
3	Khaled gives Mohammed an authentication code. He instructs Mohammed to give this code to Ahmad (but only to Ahmad). Mohammed conveys the code to Ahmad.
4	Khaled has a pre-existing relationship with a <i>hawālah</i> broker located in Kabul. The Kabul-based broker is named Adel. Khaled asks Adel to pay Ahmed \$5,000. Adel agrees.
5	Adel transfers \$5,000 to Ahmed, as soon as Ahmed provides Adel with the necessary authentication code. Thus, the father, Ahmed, living in Kabul, now has the funds intended for him by his son, Mohammed, working in Dubai. However, Khaled owes Adel \$5,000.
6	Three months later, another <i>hawālah</i> transaction involving parties in Dubai and Kabul arises, but with funds to be transferred in opposite direction from the first one. Sarah is an importer in Kabul. She seeks to pay \$5,000 to the exporting company from which she obtains her supplies. The exporter is in Dubai.
7	Sarah goes to Adel, hands over \$5,000 plus a fee or small commission. She asks Adel to arrange for \$5,000 to be transferred into the bank account of the exporter in Dubai.
8	Adel gives Sarah an authentication code. Adel instructs Sarah to convey this code to the Dubai-based exporter. Sarah does so.
9	Adel contacts Khaled, and asks Khaled to pay \$5,000 to the exporter. Khaled agrees.
10	In Dubai, the exporter takes the authentication code and gives it to Khaled. Khaled then deposits \$5,000 in the bank account of the exporter. Consequently, the Dubai exporter has the funds it needs as payment for the goods it ships to Sarah in Kabul. Moreover, Khaled has wholly offset the debt he owed to Adel. In the first <i>hawālah</i> transaction, Adel paid \$5,000 on behalf of Khaled. In the second <i>hawālah</i> transaction, Khaled paid \$5,000 on behalf of Ahmed. The two correspondents, both money exchangers in their respective localities, are "square" with each other, with the liabilities off-setting and cancelling each other out. Neither Khaled nor Ahmed used the formal banking system to send funds between Dubai and Kabul.

Not all *hawālah* brokers go unnoticed however, especially those inside the United States. In fact, there are over 40,000 registered *hawālah* brokers registered with

American authorities.<sup>46</sup> These dealers are required to keep records and are subject to the same kind of constraints that banks are subject to, including penalizing unregistered dealers. While more stringent standards are making it harder for dubious transactions to go forward, it is still very difficult to trace transfers that originate in the Middle East, usually in the Gulf. This situation makes it difficult for authorities to specify exactly who initiated the money transfer. For example, although the United States has placed pressure on banks in the UAE to tighten restrictions on Iranian and Syrian businesses, the UAE has had to proceed cautiously to avoid angering their next door neighbors whose economy often depends on the export/import funds.

<sup>46</sup> See Field, *supra*.



## Chapter 32

### FINANCE (*TAMWEEL*): INNOVATIVE INSTRUMENTS AND MARKETS

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Money is better than poverty, if only for financial reasons.

Woody Allen (1935– ),  
American Screenwriter, Director, and Comedian, and  
Winner of three Academy Awards

#### SYNOPSIS

##### § 32.01 MICROFINANCE

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- [B] Features
- [C] Empowerment of Women
- [D] Islamic Microfinance
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##### § 32.02 ISLAMIC REAL ESTATE INVESTMENT TRUSTS (I-REITS)

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##### § 32.03 CONVENTIONAL NON-ISLAMIC INVESTMENT FUNDS

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- [A] Defining “*Shari’a* Compliant”
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§ 32.01 MICROFINANCE<sup>1</sup>**[A] Definition of "Microfinance"**

The term "microfinance" is defined as the provision of financial services to the poor. The range of such services is broad, and includes:

- Payment transactions, *e.g.*, making or receiving payments of bills.
- Retail sales transactions, *e.g.*, making or receiving payments for goods or services.
- Loans, *e.g.*, providing or receiving funds for an entrepreneurial venture.
- Remittances, *e.g.*, transferring funds from one village to another, one city to another, or one country to another.
- Savings transactions, *e.g.*, depositing or withdrawing funds from a savings account.
- Property transactions, *e.g.*, buying or selling residential or commercial property.
- Leasing, *e.g.*, paying or receiving lease payments on an asset, including rented property.
- Insurance transactions, *e.g.*, purchasing insurance, or paying premiums on an insurance policy.

Microfinance is nothing if not flexible. To this list, new transactions are added at any given time, in any particular country.

That is because the needs of poor people evolve commensurate with the local economies in which they participate, and with the forces of globalization that impact on their localities. Moreover, technological developments — not only in the sense of newer and more secure devices, but also in terms of lower costs for existing hardware and software — have a major impact on microfinance. Indeed, it is through technology that microfinance services often are provided, even in remote, impoverished circumstances.

In truth, microfinance is not new. It has existed for centuries, through pawnbrokers, moneylenders, rotating associations, mutual support networks and exchanges, and tribes, clans, and families. It has been used to engage in transactions from investing in livestock to paying school fees.

Table 32-1 summarizes some of the key differences between traditional financial transactions in the formal sector of an economy, and modern microfinance in the small, informal sector of an economy. Even a glance at the Table reveals the attractions of microfinance to poor people, be they Muslim or non-Muslim.

<sup>1</sup> This discussion draws from *Banking at the Base of the Pyramid: How Microfinance is Changing and How You Can Be Involved* (panel presentations), Inter-Pacific Bar Association, 19th Annual Conference, Manila, Philippines, 30 April 2009.

**[B] Features**

A robust appreciation for modern microfinance requires understanding five important features. First, microfinance focuses on a large number of small value transactions involving individual parties (or a small number of individuals per party, such as a household or small business). For example, in Mongolia (as of May 2009), microfinance transactions were conducted for U.S. \$9. That focus contrasts with traditional non-Muslim and Muslim banking, both of which involve a small number of large players (*e.g.*, sizeable commercial bank lenders and business borrowers), and a small number of large-value transactions. In other words, microfinance does not anticipate, nor indeed search for, high profit margins. Rather, profits are made through tiny margins on a large number of transactions. Traditional non-Muslim and Muslim banks seek to maximize profits through a judicious number of high-margin deals.

**Table 32-1:**  
**Contrasts between Conventional Finance and Microfinance**

Issue	Traditional, Formal Finance	Microfinance
<i>Where is the service provided?</i>	In a formal office, such as the branch of a commercial bank, which a poor person may find intimidating. The location of the office, if not in the village of that poor person, may be expensive for the person to travel to. The distant location may require her to close temporarily her family store (which itself means lost profits), purchase a bus ticket, and travel several hours to a city to get to a branch.	In an informal environment, at or near the home or village of a poor person, which does not intimidate that person. Moreover, the transaction costs of accessing the service provider are minimal.
<i>Who provides the service?</i>	An official of a commercial bank who holds a defined status in that bank, and who dresses in business attire ( <i>e.g.</i> , suit, shirt and tie), both of which may be intimidating to some poor people.	A person informally dressed, and probably known (actually or by reputation) to many poor people in the relevant home or village market area.
<i>How complex is the provision of the service?</i>	Written legal documentation is required for any transaction.	Recognition of the transaction among nearby inhabitants and market participants usually suffices to "document" the transaction.
<i>How large is the typical transaction?</i>	The minimum value for any transaction is large, at least for any poor person.	There is no fixed minimum value, and the typical transactional amounts are small.



Issue	Traditional, Formal Finance	Microfinance
<i>How literate and numerate must the client of the service be?</i>	Literacy and numeracy at a high level is required.	There is no need for a high level of literacy or numeracy.

Second, and following from this first feature, microfinance seeks a so-called "double bottom line," i.e., a social return and a commercial return. The pre-eminent motive for any microfinance transaction is (or is supposed to be) the provision of social benefits. That is the first bottom line. The second bottom line is making a profit. The commercial return serves the first bottom line — unless a small profit is turned, it will be impossible for a microfinancier to continue to offer services that yield a social return.

Third, by definition, poor people have few, if any, assets to pledge as security for loans or other banking transactions. Therefore, as microfinance service providers are wont to say, the "2 Cs" are important to assess the prudence of entering into a transaction with a prospective party: character and capacity. Does the party have a good character, in a moral sense, which suggests the party can be trusted to repay any obligation? Does the party have the capacity to repay any obligation, such as through a stream of revenues the party will generate through skillful deployment of loaned funds in a business venture? the logic in favor of the prefix "micro" in "microfinance" is clear from the first three features: small transactions, modest profits, and poor, individual customers.

The fourth feature of microfinance follows from the third one. Many poor countries — Muslim and non-Muslim alike — are plagued by a rickety, inchoate rule of law framework in which property rights are ill defined, and a commercial law on secured transactions (if it exists at all) is ill drafted and ill enforced. When those rights are not clearly demarcated, prospective creditor institutions do not see assets against which they can lend, and would-be debtors cannot credibly pledge assets against which they can borrow. In turn, without extensions of credit, it is not possible for an economy to put all of its extant assets to their highest and best — that is, most efficient — use. That is, the lack of property and commercial law stifles capital raising, which in turn inhibits modern economic growth. Microfinance is not a systemic solution to this situation. However, it is part of the answer: Lending to poor people occurs, notwithstanding their deficit in hard assets. Such borrowers contribute to robust, if ground-level and bottom-up, growth.<sup>2</sup>

Fifth, new technologies are being used in microfinance. Automated teller machines (ATMs), personal digital assistants (PDAs), point of sale (POS) terminals, and smart cards are all illustrations. For example, third-parties, rather than major

banks, set up ATM networks to provide deposit, withdrawal, and payment services to microfinance customers. It is much cheaper for a provider of microfinance services, whether it be a non-governmental organization (NGO) or a major bank, to provide services through an agent using technology, than to set up an office, such as a branch, which has fixed overhead costs. Using technology also can be safer than setting up an office. For instance, in a dangerous neighborhood of Bogotá, Colombia, no bank wanted to establish a branch. However, one enterprising bank designated a small shop as an agent. Using a POS, the agent partnered with a next-door hardware store to provide payment services.

Mobile (cellular) phones are perhaps the most promising technology through which to provide so-called "mobile phone banking" microfinance services. Around the world (as of May 2009), there were 4 billion mobile phone accounts, and 3 billion subscribers. In many countries, even Afghanistan, the tipping point of 50 percent of the adult population owning a mobile phone has been crossed. In the Philippines, over 60 percent of the adult population had a mobile phone. Mobile phone banking allows for "mobile money," that is, the transfer of money using a mobile phone. In effect, a cell phone becomes a mobile wallet, into which to receive funds and loan disbursements, and out of which to make bill and other payment obligations. It may even be said that mobile phone banking is the ATM of the future, in Islamic and non-Islamic countries alike.

### [C] Empowerment of Women

Microfinance improves the economic, political, and social influence of women, as well as their personal health and sanitary conditions. A challenge facing modern microfinance in its early years was to ensure it did not automatically mean women borrow, but men control. That problem afflicted the famous Grameen Bank in Bangladesh in the early years of microfinance. Likewise, microfinance is not supposed to mean poor borrow and rich control. These problems, at least to some degree, have been addressed, though continued vigilance is necessary as microfinance matures and larger players enter the market for providing microfinance services.

In 2007, 155 million people were microfinance customers, and the outstanding loan portfolio of microfinance borrowings was \$32 billion. Women accounted for two-thirds of this total figure, and two-thirds of the total were well below the absolute poverty line (i.e., living below roughly U.S. \$1 per day). Thus, beneficiaries of microfinance tend overwhelmingly to be poor women. With greater financial resources at their disposal through microfinance, women have greater say in household decision-making, in particular, over how money is to be earned, spent, and invested. In their communities, microfinance enhances their standing.

For example, in Nepal, men (and women) started electing women to local councils when they realized — by observing microfinance in operation — that women can manage money efficiently and honestly. This observation has been replicated in many countries, namely, that women often manage finances more effectively, and with less corruption, than men. Not surprisingly, through prudent use of funds provided through microfinance, women have enhanced their own

<sup>2</sup> See generally C.K. PRAHALAD, *THE FORTUNE AT THE BOTTOM OF THE PYRAMID — ERADICATING POVERTY THROUGH PROFITS* (Upper Saddle River, New Jersey: Pearson Education, Inc., 5th ed., 2010) (arguing companies should revolutionize how they do business in developing and least developed countries by serving the poor, and that if they do so, they will realize increased profits and growth); PAUL COLLIER, *THE BOTTOM BILLION — WHY THE POOREST COUNTRIES ARE FAILING AND WHAT CAN BE DONE ABOUT IT* (Oxford, England: Oxford University Press, 2007) (arguing that while poverty is falling in 80 percent of the world, it is not being reduced in about 50 failing states).

personal health and education, and that of their children, neighbors, and communities.

### [D] Islamic Microfinance

There is nothing inherently incompatible between microfinance and Islam. Microfinance transactions can be conducted in conformity with the *Shari'a*. Indeed, they are, every day, in many Muslim countries. Conceptually, that conclusion makes sense. Conventional, non-Muslim large-value transactions can be re-worked as needed to conform to *Shari'a* precepts, and a *fortiori* smaller deals can be rendered consistent with Islamic legal principles.

Historically, too, that conclusion makes sense. Modern microfinance originated in the Muslim world — specifically, Bangladesh. It was Muhammad Yunus, a Lecturer in Economics at Chittagong College (located in Chittagong, the major port city of Bangladesh), who originated modern microfinance, and who founded the now-famous Grameen Bank.<sup>3</sup> “For their efforts to create economic and social development from below,” he and the Bank earned the 2006 Nobel Peace Prize.<sup>4</sup>

In 1976, during visits to the poorest households in the village of Jobra near Chittagong University, Yunus discovered that very small loans could make a disproportionate difference to a poor person. Jobra women who made bamboo furniture had to take out usurious loans for buying bamboo, to pay their profits to the moneylenders. His first loan, consisting of U.S.D. 27.00 from his own pocket, was made to 42 women in the village, who made a net profit of BDT [Bangladesh taka] 0.50 (USD 0.02) each on the loan. Thus, vastly improving Bangladesh's ability to export and import as it did in the past, resulting in a greater form of globalization and economic status.<sup>5</sup>

A different account sources the origin even earlier. In 1965, a woman begging him for money approached Dr. Yunus. He responded with words to the effect: “How about I give you five combs? You can go sell them, and then come back and we will start from there.”

Following the latter account, Professor Yunus and the woman — perhaps unbeknownst to them — were about to launch a contemporary microfinance revolution. This revolution — like many revolutions — occurred because of a failure, in this case, market failure. Conventional banking institutions, whether they were operating on Islamic principles or not, were not providing services to the poor. (Their failure to do so could be viewed as both un-Islamic and un-Christian, but that is another matter.) Those institutions believed there was no money in offering

financial services to impoverished persons. Social justice simply was not a bottom-line principle by which they operated.

By the 1970s and 1980s, NGOs extended credit. The 1980s and 1990s were a great leap forward in microfinance. Then, with the success of microfinance, those same institutions began to take a second look. On the supply side of the microfinance market, commercial banks started to move “down market” and think they could benefit and profit from microfinance. They began to appreciate that poor people often are smart at managing money, because they have so little of it. They also observed that the repayment rate on loans to poor people was far better than to rich people — on average, 98 percent.

On the demand side of that market, it was clear the sums needed to combat poverty were staggering enough that only the private sector — which includes NGOs — can provide the needed capital. Today, put bluntly, it is manifest that the only way to attract the kind of money needed to fight and defeat poverty is through the private sector, regardless of whether specific institutions in that sector operate along *Shari'a* lines or not. Moreover, the private sector is adept at offering services efficiently, providing the maximum offerings at the cheapest cost to the widest range of customers.

### [E] Challenges

A critical issue about microfinance does not concern the application of Islamic principles. Rather, it is about motive. Islamic Law has plenty of devices (*hiyal*) to render a transaction that otherwise would be forbidden (*haram*) permissible (*halal*). For instance, in many microfinance transactions in Pakistan, the word interest (*riba*) is not used (e.g., in documentation). Instead, the term “service charge” is applied. Intriguingly, the service charge typically is calculated in the same way as interest. In both Egypt and Jordan, microfinance lending occurs in accordance with the *Shari'a*, using *sharikah al-mudharabah* arrangements. That is true even though, as a practical matter, it can be difficult to decide how to split up any profits among the working partners (*mudharib*) and sleeping partner (*rabb al-mal*), because the transaction values are so small.

Yet, there is an obvious concern when Wall Street institutions, or their Islamic counterparts, enter the microfinance market. Are they, at bottom, taking a commercial return approach, or a social return approach — what matters most to them? That concern is amplified by the rapid, and largely unregulated, growth of microfinance. One anecdote is that in a recent 3-year period following the turn of the millennium, in Kenya, more people opened microfinance accounts than regular bank accounts. Microfinance, then, has become the proverbial victim of its own success, attracting mainstream Muslim and non-Muslim banks and NGOs into the game, not all of which share the pure-hearted motives with which Dr. Yunus and his followers resonate.

Still, there are other realities about microfinance, five of which are especially noteworthy. First, there are regulatory concerns. As discussed below, not every provider of microfinance services is concerned primarily with social returns. Moreover, there are law enforcement issues that can arise. For example, if

<sup>3</sup> The seminal works authored by Professor Yunus on microfinance are:

- MUHAMMAD YUNUS, *A WORLD WITHOUT POVERTY: SOCIAL BUSINESS AND THE FUTURE OF CAPITALISM* (Jackson, Tennessee: Perseus Books/Public Affairs, 2008).
- MUHAMMAD YUNUS, *BANKER TO THE POOR: MICRO-LENDING AND THE BATTLE AGAINST WORLD POVERTY* (Jackson, Tennessee: Perseus Books/Public Affairs, 2003).
- MUHAMMAD YUNUS, *GRAMEEN BANK, AS I SEE IT* (Dhaka, Bangladesh: Grameen Bank, 1994).

<sup>4</sup> The Nobel Peace Prize for 2006, 13 October 2006, posted at NobelPrize.org.

<sup>5</sup> *First Loan He Gave was \$27 from Own Pocket*, THE DAILY STAR, front page, 14 October 2006, posted at [http://en.wikipedia.org/wiki/Muhammad\\_Yunus](http://en.wikipedia.org/wiki/Muhammad_Yunus).



microfinance services involve taking of deposits, then can authorities be sure that money laundering is not going on?

Second, microfinance does not work in markets dominated by counter-trade. That is, it is ill-suited for a climate in which goods are exchanged for goods, commonly known as "barter trade." That is because microfinance involves currency-based transactions. Papua New Guinea is an example of a country characterized by a high degree of counter-trade. In times of hyperinflation, barter typically replaces monetary payments.

Third, while microfinance empowers women, it does not ineluctably lead to an easing of their lot. They often have to work quite hard in their microfinance-based arrangements. Moreover, female beneficiaries of microfinance sometimes wind up in competition with one another in the same services markets.

Fourth, not all poor households have the right mix of labor skills to benefit from microfinance. A certain skill for service-based transactions, coupled with an entrepreneurial drive, is essential. To be sure, that does not mean a high degree of education is required.

The fifth point follows from the third and fourth observations. Microfinance will not save all women, all of the poor, or all poor women. Rather, it is one tool in the kit to empower women and fight poverty. Microfinance enhances economic growth, particularly at lower socioeconomic strata, and helps ensure growth is more evenly distributed than it might otherwise be. But, putting a person into debt — through microfinance or conventional banking — does not automatically put them out of poverty.

## § 32.02 ISLAMIC REAL ESTATE INVESTMENT TRUSTS (I-REITS)<sup>6</sup>

### [A] Advantages of Malaysia over Arab Muslim World

While Islam is a global religion, developments in Islamic finance have been limited to just a few Muslim countries, such as the United Arab Emirates (UAE), specifically, Dubai. The lodestar among Muslim countries is the non-Arab, Southeast Asian nation of Malaysia. The country boasts a robust Islamic capital market, and is a center for Islamic banking assets, *shukūk* (Islamic bonds), and *takaful* (Islamic insurance). Indeed, since the 1980s, Malaysia has been at the forefront of efforts in the Islamic world to sponsor a sustainable, workable capital market that conforms with *Shari'a* precepts, and that is of financial and ethical appeal to Muslim and non-Muslim customers alike. Kuala Lumpur, the capital city of Malaysia, aspires to outpace Dubai not only as the pre-eminent center for Islamic finance, but also as a major center for international financial.

What explains the success of Malaysia thus far? Candidly speaking, Malaysian financiers and lawyers have worked with their colleagues among Islamic legal and

religious scholars (the *fukahā'* and *ulema*, respectively). These interdisciplinary teams, which generally have a pragmatic rather than dogmatic orientation, have provided impressive work on Islamic finance. In turn, Malaysia boasts at least six advantages over any Middle Eastern financial center.

First, Malaysia is a pluralistic, multi-religious, multi-racial society.<sup>7</sup> Indigenous Malays are Muslim, and account for slightly over 50 percent of the population. Ethnic Chinese, who represent nearly 25 percent of the population, migrated to the Malayan peninsula over centuries, while Indians, who represent a bit more than 7 percent were brought there by British colonial masters to work in rubber plantations and tin mines. Chinese tend to be Buddhist or Catholic Christian, and Indians tend to be Hindu or Catholic Christian. This heterogeneity is not only an inherent strength of the country, but also makes it an attractive destination, with a tolerant environment and (as Malaysians love to tout) exquisite, inexpensive food. Put bluntly, many bankers and lawyers prefer Malaysia to most Arab Muslim countries, which they find lack stimulating diversity and have an oppressive atmosphere characterized by a lack of religious freedom, unjust treatment of women, and uncomfortable segregation of expatriate and local workers.

Second, Malaysia has a diverse economy, rich in natural resources and a talented, enterprising labor force. In broad terms, traditionally, Muslim Malays dominated the agricultural sector, Chinese dominated the trading sector, and Indians dominated the industrial sector. Now, these lines are increasingly blurred, with good effect. While not quite an East Asian Tiger like Hong Kong, Korea, Singapore, or Taiwan, Malaysia has achieved impressive growth. Malaysia has sought balance in that growth among the Malays, Chinese, and Indians through controversial redistributive affirmative action-style programs that began in the 1970s (under the rubric of the "New Economic Policy," or "NEP") initiated after race riots in 1969-1970.<sup>8</sup> Yet, much of the NEP is being dismantled, albeit slowly, by the government, because it has created complacency and dependency among some elements in the Malay community when what is prized in the modern global economy is energy and entrepreneurship. Notwithstanding the debate about the NEP, what is manifest is that Malaysia has largely avoided the obscene disparities of wealth found in many Arab Muslim countries.

Third, again in sharp contrast to most of the Arab Muslim world, Malaysia is a multi-party parliamentary democracy. The Malay-dominated governments that have ruled Malaysia are invariably coalitions involving Chinese and Indians, and Islamic and secular interests. Free and fair elections are held regularly, on schedule, and a free press communicates competing ideas among the electorate. Open and sometimes fierce criticism of the government — both policies and officials — is part of the culture.

<sup>7</sup> See CENTRAL INTELLIGENCE AGENCY, THE WORLD FACTBOOK, posted at [www.cia.gov/library/publications/the-world-factbook/geos/try.html](http://www.cia.gov/library/publications/the-world-factbook/geos/try.html). The statistics are as of July 2010.

<sup>8</sup> See generally HOLLIS CHERNEY, REDISTRIBUTION WITH GROWTH: POLICIES TO IMPROVE INCOME DISTRIBUTION IN DEVELOPING COUNTRIES IN THE CONTEXT OF ECONOMIC GROWTH (Oxford, England: Oxford University Press, 1974) (discussing the balance between growth measured conventionally through gains in per capita Gross Domestic Product (GDP) and distribution of income).

<sup>6</sup> This discussion draws from *Current Trends in Islamic Finance*, (panel presentations), Inter-Pacific Bar Association, 19th Annual Conference, Manila, Philippines, 30 April 2009.



Fourth, Malaysian law is based on English Common Law. That is thanks to the colonial experience of Malaya under British Rule. Thus, in a manner redolent of Anglo-Muhammadian Law, the Malaysian legal system is a synthetic one that eschews extremes sometimes observed in the regimes of some Middle Eastern countries, most infamously, the Kingdom of Saudi Arabia. Its separation of powers is imperfect. But, Malaysia is far closer to rule of law than rule of man than is the case in many Arab Muslim countries.

In the particular instance of Islamic Real Estate Investment Trusts (I-REITs), the Common Law culture of Malaysia has proved to be a key asset. One reason Malaysia has been so successful in developing and promoting this kind of financial instrument is that it is a Common Law country with well defined property rights. That is, its Property Law and Trust Law are based on English Law, which provides great comfort to investors, be they Muslim or non-Muslim. Those investors look askance at the political and legal risks they incur in most Arab Muslim countries. Those risks, put bluntly, are that at any moment, their investment can be lost or damaged because of the whim of a single ruler.

Certainly, it is not that Islamic Law lacks sound Property or Trust Law principles. It not only has such principles, but in some respects was a forerunner of the Common Law. Rather, the problem from the perspective of modern investors is the perception that Arab Muslim countries do not systematically apply the rule of law, and their financial markets lack transparency. (The same perception exists with China.) Consequently, at least since the Second World War, if not earlier, international investors have viewed as a benefit in any financial instrument documentation a choice of law clause identifying the law of New York, or the law of England, as the governing law. Concomitantly, they are accustomed to the courts of New York (particularly the federal court of the Southern District), and the commercial court in London, as the venue for resolving disputes. In turn, New York and English law are well-developed in the area of finance, and the judges tend to be well-schooled about the field. As for Malaysia, international investors admire the semblance of its legal system with the familiar American legal system, and also the relative transparency of its financial market.

To be sure, Gulf Arab states are not oblivious to the negative perceptions about rule of law and transparency, and a few rulers have sought to counter them. Prominent examples include leaders of the Emirate of Dubai. In the Dubai International Financial Centre (DIFC), the law of England applies. Stepping physically into the DIFC is legally equivalent to being in England.

But, the DIFC is the exception that proves the rule. It is an exception for a limited geographical zone within the UAE, and the exception exists because of the grace of the one or more senior-most members of a ruling family, and the appreciation of the rulers that international financial capital will be attracted to the DIFC if English law — and English trained lawyers and judges — are used. Throughout most of the rest of the Gulf, international financiers and their lawyers worry that local law might apply to their transactions, that law might be a rigid version of the *Shari'a*, and the judges applying that law might be poorly trained in modern international banking, commerce, and trade. Malaysia does not quite conjure up the same degree of legal risk.

Fifth, Malaysians tend to be well schooled in English, and also at least one Asian language, such as Chinese, Malay, or Tamil. The notable exception is the generation of Malaysians educated in the 1980s, when a pro-Malay language policy was pushed by the central government. The consequences, in terms of producing a sophisticated labor force rich in human capital was disastrous. Chinese and Indians with the ability to do so emigrated from the country to Australia, Canada, New Zealand, the United Kingdom, and United States, contributing to a brain drain that weakened the global competitiveness of the country. With the government reversing the pro-Malay language policy, the importance of fluency in English is now increasingly stressed throughout the education system at all levels. This emphasis contrasts with many Arab Muslim countries, in which English is at best a secondary language, and when mastered, is mastered by elites.

Finally, Malaysia has enjoyed regional stability. Under the British, with particular credit to Field Marshall Sir Gerald Templer (1898-1979), who coined the phrase "winning hearts and minds," a communist insurgency was defeated in the 1950s. Following this "Emergency Period" of 1948-1960, and independence in 1957, Malaysia avoided war. Rivalry with Singapore is, at bottom, good-natured, with competition focusing on commerce, culture, and food. The rivalry has some salubrious effects. For example, Klang (the port near Kuala Lumpur) is a better facility in part because of world-class competition offered by the Port of Singapore Authority (PSA). In sharp contrast, most Arab Muslim countries, with the notable exception of Egypt since 1979 and Jordan since 1993, have been obsessed with Israel. On a permanent war footing with that country, and fighting wars with it in 1948, 1956, 1967, and 1973, they channel large amounts of resources to their militaries. The emergence of Iran as a potential nuclear threat has lessened stability in the Gulf region. As if to underscore the insecurity, whether the Gulf is rightly called the "Arabian Gulf" or "Persian Gulf" is itself a hot topic.

These advantages translate into a competitive edge in international Islamic finance. They have led to innovative products, such as I-REITs. To be sure, some Arab Muslim countries — most notably, the UAE — look admiringly at Malaysia for lessons to bring home. Yet, it is not at all clear whether they can or will do so in a manner convincing to professional bankers and lawyers.

## [B] Attractions of I-REITs

Given the aforementioned advantages, it ought not to be a surprise Malaysia was the pioneer in developing Islamic Real Estate Investment Trusts, or "I-REITs." These instruments are attractive to Muslim and non-Muslim investors for at least four reasons.

First, I-REITs provide a stable stream of income, or cash flow, to investors. A solid portfolio of real property backs this cash flow. In turn, the underlying properties typically consist of tenants — users of the property — that make regular, contract-based rent payments. These payments provide I-REIT investors with certainty of income. That income, measured by a key financial metric, tends to provide a high yield return.



Second, the Malaysian Securities Commission has issued guidelines for I-REITs. This fact is critically important. It means the Malaysian government, via regulation, provides a stable, secure, and transparent legal footing for the financial instruments. The guidelines address the classification of asset types used to back I-REITs, and the permissibility of assets that may be used for this backing.

In particular, the guidelines say an "I-REIT" is defined as an investment vehicle that proposes to invest at least 50 percent of the total assets in real estate. This figure indicates the flexibility of the Malaysian authorities. There is no set international standard for the percentage of assets that must be dedicated to real estate. But, in major, developed country markets the figure tends to be over 50 percent. In the United States, it is 75 percent. In Korea and Singapore, it is 70 percent.

Third, the Malaysian government offers tax incentives to promote a flourishing Islamic financial market in Kuala Lumpur. For example, it has reduced certain levies imposed on investors. Such moves encourage an influx of liquidity from the Middle East.

In May 2006, the first I-REIT in the world was issued on *Bursa Malaysia*, that is, the Kuala Lumpur Stock Exchange (KLSE). The assets underlying the May 2006 I-REIT flotation consisted of hospitals. In other words, property dedicated to hospitals backed share certificates. The issuance raised financial capital for the hospitals, and income generated from medical services provided by the hospitals was the source of cash flow passed through to investors in the certificates.

In January 2007, the first I-REIT backed by plantations was issued on *Bursa Malaysia*. Like the hospital I-REIT, the plantation I-REIT did not raise significant difficulties under the *Shari'a* in terms of the use to which the underlying property assets were put. Hospitals and plantations engage in activities that, almost by their nature, comply with Islamic Law. They do not involve the consumption of forbidden (*haram*) products, namely, alcohol (except for medicinal purposes in the case of hospitals), pork, pork products, or pornography. They do not involve even the production of these items. The only question these I-REITs posed was avoidance of interest (*riba*).

In December 2008, an I-REIT backed by commercial, office, industrial, and retail property was floated on *Bursa Malaysia*. This offering, in contrast to the hospital and plantation I-REITs, did require careful scrutiny to ensure the underlying properties were not put to use in a manner inconsistent with the *Shari'a*. By May 2009, 13 I-REITs had been issued on the Malaysian securities market, returning an impressive average annual dividend yield of 7 percent. This figure, while it does not account for inflation or taxes (or, for foreign investors, possible currency exchange losses), was impressive, particularly given the dreadful performance of nearly every financial asset category around the world following the 15 September 2008 collapse of Lehman Brothers on Wall Street. Note that the 7 percent annual dividend yield is not a fixed or guaranteed interest rate, which would be impermissible. Rather, it reflects a calculation of profit returned to a holder of an I-REIT certificate against initial investment by a certificate holder.

### [C] Compliance with Islamic Law

Conventional non-Muslim REITs and I-REITs have a number of features in common. That includes techniques used to value the instruments, and the engagement of institutions like a trustee and special purpose vehicle. There are two key differences, of course, which may be put in the form of questions:

- (1) How is income from the underlying REIT derived or earned? In a conventional non-Muslim REIT, the income may be from any source. But, in an I-REIT, the income must be from an economic activity that is compliant with the *Shari'a*.
- (2) How is an investment in a REIT determined? That is, who makes the decision about which real estate properties are acceptable to back a REIT, and which are not? In a conventional non-Muslim REIT, the decision is made by the financial manager of the REIT, or fund of REITs. The decision is made based on purely financial criteria. In an I-REIT, the decision also is made by a manager, but only after an individual *Shari'a* Advisor or Advisory Committee has provided an opinion on what properties are permissible (*halal*) versus forbidden (*haram*) investments. That delineation depends on Islamic legal criteria, which must be met before the manager can make decisions on financial grounds.

In brief, the central difference between a regular REIT and I-REIT is the latter instrument undergoes an assessment for compliance with the *Shari'a*. Knowing that certification for consistency with Islamic Law is necessary, the issuers of an I-REIT, plus their banking and legal advisors, structure the proposed instrument in a way to pass muster.

Ultimately, before an initial public offering (IPO) of an I-REIT, an individual *Shari'a* Advisor, or a *Shari'a* Advisory Committee, undertake the requisite assessment. The person or persons is supposed to be suitably qualified in Islamic law and finance to render an authentic, unbiased opinion. They are selected by the Malaysian Securities Commission, which retains a registry of eligible, well-credentialed *Shari'a* experts. They also are paid a fee for their work. The individual Advisor or Committee is responsible not only for certifying a proposed I-REIT issuance for *Shari'a* compliance, but also for overseeing operation of the I-REIT after the IPO to ensure continued compliance.

In reality, a difficulty facing not only Malaysia, but all governmental and private sector bodies interested in obtaining a reliable opinion on an Islamic financial matter is a shortage of *bona fide*, neutral experts. As in non-Muslim securities markets, Muslim markets are plagued by fraudsters, and in the latter context the problem of "renting an Imam" and thereby getting an opinion that is biased by the amount and timing of the fee has been observed. (In the former context, there is a cynical adage that one would never want to buy anything an American investment banker wants to sell.)

What, exactly, are the issues an individual *Shari'a* Advisor or Advisory Committee check when opining on a proposed I-REIT transaction? The answer is the individual or Committee look to see the deal meets five key Islamic legal



requirements, which also are reflected in the Malaysian government guidelines, as follows:

(1) *Halal* Uses of Properties —

First, rental properties must be put to a use or use that is *halal*. Stated differently, rental income generated by the properties that back an I-REIT, and which flow through to investors in the I-REIT certificates, must be from permissible activities. Impermissible activities would be any financial services based on *riba*, certain entertainment facilities (particularly gambling), or manufacturing of non-*halal* goods (e.g., alcohol, pork, or pornography). Thus, for example, suppose the underlying properties consisted of banks that do not operate on *Shari'a* principles, casinos, breweries, vineyards, pig farms, racy lingerie companies, or production studios that make "X" rated movies. It is forbidden (*haram*) to issue I-REIT certificates backed by the income from such properties, because of the use to which the properties are being put — namely, un-Islamic purposes.

Interestingly, two other categories of property activity also are considered impermissible: tobacco products; and hotels and resorts. Tobacco products, such as cigarettes, cigars, chewing tobacco, and pipe tobacco, are not strictly forbidden under the *Shari'a*. Certainly, there are incontrovertible health reasons to deny tobacco farms or companies engaged in making tobacco products status as an acceptable property basis for an I-REIT flotation. As for hotels and resorts, depending on how strict, indeed puritanical, the scrutiny is of a potential I-REIT deal, several of their services may pose problems. A few examples include: (1) offering alcoholic beverages and pork products, (2) serving non-*halal* food; (3) having a karaoke bar and lounge, and (4) providing massage services by female massage therapists to males, or *vice versa*. Likewise, failure to sponsor certain architectural layouts, or failure to make certain logistical arrangements, can raise difficulties. For example: (1) not having segregated swimming pools, beach areas, or fitness centers for women (i.e., so that they are screened off from men); (2) not having dining facilities that allow for screens between guests (so that women in one family may not be seen by men at other tables); and (3) not having separate floors for guests who are families and guests who are singles.

Under the Malaysian government guidelines, the individual *Shari'a* Advisor or Advisory Committee is entitled to use discretion, specifically *ijtihad*, in two directions, as it were. On the one hand, *ijtihad* may be applied to determine whether an activity not listed as impermissible actually is forbidden (*haram*). On the other hand, *ijtihad* may be used to discern that property — despite initial appearances — is not actually being used in an impermissible manner, and thus can be the basis for an I-REIT transaction. For example, in one 2009 Malaysian case, a *Shari'a* Committee determined that revenues from a hotel could be used to back an issuance of new I-REIT certificates. The hotel served only *halal* food, provided only permissible entertainment (which excluded karaoke), had separate floors for families versus single guests, constructed a barrier by its swimming pool so that persons inside a nearby office tower could not see the pool, and provided separate pool areas for women versus men.

The point, then, is the list differentiating permissible from impermissible uses for property proposed to undergird an I-REIT deal cannot be regarded as wooden — at least not if a financial center like Kuala Lumpur seeks world-class status. Rather, each individual property needs to be checked carefully to see what actually is going on. Otherwise, large sums of potential investment will be lost, because some properties that are operating entirely or closely in conformity with the *Shari'a* will be ruled out *a priori*, and their revenues unjustly deemed forbidden as an investment return. This kind of property-by-property check requires not only time and expense, but also flexibility — the flexibility that is inherent in *ijtihad*.

(2) Mixed Use Properties —

From a *Shari'a* perspective, an ideal portfolio of real estate to back I-REIT certificates would consist only of properties the income from which is derived from activities that, without question, are permissible (*halal*). Such portfolios, of course, do exist, and are used in asset-backed securities transactions. However, to constrain finance only to such portfolios is — from a practical economic perspective — to constrain growth.

By exalting purity of activity, albeit for sound religious and ethical reasons, over all else, the possibility of slightly less-than-perfect portfolios is excluded. Put simply, the best becomes the enemy of the good. The larger the value and volume of properties that are excluded from backing asset-backed securities, i.e., the smaller the pool of underlying assets, the smaller the number and size of asset-backed offerings that are possible. The market for *Shari'a* compliant securities must await growth in *Shari'a* compliant property activities. In the meantime, potential investors — Muslim as well as non-Muslim — may have little choice but to put their savings elsewhere. Another reality particular to Malaysia mitigates against a hard-line rule of permitting only 100 percent *halal* property activities to back an I-REIT deal. That reality is the heterogeneous ethnic, racial, and religious population of the country. A hard line rule is easier to advocate when nearly 100 percent of the citizens and landowners are Muslim, as is true in most of the Gulf region. If Chinese and Indians, who are Buddhists, Christians (largely Catholics), and Hindus, dominate large commercial sectors, as they do in Malaysia, then economic diversity calls for financial flexibility.

In brief, the question is: Why not allow a portfolio of real properties, most of which are engaged in *Shari'a* compliant activities, but some of which skirt or cross the line, to be the basis for an IPO of I-REIT certificates? Not surprisingly, Malaysian authorities, clerics (*ulema*) and legal scholars (*fuqahā*) take a flexible approach (at least within boundaries). They regard as acceptable for an I-REIT transaction rental income from tenants that operate mixed activities. "Mixed," here, means rental income that ultimately is passed through to I-REIT certificate holders is derived from a potpourri of activities, some of which consistent with the *Shari'a*, but others of which are incongruous with it. Their flexibility is manifest in what may be dubbed a "20 Percent Rule."

Under this rule, a financial manager of an I-REIT cannot invest in a property if the rental income from tenants of that property from non-*Shari'a* compliant sources exceeds 20 percent of total turnover per year. The formula is:



$$20 \text{ percent} < \text{or} = \frac{\text{Rental income from sources that do not comply with the } \textit{Shari'a}}{\text{Total annual rental income from the property}}$$

In other words, any property the income from which is derived from activities impermissible under the *Shari'a*, nevertheless may qualify to back an I-REIT. The question is "how much?," i.e., how much of the income comes from forbidden (*haram*) or otherwise suspect activities? As long as the answer is 20 percent or less, then that property can be used in an I-REIT, or stated equivalently, the financial professional running the I-REIT can invest in that property.

The 20 percent threshold is calculated on an annual basis, and is a percentage of total revenue from all property activities, both *Shari'a* and non-*Shari'a* compliant ones. If in one year the figure creeps above 20 percent, then a problem could arise. The manager would have to divest the I-REIT fund of that property. But, depending on market conditions, the sale of the interest in the property could be at a considerable loss, and redound back to the I-REIT investors. Moreover, the problem may arise for reasons beyond the control of the manager. For instance, revenues from a *Shari'a*-compliant activity, such as making Persian carpets, could collapse, and revenues from a non-compliant one, such as alcohol sales, could skyrocket. That pattern would be consistent with a recession, in which luxury items like Persian carpets fare poorly, but beer and wine sales tend to hold steady or even rise. Of course, the response to the problem is simple: the manager is paid a healthy salary for her expertise in dealing with uncertainty.

Malaysian authorities and *Shari'a* experts also have been flexible in permitting alternative methods to calculate the acceptable degree of non-*Shari'a* compliant properties backing an I-REIT. Suppose accurate sales revenue figures from all underlying properties are unavailable (e.g., they are missing or unreliable) in a given year. Or, suppose the extant figures do not convey an accurate portrayal of the nature of the real estate portfolio. For these and other reasons, a different criteria to judge *Shari'a* compliance is needed. Square footage is that alternative. That is, an individual *Shari'a* Advisor or Advisory Committee may check the ratio of square footage dedicated to *Shari'a* versus non-*Shari'a* compliant activities. The quantitative benchmark is 20 percent, meaning that non-compliant activities must take up no more than 20 percent of the total square footage space. The formula is:

$$20 \text{ percent} < \text{or} = \frac{\text{Square footage in a property dedicated to purposes that do not comply with the } \textit{Shari'a}}{\text{Total square footage of the property}}$$

For example, suppose the property in question is a supermarket — it is proposed as the backing for an I-REIT issuance, or more likely, it is one of several properties in the mix that would underlie the I-REIT certificates. The supermarket has 10,000 square feet total. Of this amount, 1,000 square feet are dedicated to the sale of alcoholic beverages and non-*halal* food. The supermarket qualifies for the I-REIT, because only 10 percent (1,000 square feet divided by 10,000 square feet) of its floor space is used for un-Islamic purposes. There is no prohibition on the I-REIT manager investing in this supermarket.

### (3) I-REIT Investments —

An I-REIT generates cash flow, and passes it through to certificate holders, from underlying revenue sources. Those sources, of course, must comport with Islamic Law, as explained above. A third rule checked by an individual *Shari'a* Advisor or Advisory Committee, pursuant to Malaysian government guidelines, concerns the deposit, financial, and investment instruments associated with an I-REIT. Simply put, all of them must comply with the *Shari'a*. This rule covers deposits taken or made by the I-REIT, financial arrangements of the I-REIT, and any investments in which the I-REIT places revenue streams from the underlying portfolio of real estate holdings.

### (4) Insurance (*Takaful*) —

Many non-Islamic financial securities carry with them some form of guarantee appropriate to their risk. The guarantee helps assure investors that they will be paid a certain sum, at least their initial capital investment, if one or more events of default occur as specified in the relevant legal documentation for the securities. That is also true for many Muslim securities, including I-REITs. What happens, for instance, if the rental payments from properties underlying an I-REIT cease, perhaps because of poor business fortunes, or insolvency, of the tenants? The certificate holders would like to receive at least their initial principal investment, if not also some return.

This kind of situation goes by the rubric of "credit risk." It is the risk investors assume in buying and holding a financial instrument that the issuer of that instrument obligated to make or pass through payments to them defaults on those obligations. An insurance policy under which the investors are the ultimate beneficiaries helps mitigate credit risk. For an I-REIT, an individual *Shari'a* Advisor or Advisory Committee must check to see that such a policy exists. In particular, the policy must insure the assets — the real property — that back the I-REIT. Moreover, that policy must conform with Islamic insurance principles, i.e., it must be *takaful* insurance. Here again, though, the Malaysian government guidelines allow for flexibility. If there is no appropriate *takaful* available, then conventional, non-Islamic insurance may be used.

Almost certainly, the above requirements will evolve. That is because financial market conditions are never static, and because of the ingenuity of financial professionals to devise new instruments to meet dynamic conditions. Malaysian government authorities, *ulema*, and *fukahā'* will be presented with new environments and proposed securities in which to issue them.

## § 32.03 CONVENTIONAL NON-ISLAMIC INVESTMENT FUNDS

### [A] Mutual Funds

Mutual funds are a prominent investment vehicle in the United States and many other developed countries. The term "mutual fund" is a generic, but precision as to its meaning is gained by understanding the relevant legal and commercial

framework. The starting point is the definition of an "investment company" in the *Investment Company Act of 1940*:<sup>9</sup>

An investment company invests the money it receives from investors on a collective basis, and each investor shares in the profits and losses in proportion to the investor's interest in the investment company.<sup>10</sup>

There are three sorts of investment companies:

- (1) Open end companies.
- (2) Closed end companies.
- (3) Unit investment trusts (UITs).

The United States Securities and Exchange Commission (SEC) regulates each type of investment company.

Any investment company sells securities through the activities of an "investment adviser." An investment adviser is defined as:

any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities. . . .<sup>11</sup>

Unless a specific exemption applies, all investment advisers must register with the SEC.<sup>12</sup> The SEC regulates investment advisors pursuant to the *Investment Advisors Act of 1940*.

#### • Open End Companies:

Open end companies are the most numerous of the three sorts of investment companies. Statutorily, an open end company is a:

management company which is offering for sale or has outstanding any redeemable security of which it is the issuer.<sup>13</sup>

Commonly, open end companies are referred to as "mutual funds." A "mutual fund:"

<sup>9</sup> *Investment Company Act of 1940* § 3, 15 U.S.C. § 80-a3 (2006), posted at [www.law.uc.edu/CCL/InvCoAct/index.html](http://www.law.uc.edu/CCL/InvCoAct/index.html). This Act is codified at 15 U.S.C. §§ 80-a1-80-a-64 (2006). [Hereinafter, *1940 Investment Company Act*.]

<sup>10</sup> SECURITIES AND EXCHANGE COMMISSION, *INVESTMENT COMPANIES*, posted at [www.sec.gov/answers/mfivco.htm](http://www.sec.gov/answers/mfivco.htm).

<sup>11</sup> *Investment Advisers Act of 1940* § 202(a)(11), 15 U.S.C. § 80b2-1-80b-18a (2006), posted at [www.law.uc.edu/CCL/InvAdvAct/index.html](http://www.law.uc.edu/CCL/InvAdvAct/index.html). This Act is codified at 15 U.S.C. §§ 80b-1-80b-18a (2006). [Hereinafter, *1940 Investment Advisers Act*.]

<sup>12</sup> See *1940 Investment Advisers Act of 1940*, *supra*, § 203, 15 U.S.C. § 80b-3.

<sup>13</sup> *1940 Investment Company Act*, *supra*, § 5(a)(1), 15 U.S.C. § 80-a5.

is a company that pools money from many investors and invests the money in stocks, bonds, short-term money-market instruments, or other securities.<sup>14</sup>

Mutual funds are diverse in nature. They can consist of stocks, bonds, money market instruments, an index, or any combination thereof. Financial assets in them may be domestic, international (*i.e.*, outside of home country of the fund, *e.g.*, outside the United States), or global (*i.e.*, both domestic and international). But, there are four characteristics common to all mutual funds that distinguishing them from other investment companies.

First, an investor in a mutual fund does not purchase directly the underlying investments in the fund. Rather, the investor obtains shares in the fund itself.<sup>15</sup> Those shares represent an ownership interest in a portion of the assets in which the fund is invested. The price an investor pays is the ratable net asset value (NAV) plus any applicable fees. The NAV is the total assets less total liabilities of the mutual fund.<sup>16</sup>

Second, at any time after purchase, an investor can redeem her investment share.<sup>17</sup> The redemption amount is determined similarly to the calculation of the purchase price. That is, it is based on the ratable NAV at the time of redemption less any applicable fees. Stated differently, there is no secondary market for trading the mutual fund securities; rather, an investor seeking to terminate its investment in the fund does so by selling the shares back to the open end company and receive cash in exchange. Redemptions can create cash-flow problems for an open end company. If there are a large number of redemptions in a short period, then the fund may run short of cash. This scenario often occurs during periods of market decline, despite the common sense advice to "buy low and sell high." Consequently, at the very time when the fund would like to acquire more financial assets, because their prices have fallen, it must use up cash to redeem shares in the fund, rather than to buy attractive low-priced assets.

Third, a mutual fund typically sells shares continuously.<sup>18</sup> Some funds may suspend trading if they determine there are too many sold, but unredeemed shares. In other words, new investors can come into the mutual fund at virtually any time in the life of the fund. Issuance of new shares, of course, generates liquidity for the fund.

Fourth, an investment advisor manages a mutual fund. Specifically, an investment advisor runs the portfolio of financial assets contained in the fund.<sup>19</sup> For example, the former Merrill Lynch Dragon Fund was an open end mutual fund

<sup>14</sup> SECURITIES AND EXCHANGE COMMISSION, *MUTUAL FUNDS*, posted at [www.sec.gov/answers/mutfund.htm](http://www.sec.gov/answers/mutfund.htm). [Hereinafter, *MUTUAL FUNDS*.]

<sup>15</sup> See *MUTUAL FUNDS*, *supra*.

<sup>16</sup> See SECURITIES AND EXCHANGE COMMISSION, *NET ASSET VALUE*, posted at [www.sec.gov/answers/nav.htm](http://www.sec.gov/answers/nav.htm).

<sup>17</sup> See *MUTUAL FUNDS*, *supra*.

<sup>18</sup> See *MUTUAL FUNDS*, *supra*.

<sup>19</sup> See *MUTUAL FUNDS*, *supra*.



worth U.S. \$1.2 billion at its peak in 1993. This Fund was run by an investment advisor, Merrill Lynch Asset Management (MLAM), which the Board of Directors of the Fund hired. The investment advisor had specialty expertise in the instruments in which the Fund was invested, namely, equities issued and traded on all East Asian stock markets except Japan. If an investment advisor manages a portfolio of over \$25 million, then it must register with the SEC.<sup>20</sup> If the portfolio is less than \$25 million, then advisor must register with the state securities commission where the principal place of business is located.<sup>21</sup>

• Closed End Companies:

A closed end company, more commonly referred to as a closed end fund, is an investment company whose shares are traded like publicly traded stocks.<sup>22</sup> Such a company is defined by reference to an open end company; namely, as "any management company other than an open end company."<sup>23</sup>

There are five common features of closed end funds that delineate them from mutual funds. First, shares in a closed end fund are traded like publicly traded stock. Hence, the process of selling and buying shares in a closed end fund is different from a mutual fund. Shares in a closed end fund are not offered continuously by the investment company. Rather, they must be purchased on a secondary market, like the New York Stock Exchange (NYSE).<sup>24</sup> Thus, for example, the former Merrill Lynch Emerging Tigers Fund was a \$300 million closed end fund, specializing in stocks issued and traded in developing Far Eastern countries. (Japan, Korea, and Taiwan were excluded.) Shares in that Fund were issued once by Merrill Lynch. Following the 1994 IPO, investors seeking to acquire shares in the Fund had to do so on the NYSE.

Second, pricing shares in a closed end fund after its IPO is determined by its share price.<sup>25</sup> If the share price exceeds the NAV, then the fund is trading at a premium.<sup>26</sup> Conversely, if the NAV exceeds the share price, then the fund is trading at a discount.<sup>27</sup>

Third, a closed end fund is not obligated to redeem shares in it at the request of an investor.<sup>28</sup> Rather, if the investor wants to sell its shares, then it must do so on the secondary market. Consequently, a closed end fund does not have problems of redemption as does an open end fund. However, there are some closed end funds,

known as "interval funds," which periodically offer to repurchase shares from their investors.<sup>29</sup>

Fourth, and like a mutual fund, an investment advisor manages the investment portfolios of a closed end fund.<sup>30</sup> The same advisor can run both an open and closed end fund, as was the case of the Merrill Lynch Dragon and Emerging Tigers Funds.

Fifth, a closed end fund may invest in more illiquid securities than a mutual fund.<sup>31</sup> An illiquid security, in this context, is "a security that cannot be sold within seven days at the approximate price used by the fund in determining net asset value."<sup>32</sup> This feature is connected with the point about redemption. If a closed end fund were obligated to redeem shares on demand, then it might have to sell underlying financial assets to generate cash to meet the redemptions. If those assets were illiquid, then it might not be able to do so. But, relieving the fund of the redemption obligation means it has greater freedom to invest in assets that are not readily tradeable.

• Unit Investment Trusts

The third type of investment company is a UIT. A UIT is:

an investment company which (A) is organized under a trust indenture, contract of custodianship or agency, or similar instrument, (B) does not have a board of directors, and (C) issues only redeemable securities, each of which represents an undivided interest in a unit of specified securities; but does not include a voting trust.<sup>33</sup>

There are five common characteristics of UITs.

First, units (which function like shares) in a UIT sold to investors may be redeemed at any time for the ratable NAV of those units.<sup>34</sup> Second, units are sold at one time.<sup>35</sup> A secondary market, however, often is maintained by sponsors of the UIT that allows for the additional sale of units. Third, a UIT only operates for a fixed time.<sup>36</sup> If at the termination date the trust still has outstanding investments, then those investments are redeemed and the proceeds distributed proportionately to unit owners. Fourth, a UIT buys a portfolio of securities at the inception of the UIT, and those securities change little, if at all, during the term of the trust.<sup>37</sup> The investment portfolio of a UIT is listed in the UIT prospectus. Fifth, "[a] UIT does

<sup>20</sup> See SECURITIES AND EXCHANGE COMMISSION, INVESTMENT ADVISORS: WHAT YOU NEED TO KNOW BEFORE CHOOSING ONE, posted at [www.sec.gov/investor/pubs/invadvisers.htm](http://www.sec.gov/investor/pubs/invadvisers.htm). [Hereinafter, INVESTMENT ADVISORS.]

<sup>21</sup> See INVESTMENT ADVISORS, *supra*.

<sup>22</sup> See INVESTMENT COMPANY INSTITUTE, A GUIDE TO UNDERSTANDING MUTUAL FUNDS 18, posted at [www.ici.org/pdf/g2understanding.pdf](http://www.ici.org/pdf/g2understanding.pdf). [Hereinafter, GUIDE.]

<sup>23</sup> 1940 Investment Company Act, *supra*, § 5(a)(1), 15 U.S.C. § 80-a5.

<sup>24</sup> See SECURITIES AND EXCHANGE COMMISSION, CLOSED-END FUNDS, posted at [www.sec.gov/answers/mfclose.htm](http://www.sec.gov/answers/mfclose.htm). [Hereinafter, CLOSED-END FUNDS.]

<sup>25</sup> See CLOSED-END FUNDS, *supra*.

<sup>26</sup> See GUIDE, *supra*, at 18.

<sup>27</sup> See GUIDE, *supra*, at 18.

<sup>28</sup> CLOSED-END FUNDS, *supra*.

<sup>29</sup> SECURITIES AND EXCHANGE COMMISSION, INTERVAL FUNDS, posted at [www.sec.gov/answers/mfinter.htm](http://www.sec.gov/answers/mfinter.htm).

<sup>30</sup> See CLOSED-END FUNDS, *supra*.

<sup>31</sup> See CLOSED-END FUNDS, *supra*.

<sup>32</sup> CLOSED-END FUNDS, *supra*.

<sup>33</sup> 1940 Investment Company Act, *supra*, § 4(2), 15 U.S.C. § 80-a4.

<sup>34</sup> See SECURITIES AND EXCHANGE COMMISSION, UNIT INVESTMENT TRUSTS, posted at [www.sec.gov/answers/uit.htm](http://www.sec.gov/answers/uit.htm). [Hereinafter, UNIT INVESTMENT TRUSTS.]

<sup>35</sup> See UNIT INVESTMENT TRUSTS, *supra*.

<sup>36</sup> See UNIT INVESTMENT TRUSTS, *supra*.

<sup>37</sup> See UNIT INVESTMENT TRUSTS, *supra*.

not have a board of directors, corporate officers, or an investment adviser to render advice during the life of the trust."<sup>38</sup>

### [B] Hedge Funds

A hedge fund is similar to a mutual fund in that both pool money from investors to purchase and sell financial instruments. However, a hedge fund is less stringently regulated by the SEC than a mutual fund, even though it deals actively in securities. Shares in a mutual fund, as well as a closed end fund, are registered pursuant to the *Securities Act of 1933*. In contrast, shares in a hedge fund are sold through a private offering. Such private placements are exempt offerings under the *1933 Act*.<sup>39</sup>

Hedge funds invest in the same types of financial assets as an open or closed end fund. But, the manner in which it makes these investments tends to differ. Hedge funds pursue riskier investment strategies including leveraged investing and other speculative investment practices, than mutual or closed end funds.<sup>40</sup> Some hedge funds also invest in the funds of other hedge funds.<sup>41</sup> Hedge funds have varying investment strategies that use a dizzying array of complex mathematical and computational formulae in search of extraordinary profit-maximizing objectives. Often, these formulas exploit short-term market inefficiencies and other circumstances in which there may be a large, but uncertain, return in a quick period.

In exchange for the opportunity for super-normal return vis-à-vis conventional funds, a hedge fund charges more substantial fees than the alternative vehicles. The customary hedge fund charge is a 2 percent management fee on assets initially invested in the fund, and an additional 2 percent fee on the assets of each investor for each subsequent year.<sup>42</sup> On top of the 2 percent *per annum* management fee, a hedge fund charges a 20 percent performance fee on any profits (realized or unrealized) by the investor.<sup>43</sup> Thus, a — if not the — defining feature of a hedge fund is its fee structure, commonly referred to in Wall Street parlance as a "2 and 20" arrangement.

Hedge funds are not for modest wallets or faint hearts. Typically, hedge funds require large minimum investments, such as U.S. \$1 million, and lock up these

<sup>38</sup> UNIT INVESTMENT TRUSTS, *supra*.

<sup>39</sup> *Securities Act of 1933*, § 4(2), 15 U.S.C. § 77d (2006), posted at <http://www.law.uc.edu/CCL/33Act/see4.html>. This Act is codified at 15 U.S.C. §§ 77a-77e-3 (2006). Relatedly, the *Securities Exchange Act of 1934* is codified at 15 U.S.C. §§ 78a-78nn (2006). For a comprehensive treatments of United States Securities Law, see Louis Loss, Joel Seligman & Troy Paredes, *Securities Regulation* (1961) (New York, New York: Aspen Law & Business, 2006) and Marc I. Steinberg, *Understanding Securities Law* (New Providence, New Jersey: LexisNexis, 5th ed. 2009). For a concise treatment, see Louis Loss & Joel Seligman, *Fundamentals of Securities Regulation* (1983) (New York, New York: Aspen Publishers, 2003).

<sup>40</sup> SECURITIES AND EXCHANGE COMMISSION, HEDGING YOUR BETS: A HEAD-UP ON HEDGE FUNDS AND FUNDS OF HEDGE FUNDS, posted at [www.sec.gov/answers/hedge.htm](http://www.sec.gov/answers/hedge.htm). [Hereinafter, HEDGING YOUR BETS.]

<sup>41</sup> HEDGING YOUR BETS, *supra*.

<sup>42</sup> HEDGING YOUR BETS, *supra*.

<sup>43</sup> HEDGING YOUR BETS, *supra*.

investments for a defined period, such as a year, or mandate a minimum notice period for withdrawal of 30 days. The aggressiveness, if not outright greed, of the high net worth investors is matched by the hedge fund managers. They are under enormous pressure to justify their 2 and 20 fee structure with far better than average returns, and to outperform themselves (and their competitors) each successive year. Indeed, if the fund falls below the high-water mark of performance in the previous year, then the manager does not get a performance fee until it surpasses that mark.

### [C] Socially Responsible Funds: A Case Study of Ave Maria

Traditionally, none of the aforementioned investment products is judged by financial market participants on religious or moral criteria. What matters, indeed, all that matters, is making money for shareholders in a lawful manner. Thus, if the shares in a mutual fund, closed end fund, UIT, or hedge fund are in equity or debt of (for example) a —

- cosmetics company that tests beauty products on animals,
- defense contractor that makes Predator drones that kill innocent civilians,
- industrial manufacturer that dumps pollutants into the atmosphere,
- jeweler that uses conflict diamonds,
- multinational corporation that operates sweatshops in poor countries,
- pharmaceutical firm that makes abortifacient pills, or
- publisher that sponsors pornographic magazines,

so be it. The inexorable logic of capitalist finance is on profits.

Yet, questioning this logic is a growing trend in non-Muslim western financial circles. Investors increasingly are concerned about the taint on their profits, and by extension their souls, of financial returns obtained from investments that, while not illegal, offend their consciences. Many such investors are willing to forego some — but not all — financial gains in exchange for what are called "socially responsible" or "ethical" investments.

Eager to fill this market, Wall Street offers a range of conforming vehicles. The vehicles are not all alike. Some of them are distinctly Christian funds, which — depending on the exact fund — look askance at companies that make money from abortion, artificial birth control, gambling, tobacco, pornography, and weapons. Others are independent of religion, but stress ethical principles like good stewardship of the environment when searching for companies in which to invest.

Established in 1980, Ave Maria Mutual Funds are one example of the many choices available to investors. The objective of Ave Maria is:



to seek long-term capital appreciation from equity investments in companies that do not violate core values and teachings of the Roman Catholic Church.<sup>44</sup>

Ave Maria offers five different types of funds. Four of them are equity funds, and the fifth is a bond fund.

In managing each fund, Schwartz Investment Counsel, Inc., the investment advisor for Ave Maria, regards adherence to the ideals of Catholic Church as important as earning potential. Using standard investment tools, the fund managers analyze the earning potential of common stock and bonds of various issuers. For example, they consider price-earnings ratios, dividend yields, and a variety of other standard quantitative benchmarks. But, even if a prospective equity or debt investment passes conventional financial criteria, the managers will not purchase an investment for an Ave Maria portfolio if the issuer operates inconsistently with Catholic precepts. Specifically:

Under normal circumstances, all of the Fund's equity investments and at least 80% of the Fund's net assets, including the amount of any borrowings for investment purposes, will be invested in securities meeting the Fund's religious criteria.<sup>45</sup>

The only way to deviate from this commitment is by a majority vote of the outstanding shares of the Ave Maria fund in question.<sup>46</sup>

Ave Maria realizes that restricting investment to equity stakes in qualified companies may cause its funds to lag behind growth in the stock market.<sup>47</sup> There are gauges, such as KLD Indexes, which track investment vehicles like the Ave Maria funds that adhere to religious, moral, or other non-financial criteria (e.g., parameters concerning corporate governance).<sup>48</sup> Using these value-based investment screens, KLD tracks the performance of socially responsible companies against an index, like the Standard & Poor's 500 (S&P 500), which has no comparable restriction. Another example, launched in April 2010, is the first Christian equity index in Europe:

The Stoxx Europe Christian Index comprises 533 European companies that only derive revenues from sources approved "according to the values and principles of the Christian religion."

BP, HSBC [Hong Kong Shanghai Banking Corporation], Nestlé, Vodafone, Royal Dutch Shell, and Glaxo-SmithKline are among the companies in the index. Only groups that do not make money from pornography, weapons, tobacco, birth control, and gambling are allowed to be listed.

<sup>44</sup> Ave Maria Mutual Funds, *Prospectus 1* (1 May 2008), posted at [www.ave-mariafund.com/home.htm](http://www.ave-mariafund.com/home.htm). [Hereinafter, Ave Maria Prospectus.]

<sup>45</sup> Ave Maria Prospectus, *supra*, at 4.

<sup>46</sup> Ave Maria Prospectus, *supra*, at 4.

<sup>47</sup> Ave Maria Prospectus, *supra*, at 4.

<sup>48</sup> See KLD Indexes, posted at [www.kld.com/indexes/index.html](http://www.kld.com/indexes/index.html).

A committee, which Stoxx says includes representatives of the Vatican, screens shares, which are drawn from the Stoxx Europe 600 Index.<sup>49</sup>

Note the Stoxx Europe Christian Index tracks shares of individual companies, thereby meeting investor demand for buying and selling equities in specific companies, as distinct from funds.

Such indices bolster the transparency of the market and empower investors to make choices with fuller, though not necessarily full, information. Armed with such information, however, it becomes clear that often there is a trade-off between sticking to principles of conscience and maximizing investment returns. The severity of the trade-off depends on the investment vehicles being compared, and the time period of the comparison. Further, it may be difficult to differentiate the cause of differential performance, i.e., whether a socially responsible investment fund underperforms a market index because of values-based strictures on the fund, or because of exogenous economic and political factors affecting investments in that fund.

How does Ave Maria determine if a company in which it is considering an investment violates Catholic teaching? Ave Maria has a Catholic Advisory Board ("CAB") composed of distinguished individuals "familiar with the magisterium of the Roman Catholic Church."<sup>50</sup> The CAB is assisted by a distinguished, senior Ecclesiastical advisor (e.g., a Cardinal), who does not serve in an official role for Ave Maria and thus is independent of Ave Maria.<sup>51</sup> The CAB does not support:

two major categories of companies: first, those involved in the practice of abortion, and second, companies whose policies are judged to be anti-family, such as companies that distribute pornographic material or whose policies undermine the Sacrament of Marriage.<sup>52</sup>

The CAB serves in an advisory capacity and does not itself make investment decisions on behalf of Ave Maria.<sup>53</sup>

Among the religious and moral criteria examined by Ave Maria when making investment choices are policies of an issuer concerning the family. The Catholic Church regards the traditional family as the essential building block of civilization. In respect of anti-family policies, Mr. George P. Schwartz, CFA, founder of Ave Maria, states:

when a company offers to put a non-marital union on par with marriage, it's a slap in the face to the Catholic Church and such companies should be screened out.<sup>54</sup>

<sup>49</sup> David Oakley, *Vatican-Backed Index Aims to Meet Demand for Ethical Stocks*, FINANCIAL TIMES, 27 April 2010, at 13.

<sup>50</sup> Ave Maria Prospectus, *supra*, at 33.

<sup>51</sup> See Ave Maria Prospectus, *supra*, at 33.

<sup>52</sup> Ave Maria Prospectus, *supra*, at 10.

<sup>53</sup> See Ave Maria Prospectus, *supra*, at 33.

<sup>54</sup> William Baue, *Ave Maria Funds Promote Catholic Values Through Morally Responsible Invest-*

Thus, providing benefits to non-marital partners of employees — whether heterosexual, homosexual, or any other category — is sufficient to preclude investment by Ave Maria. However, Ave Maria does not screen out companies that ban employment discrimination based on sexual orientation.<sup>55</sup>

The job of the CAB — to discern religiously and morally acceptable investments — is not always easy. In turn, decisions about investing may not always be consistent, or even transparent. Consider Wal-Mart and Lockheed Martin. These two companies have policies banning employment discrimination based on sexual orientation. Ave Maria previously invested in them (as of 2003).<sup>56</sup> Yet, Wal-Mart sells both barrier contraceptives and, in its pharmacy (as of 2006), abortifacient drugs (namely, the morning-after pill).<sup>57</sup> Ave Maria funds no longer hold investments in Wal-Mart. As for Lockheed Martin, which is a defense contractor, weapons manufacturing poses a Catholic theological objections. It appears Ave Maria invests in this company. Still other examples of controversial investment choices concern companies that sponsor gambling, produce tobacco, or are excessive polluters.

## § 32.04 SHARĪ'A COMPLIANT INVESTING

### [A] Defining "Sharī'a Compliant"

Like their non-Muslim counterparts, many Muslim investors are interested in putting their money into vehicles that are acceptable from a religious and moral standpoint. An example of such a vehicle is the Amana Mutual Funds Trust Growth Fund, which is one of several funds sponsored by the Amana Mutual Funds Trust. Funds in this Trust abjure investments in stocks and bonds of companies dealing in alcohol, pork, or pornography, as well as of banks that practice interest (*ribā*).

The size (as of November 2009) of the Islamic financial market, in terms of assets under management in a Sharī'a compliant manner, is around U.S. \$750 billion to \$1 trillion, and growing at a rate of 15-20 percent.<sup>58</sup> This market has caught the attention of non-Muslim investors, both individual and institutional. It must do so if it is to be truly global and deeply liquid. Thus, it is not unusual to see

ing, SOCIAL FUNDS, 12 September 2003, posted at [www.socialfunds.com/news/article.cgi/1219.html](http://www.socialfunds.com/news/article.cgi/1219.html). [Hereinafter, Baue.]

<sup>55</sup> See Baue, *supra*.

<sup>56</sup> Baue, *supra*.

<sup>57</sup> Wal-Mart to Begin Dispensing "Morning After" Pill this Week, CONSUMER AFFAIRS, 19 March 2006, posted at [www.consumeraffairs.com/news/04/2006/03/walmart\\_planh.html](http://www.consumeraffairs.com/news/04/2006/03/walmart_planh.html).

<sup>58</sup> A number of websites address the topic of Sharī'a compliance and provide facts and figures about the market for Islamic financial products, including:

- [www.ethicalcorp.com/content.asp?ContentID=4856](http://www.ethicalcorp.com/content.asp?ContentID=4856).
- [www.straightwayethical.com/index.php](http://www.straightwayethical.com/index.php).
- [www.investopedia.com/ask/answers/07/islamic\\_investments.asp](http://www.investopedia.com/ask/answers/07/islamic_investments.asp).
- [www.islamicfinancetraining.com/islamicFund.php](http://www.islamicfinancetraining.com/islamicFund.php).
- [www.assetmanagement.hsbc.com/uk/amanah/principles.html](http://www.assetmanagement.hsbc.com/uk/amanah/principles.html).
- [http://stocks.investopedia.com/stock-analysis/2008/shariah\\_compliance\\_principles\\_gs\\_aig.aspx?partner=YahooSA](http://stocks.investopedia.com/stock-analysis/2008/shariah_compliance_principles_gs_aig.aspx?partner=YahooSA).

banks in Hong Kong, the United Kingdom, and elsewhere offer and invest in such Sharī'a compliant vehicles.

Broadly speaking, "Sharī'a complaint" investing refers to allocating funds into financial instruments, transactions, and markets that are themselves consistent with Islamic Law. In turn, a financial instrument, transaction, or market is "Sharī'a compliant" if it is, along the Scale of Religious and Legal Qualifications (*Al Ahkām Al Khamsa*), at least permissible (*mubāh*) under Islamic Law. Thus, obtaining the imprimatur "Sharī'a compliant" requires filtering out proposed financial products, dealings, and platforms that are *harām* (forbidden), and identifying ones that mix elements that are *harām* and *halāl* (permissible). Some proposals involve indisputably *harām* activities, such as consumption of alcohol, pork, *maisir* (gambling), pornographic products, or violations of human rights, or have obvious forbidden components, such as *ribā* (usury) or *gharar* (uncertainty). Other proposals might blend the forbidden with the permissible, such as the service of alcohol aboard a luxury cruise ship.

Generally speaking, the Sharī'a provides a flexible framework for financial instruments, transactions, and markets. The starting point for "Sharī'a compliance" is that a proposal is permissible unless proven otherwise, rather than every proposal is immediately suspect and assumed impermissible until proven otherwise. This pro-free market orientation is derived from *surah* 2, *ayah* 276 of the Qur'ān:

... God has allowed trade and forbidden usury.<sup>59</sup>

Put simply, unless a proposal is found to have a prohibited () element in it, such as *ribā* (interest) it may go forward.

### [B] Certification from Sharī'a Board

In practice, who defines "Sharī'a compliance"? The answer is a legal scholar, or more typically, a group of them (*fukahā*) assembled into a "Sharī'a Board." Note that an alternative name for a "Sharī'a Board" are "Sharī'a Advisory Committee." Sometimes, a Sharī'a Board bears the rubric "*Majlis of Ulema*," that is, a Committee of Religious Scholars. Like a Board, this *Majlis* would be responsible for issuing a *fatwā* concerning the legality of a proposal.

The importance of this body, gaining its approval, and the considerable variations among opinions depending on the legal scholars, cannot be over-stated:

Each *madhhab* [School of Islamic jurisprudence] is a body of juristic opinions and a related methodology of how to use text, tradition, and reason to understand pure Sharī'a. Historically, the *madhahib* [Schools] frequently interpreted and applied the Sharī'a differently to different factual or structural situations, and there have been variations even within individual schools. Thus, scholars that [*sic*] have specialized in the study of the Sharī'a play a prominent role in the interpretation and application of

<sup>59</sup> THE QUR'AN — A New Translation by M.A.S. Abdel Haleem 2:276 at 32 (Oxford, England: Oxford University Press, 2004).



the *Shari'a*, particularly in the field of Islamic finance. Islamic banks and financial institutions, some higher net worth families and individuals, sponsors and developers of *Shari'a*-compliant funds and investment products have retained one or more *Shari'a* scholars, comprising a *Shari'a* board, to assist in making the relevant determinations. The boards oversee the complete range of investment practices as well as the principles, methodology, and operational activities of the entity or individual that has retained that particular board. Each board will certify, pursuant to *fatwa* (juristic opinions; *fatwa* is the singular), *Shari'a* compliance of a given fund, structure, or instrument, usually on a confidential basis on behalf of the retaining party or entity.<sup>60</sup>

Obviously, the key question for approval of a proposed financial instrument, transaction, or market involves an admixture of law, religion, and morality: is the proposal consistent with the *Shari'a*? The idea is to screen out proposals that would violate Islamic Law, but rule in ones that accord with conscientious Muslim precepts about what is fair for individuals and the community.

Given the current *ad hoc* system for opining on *Shari'a* compliance, what, exactly, does a *Shari'a* Board do? That is, how does it go about its work of determining compliance? There is no single template. Consider the context of a Board evaluating a proposal to establish a new investment fund designed to hold assets that are engaged in Islamically-acceptable activities:

The precise role of a *Shari'a* board varies from entity to entity; it is a function of the unique relationship between the individual *Shari'a* board and its related retaining entity. As a general matter it can be said that a *Shari'a* board will perform a number of different roles, including, typically, the following: participation in product development and structuring activities; review and approval of the fund or entity structure and its objectives, criteria and guidelines, and issuance of a *fatwa* in respect thereof; review and approval of disclosure and offering documents, and issuance of a *fatwa* in respect thereof; review, approval and oversight of investment and business operational structures and methodology, and issuance of a *fatwa* in respect thereof; ongoing review, oversight, and approval of transactional or operational variances or applications to unique or changing circumstances; and annual audits of the operations of the fund or entity and issuance of an annual certification of *Shari'a* compliance.<sup>61</sup>

Thus, before launching a new financial instrument, entering into a different transaction, or establishing a new market, the *fukaha*<sup>62</sup> that comprise the *Shari'a* Board discuss and debate the proposal at hand.

Indeed, even before the topic of *Shari'a* compliance rises to the level of the Board, it is likely to have been vetted by lawyers for the financial institution sponsoring the proposal. Every Islamic bank has a Legal Department, sometimes called the

"*Shari'a* Department." Some non-Islamic banks that sponsor Islamic windows, i.e., that offer *Shari'a* compliant financial products, have such Department, or an attorney specializing in Islamic Law. Alternatively, of additionally, these financial institutions may retain outside counsel to opine on *Shari'a* compliance issues.

All of the common Islamic financial transactions are the subject of a *fatwa* for *Shari'a* compliance. For example, savings accounts require scrutiny to ensure they do not involve *riba*, but rather are genuine profit-sharing ventures. That also is true of *sukuk*. If a customer lacks funds to pay the full purchase price of a car, and thus seeks an Islamic auto loan, then the question is whether the resulting *murabahah* transaction (whereby the bank buys and then sells the car at a higher price, with payments from the customer in installments) comports with the *Shari'a*. *Takaful* products must be checked to see that they do not run afoul of the rules about *ghavar*.

### [C] A Sole Certification Authority?

Manifestly, there is no world-wide accreditation agency for determining "*Shari'a* compliance." Consequently:

... Islamic finance tends to develop in a rather disjointed fashion, without coordination across markets or *madhahib*. A different and more coordinative trend is exemplified by the existence and prestige of *Shari'a* boards of institutions such as the Accounting and Auditing Organization for Islamic Financial Institutions (AOIFI), the Fiqh Academy (*Majma' Al-Fiqh Al-Islami*) of the Organization of the Islamic Conference (OIC) (*Munazamat Al-Mu'tamar Al-Islami*), the Islamic Jurisprudence Institute (*Al-Majma' Al-Fiqh Al-Islami*) of the Islamic League (*Rabitat Al-Alam Al-Islami*), the Islamic Development Bank, Bank Negara Malaysia, and Suruhanjaya Sekuriti, Securities Commission, of Malaysia, among others.<sup>62</sup>

Is there an argument for a single, centralized, and transparent *Shari'a* authority?<sup>63</sup>

Such an entity could provide predictability, certainty, and protection to financial market participants, and generally stabilize Islamic financial markets through greater uniformity and integrity. Is it not rather messy to have hundreds if not thousands of *Shari'a* Boards? Is it also not rather inefficient, given the dearth of *bona fide* experts in Islamic finance, to have many banks chasing a limited pool of talent? Moreover, the *status quo* has provoked the cynical charge that all a financial institution need do when proposing a *Shari'a* compliant product is rent the right *imam* to get the right *fatwa*. Finally, a single authority might prevent regionalization of Islamic financial markets, and promote *Shari'a*-compliant investment vehicles world-wide.

<sup>62</sup> McMillen, *supra*, fn. 8 at 1019-1020.

<sup>63</sup> See, e.g., Kevin Brown, *Malaysian PM Warns Islamic Financial Sector*, FINANCIAL TIMES (3 November 2009), posted at [www.ft.com](http://www.ft.com) (quoting Dr Abbas Mirakhor, a former executive director of the International Monetary Fund (IMF), who has called for a transnational regulatory authority to replace the myriad of *Shari'a* Boards and individual Islamic scholars: "It is possible to standardise and harmonise across borders a system of sharia rulings that would obviate the need for every bank and every instrument to have its own sharia boards.").

<sup>60</sup> Michael J.T. McMillen, *International Legal Developments in Review: 2007 — Islamic Law Forum*, 42 THE INTERNATIONAL LAWYER 1017, fn. 8 at 1019 (Summer 2008) (emphasis added). [Hereinafter, McMillen.]

<sup>61</sup> McMillen, *supra*, fn. 8 at 1020.

However, there are strong counter-arguments. A sole, global Islamic financial regulator might squelch innovation. Competition and creativity go hand-in-hand. Arguably, the idea of unifying rule and regulator might be akin to Closing the Gate to *Ijtihād*. Consider the conversation between *Imām* Mālik and Caliph Harūn Al Rashid during the *Abbasid* Caliphate. Caliph Harūn Al-Rashid asked *Imām* Mālik if he wished to have his book as the law that governs the entire Islamic Empire. The Caliph replied:

O Abū Abdullah [*i.e.*, the Caliph refers to the *Imām* in a respectful manner as “Father of Abdullah,” with Abdullah being the eldest son of *Imām* Mālik], if you wish, we could write this book and hold people to use it. *Imām* Mālik said, “O Emir of All Believers, the difference in the perspectives [views] among the *ulema* [and *fuqahā*] is a mercy for the nation [the Caliphate] from Allāh — the Almighty — everyone follows the right he or she has and they all follow the right path to Allāh.”<sup>64</sup>

That is, relying on *Imām* Mālik, the Caliph articulated the idea that differences, so long as they are not errant deviations, lead to the same end.

Still another argument against a single entity is that it could be captured by the institutions it purportedly oversees. It also could become the playground of a corrupt cabal. Finally, there would be a major problem of coordination between a sole Islamic regulator national-level banking supervisors, such as the United States Federal Reserve, and respect for the sovereign concerns of the individual countries.

<sup>64</sup> Quoted from an article written by Dr. Abdullah Mahfoudh Beyh (former Minister of Justice of Mauritania), posted at [www.islamtoday.com](http://www.islamtoday.com) (2 August 2004, 1425 166 A.H.) (translated from Arabic by Mr. Ahmed Alyousef). The exact date of this conversation is not available. The Caliph who talked to *Imām* Mālik was Harūn Al Rashid, the fifth and most famous of *Abbasid* Caliphs, who ruled from 786-809 A.D. His interests were eclectic, covering culture and science as well as religion, and he established the famous Baghdad library, the “*Bayt Al-Hikmah*” (House of Wisdom).

## PART NINE

### FAMILY LAW AND WOMEN



## Chapter 33

### MARRIAGE AND DIVORCE

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Love seems the swiftest but it is the slowest of all growths. No man or woman really knows what perfect love is until they have been married a quarter of a century.

Mark Twain (1835-1910, American author and humorist)  
(posted at [www.muslim-marriage-guide.com](http://www.muslim-marriage-guide.com))

#### SYNOPSIS

##### § 33.01 UNDERLYING THEORY

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- [B] Sacrament or Contract?
- [C] Between Man and Woman?
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##### § 33.02 MARRIAGE (NIKĀḤ)

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##### § 33.05 MODERNIST LEGISLATION ON DIVORCE

##### § 33.06 *SHĪ'ITE* DISTINCTION: TEMPORARY MARRIAGE (*MUT'Ā*)

### § 33.01 UNDERLYING THEORY

#### [A] Three Persons in Marriage?

A not uncommon characterization among Christians is that there are three persons in every marriage: the husband, the wife, and God. That is, God joins a man and woman together, giving each of them the gift of the other and uniting them as one. The marriage is more than a contract between the husband and wife. It also is a covenant they jointly make with God. (In this sense, a "contract" involves a promise between two or more persons to each other, but a "covenant" is a promise between one or more persons and God.) Of course, it is up to them, as husband and wife, to remain open to His presence in their union, and to appreciate how they love each other is a direct manifestation of how they love God. This characterization is based on Biblical passages, and interpretations of them, on marriage. The characterization is visually evident in the bedrooms of some Christian couples, in which a Crucifix or Cross is displayed prominently.

Do Muslims also speak of three persons in a marriage? The answer is "no," at least not commonly or explicitly. That is understandable, in the sense that the Doctrine of the Trinity — three Persons in One God — is rejected in Islam. The *Shari'a* expressly treats marriage as a contract between the bridegroom and the male guardian of the bride. But, in another sense, it would be wrong to infer Muslims reject the idea that God (Allāh) is not a force in marriage. He is a foundation of the unity of husband and wife from which they derive strength in good times and bad. As in Christian marriages, among Muslim ones, the extent to which that force is expressly recognized differs from one couple to another.

#### [B] Sacrament or Contract?

Catholic Christianity understands a "sacrament" to mean an outward, visible sign of inner, invisible grace instituted by Jesus Christ and entrusted to the Church for our salvation.<sup>1</sup> There are seven sacraments: Baptism, Reconciliation (Confession, or Penance), Communion (the Eucharist), Confirmation (Chrismation), Matrimony (Marriage), Anointing of the Sick (Last Rites), and Holy Orders.<sup>2</sup> The first six sacraments pertain to all laity, while the last sacrament concerns the ordination of priests and implicates the doctrine of apostolic succession. Each of these sacraments is rooted in one or more passages from the New Testament, and through each of them, Divine life is imparted to a recipient who has the appropriate disposition. The key point, for present purposes, is that marriage is one of the sacraments. As such, it is through the vocation of marriage that a husband and wife are called to be not just good, but also holy, and help each other toward eternal life in Heaven.

<sup>1</sup> See CATECHISM OF THE CATHOLIC CHURCH ¶¶ 1114-1116 at 289, ¶ 1131 at 293 (United States Catholic Conference, Inc., Washington, D.C.: Libreria Editrice Vaticana, 2nd ed. 1997) (especially *Part Two: The Celebration of the Christian Mystery*). [Hereinafter, CATECHISM.]

<sup>2</sup> See CATECHISM, *supra*, ¶ 1113 at 289.

As part of a secular legal system, American Family Law does not treat marriage as a sacrament. The important issue is not the relationship of the couple to God, or even whether the couple believes in God. Rather, this system focuses on the establishment of conditions for a valid marriage under the laws of the country (*i.e.*, criteria for issuance of a marriage license), and the recognition of that marriage throughout the entire country (*i.e.*, in the context of American federalism, that each state accept marriage licenses issued by each other state according to the Full Faith and Credit Clause of the Constitution). Accordingly, in the American legal tradition, marriage is nothing more (or less) than a contract between two persons given legal effect by a governing authority.

The *Shari'a* is, of course, a sacred legal system. Does it view marriage as a sacrament? The answer is "no." But, that is because Islam is not a faith based on sacraments. Does Islamic Family Law view marriage as a covenant between either or both the husband and wife, on the one hand, and God (Allāh), on the other hand? It does not do so explicitly, but it also does not rule out this view. It is a matter left to the privacy of the husband and wife. They are free to regard each other as a Divine gift to the other, and to view their loving treatment of each other as a religious expectation on which they will be judged by Allāh. Many Muslim couples do indeed take this view, though these happy marriages are not held to be newsworthy by the mainstream media in the non-Muslim world, which tends to dwell on cases of abuse and exploitation.

Thus, on the view of marriage, despite being a sacred legal system, the *Shari'a* is more analogous to secular American Family Law than to Catholic Christian teaching. Marriage in Islamic Family Law is a contract. Professor Hussain writes:

Marriage is a contract, not a sacrament, as it is in Hinduism and Christianity. However, the contract does have religious overtones. Although it is not strictly essential, in most cases there will be some religious ceremonies associated with the marriage. Also, many of the rules and principles pertaining to marriage are laid down in the *Quran*, and elaborated on in the *Sunnah* of the Prophet.<sup>3</sup>

But, the analogy is not perfect.

First, a religious official — an *imām* — is present at a marriage ceremony, and readings from the Qur'an are typical. His presence is required from a religious perspective to confer a valid Muslim marriage. Under American Family Law, a lay person, such as a justice of the peace, with no religious credentials, can marry two persons, so long as that person is authorized to do so by the relevant governing authority. In other words, the ceremony itself, and the issuance of a marriage license, can be entirely devoid of religious content. Second, Islamic Law forbids same-sex marriages or unions. In contrast, such unions — even with the rubric "marriage" — are permissible in certain states of the United States. This issue remains a hotly contested one, and such "marriages" have been specifically outlawed in other states, akin to the treatment under the *Shari'a*. Third, Islamic Family Law identifies categories of impediments that make marriage impossible.

<sup>3</sup> JAMELA HUSSAIN, ISLAMIC LAW AND SOCIETY — AN INTRODUCTION 60 (Annandale, New South Wales, Australia: The Federation Press, 1999). [Hereinafter, HUSSAIN.]



These categories are not identical to the ones under American Family Law. (The second and third points are discussed more fully below.)

### [C] Between Man and Woman?

Christianity explicitly articulates the idea of three persons in a marriage, and Catholic Christianity views marriage as a sacrament. Islam does not explicitly articulate this idea, and approaches marriage as a contract. Yet these distinctions do not mean Christianity and Islam differ completely on their theory of marriage. An important area of agreement is that under the *Shari'a*, as in Catholic Christian teaching, a "marriage" is a bond between a man and a woman. Professor Hussain observes:

Homosexuality is forbidden in Islam and so it is an essential requirement that one party be male and the other female. In Malaysia, the *Islamic Family Law Enactment* 1983 of Kelantan specifies in the Fourth Schedule that marriage requires as an essential condition a prospective husband who is male and a prospective bride who is female.<sup>4</sup>

Same-sex unions do not carry the label "marriage," and indeed are not legally recognized in any Muslim country. In either a Catholic Christian or Islamic paradigm, such unions cannot carry that label. Both Catholic Christianity and Islam understand God to have created men and women for each other, going back to the first man and first woman. In each paradigm, the essential, distinctive feature of a "marriage" is the ability of the two persons in the union to procreate. Both paradigms look askance at homosexual actions.

Catholic Christianity insists that the family is the fundamental building block of civilization. Pope John Paul II warned of attacks on the family unit — from regimes of political economy like communism and fascism to norms in modern culture such as materialism and secularism. He observed the weakening of the family unit as a characteristic of the decline of previous civilizations, including Ancient Rome, and himself lived through many "isms" of the 20th century in which proponents of one or another ideology sought to supplant family ties with loyalty to a collective body or governing authority. Regulation of the fertility of women, such as the infamous "One Child" policy of the Chinese Communist Party (CCP), was a particularly brutal attack on the family, with the primary and immediate victims being aborted children.

In general, Islam shares these perspectives. That is not to say all Muslims agree on each and every point, or articulate the points the same way. Rather, it is to say that the overarching observation that the family is a (if not the) bedrock of civilization, and that it has been under attack is widely shared. Tellingly, Professor Schacht observes:

The family is the only group based on consanguinity or affinity which Islam recognizes.<sup>5</sup>

<sup>4</sup> HUSSAIN, *supra*, at 61.

<sup>5</sup> JOSEPH SCHACHT, AN INTRODUCTION TO ISLAMIC LAW 161 (Oxford, England: Oxford University Press (Clarendon Paperbacks) 1982). [Hereinafter, SCHACHT.]

In other words, Islamic Law does not recognize tribal, ethnic, linguistic or other ways of delineating one group of people from another, simply "because the solidarity of believers [*i.e.*, a sense of community unified by Islam] should supersede" these other centripetal forces. After all, the Qur'an contains more than a few verses, and the Prophet Muhammad spent more than a bit of time, de-emphasizing tribal-like behavior and clan-like sentiments. As for the acute threats to the family in current times and the last several decades, many Muslims suggest they come from the non-Muslim western world, where materialism and secularism are rampant. Many Catholic Christians agree.

### [D] Importance

Given the emphasis Muslims traditionally place on the family, it should come as no surprise that Family Law is an important field within the *Shari'a*, one to which religious and legal scholars (*ulema* and *fukahā'*, respectively) over the ages have devoted a considerable degree of thought and writing. Along with Criminal Law, Family Law is the area of Islamic Law about which non-Muslim westerners, and lawyers in the American tradition, are most likely to have heard about. The basic familiarity is not surprising. These two areas of law are where some of the most striking differences between the Islamic and American legal systems are most pronounced (though perhaps they are overstated). Points of contrast tend to pique the interest of lawyers at least as much as points of similarity. Moreover, both Family and Criminal Law are treated extensively in the Qur'an, especially in *suras* 2 and 4, but also in many scattered *ayat*. In turn, in mainstream media coverage and everyday conversations in the non-Muslim western world, questions along the lines of "What does the Qur'an say about this?" or "Does the Qur'an really say that?" often are posed.

Further, given the nature of the *Shari'a* as a sacred legal system, it should not be surprising that the impulse behind Islamic Family Law is like that behind other specialty fields: to provide a religious and ethical basis for relationships and transactions, in this instance, those pertaining to the family. Thus, the Qur'an and other classical sources of Islamic Family Law — that is, the tradition of the Prophet (*hadith*), analogical reasoning (*qiyās*), consensus (*ijma'*) — deal with normative questions. The foundational question is: how should one act according to one's position in a family? The answer — the substantive content of the rules — is imbued with a distinctly spiritual and moral character. Indeed, it is hard to imagine an area of the law that the average Muslim would regard as more closely connected with religion than Family Law and Criminal Law.

### [E] Addressees and Effects

To answer the foundational normative question of how one ought to behave toward one's family members, Islamic Family Law provides many rules on how one ought to act toward five categories of people:

- (1) Women
- (2) Children
- (3) Relatives

- (4) Dependents, and
- (5) Orphans.<sup>6</sup>

Thus, Islamic Family Law has a large scope. This scope covers anyone connected to a family unit through blood, marriage, or certain dependency categories. Anyone with that connection is an addressee of a potentially relevant *Shari'a* rule, along with the other person involved (e.g., a woman, child, or parent). The exact rule and its applicability depend on the status, within the family unit, of the person whose act is in question.

Once the relevant rule is identified, and — presumably — followed by the person, what legal effect occurs? The answer is validity. The act at issue is determined to be valid or invalid. For example, the act might be a marriage or divorce, or concern guardianship, and the event might be either planned for the future or already have transpired. The rule establishes whether the future or past marriage or divorce will be, or was, valid, and likewise with a guardianship. Thus, the legal effect of following *Shari'a* rules on Family Law is quite similar to the repercussions of following Islamic rules on Contracts — those rules determine whether an obligation is valid or not.

Interestingly, neither Islamic Family Law nor Islamic Contract Law deals extensively with the effects of a breach. Common sense would say that a family "transaction" effected in violation of a prohibition is invalid. That consequence indeed is the case. But, the source of this rule is the *Sunnah*, not the Qur'an. That is to say, the Qur'an contains almost no technical provisions about the legal consequences of failure to fulfill one or the other of the various family obligations, i.e., about the legal ramifications of a factual predicate in which *Shari'a* obligations have been breached. Rather, the *Sunnah* is the source for the legal effect of actions contrary to the rules.

## [F] Incongruity and Orientalist Fallacy

Under the classical theory of Islamic Law, that is, the conventional approach to the *Shari'a* following in particular the Qur'an and *Sunnah*, traditional family values are championed, and women are protected. Yet, by many modern-day standards — the normative benchmarks found in international agreements and in American Law — the *Shari'a* rules on the family and inheritance raise serious controversies as to the rights of women. That is true in a *de jure* and *de facto* sense: the substantive nature of the rules, and the way in which rules are applied in practice, sometimes seem anything but supportive of the family or women. Thus, there is an incongruity between the:

- (1) ideal type, i.e., the idealized self-image of Islamic Family Law as it has been conventionally defined and elaborated, and;
- (2) measurement of Islamic Family Law against norms from an international or comparative perspective.

<sup>6</sup> It also has rules on behavior toward a sixth category — slaves. Such rules are not treated herein, given the *de jure* and (in most countries) *de facto* bans on slavery around the world.

This incongruity becomes evident every time a news story appears about the mistreatment of women in an Islamic jurisdiction.

How is this incongruity to be dealt with? One argument is to justify Islamic Family Law, in both theory and practice, as the will of God (Allāh) *per se*. In itself, that is viewed by some Muslims as both a necessary and sufficient defense. There are obvious problems with this rationale. First, not everyone, even among Muslims, accepts the defense as sufficient. It is in the nature of the human intellect to use reason, and search for a rationale that buttresses a justification from faith alone. Faith alone can lead to blind and unquestioning adherence, and thereafter, misinterpretation and extremism. Reason alone is cold, lacking the characteristics of mercy and forgiveness that are endemic to faith, and can yield inhumane outcomes. Thus, as Popes John Paul II (particularly in his September 1998 Encyclical Letter, *Fides et Ratio* (*Faith and Reason*)) and Benedict XVI (for example, in his controversial September 2008 at the University of Regensburg) have urged, both faith and reason should be employed to shed greater light on issues and problems, and to lead people to a closer union with each other and God.<sup>7</sup>

A second argument is to justify Islamic Family Law by looking not to the present for a benchmark, but to the remote past. Never mind a comparison between the *status quo* in some Islamic jurisdictions and *status quo* in the United Kingdom or United States. Why not contrast the *status quo* in Muslim communities with the *status quo ante*? Surely the rules, and the lot of the addressees of those rules, are much better than what they were before the advent of Islam on the Arabian Peninsula. That is, surely the *Shari'a* is a significant improvement over the customary law of the Bedouins.

This argument rationalizes Islamic Family Law by juxtaposing it with an earlier historical and legal context. For example, the Qur'an condones polygamy, allowing a man to marry up to four wives, if he treats them equally. But, so the argument goes, before Islam, sexual promiscuity was rampant, and the distinction between marriage and concubinage (i.e., status as a wife versus a prostitute) was blurry. Like that of women, the position of orphans was weak, insecure, and often exploited. Islamic Family Law protects women from being treated as sexual objects, and orphans from being abused, as they often were in the culture of the ancient Bedouins. In brief, Qur'anic injunctions are not only the will of God (Allāh) *per se*, but also his specific will to improve the condition of the family and its dependents vis-à-vis their condition before His revelation of the sacred text to the Prophet Muhammad. Put directly, God gave the *Shari'a* to man to make families better off than what they were before Islam.

As with the first argument, the second argument has its deficiencies. First, the argument does not preclude the possibility that Islamic Family Law can evolve in a manner to improve yet more the condition of families and their dependents. If the *Shari'a* is viewed as a static, adamant legal system, the Qur'an is read inflexibly, and the *Sunna* applied with no creativity, then there is no basis for the proposition that God (Allāh) forbade Muslims from continually strengthening family life, and rather expects the benchmark for quality to be fixed as of 570/571 A.D. (the year

<sup>7</sup> See [www.vatican.va](http://www.vatican.va) and [www.catholicculture.org](http://www.catholicculture.org), respectively.



Muhammad was born) or 609 A.D. (the year before the first revelation to Muhammad).

A second weakness concerns the Orientalist Fallacy. This Fallacy is an accusation leveled by some Muslim scholars at some non-Muslim British, Continental, and American scholars of Islam, particularly ones who worked in the 19th and 20th centuries. These "Arabists," as they were sometimes called, examined Islam from the perspective of history, specifically, the cultural, economic, legal, social, and political climate in which it was born and developed. The criticism is they failed to take Islamic Law on its own terms, as a sacred legal system revealed by God (Allāh) for all people and all times. Instead, they tried to explain the *Shari'a* as a reaction to one or another condition, and thus imply Islam does not have a universal and eternal message.

The second argument is an example of the Orientalist Fallacy — yet, ironically, committed by some Muslims in defense of Islamic Family Law. To argue the *Shari'a* improves the lot of families and their dependents relative to pre-Islamic conditions is to suggest the *Shari'a* was a response to those degrading conditions. It is a defense of the Word of God (Allāh) based on extrinsic environmental factors. The argument bounds Islamic Family Law in time and place, namely, the Arabian Peninsula before Islam. In turn, the argument fails to defend Islamic Family Law today. Now that the pre-Islamic conditions no longer exist, it becomes difficult to justify some Islamic Family Law rules and practices. Therefore, the *Shari'a* has served its purpose (narrowly defined), and today it must either be overhauled, or abandoned. Surely this outcome cannot be what proponents of the argument seek.

Thus, the incongruity remains unresolved. In the intervening centuries following the birth and spread of Islam, and subsequent to which the American legal system developed, remarkable progress has been made as to the theory and practice of Family Law. Justifying Islamic Family Law using such an outdated historical point of reference is little else than a recipe for *stasis*. As long as that reference point is used, how can modern developments — including standards about the rights of women and children — be imported into Islamic Law without, of course, that Law losing its central features? This question is one of the central challenges facing not just Islamic Family Law, but also Islamic Criminal Law, and indeed the entire *Shari'a*.

### § 33.02 MARRIAGE (NIKĀH)

#### [A] Overview of Marriage Contract

The Arabic term for "marriage" is "*nikāh*." A *nikāh* occurs between a male bridegroom and a female bride. The result of the marriage is the status of the bridegroom becomes that of a husband, called the "*zawj*," and the status of the bride becomes that of a wife, called the "*zawja*." The marriage itself is a contract under the *Shari'a*.

Critically, Professor Schacht reports "the bridegroom *concludes* the contract with the legal guardian (*wali*) of the bride. . . ." <sup>8</sup> Much turns on what he means by "concludes." One understanding is the marriage contract is between not bridegroom and bride, but rather bridegroom and *wali*. In truth, whether, as a matter of law, the *nikāh* contract is between the bridegroom-husband and guardian of the bride-wife is a matter of debate among Islamic legal scholars. Accordingly, Professor Ali states that "[t]he spouses may or may not conclude the contract themselves." <sup>9</sup> Some renditions of the rule indicate the presence of a *wali* is a condition for the contract, but not an essential element thereto.

Given that in some circumstances a wife has a right to rescind the contract, her being akin to a third rather than principal party to the agreement would seem odd. Moreover, in everyday family life, the marriage is between the husband (*zawj*) and wife (*zawja*). Still, here lies a contrast between Islamic and American Family Law. Under the other legal systems, marriage unambiguously occurs between the bridegroom and bride. As child marriage generally is illegal, in respect of the man, the bridegroom no longer is under any guardianship. Unless he is married off as a child, he is an adult and is his own guardian. But, under the *Shari'a*, a woman has a guardian throughout her life. This legal guardian is called the "*wali*." The *wali* is the male — and the guardian must be a male — relative who is closest, in terms of family ties and in the order of succession, to the bride. If there is no *wali*, then an Islamic judge (*qāḍī*) may serve the role.

In the marriage contract, the bridegroom agrees to pay a nuptial gift, called a "*mahr*" or, in English, a dowry. This payment is made directly to the new wife, not to the *wali*, and becomes and remains her property. In pre-Islamic times, the payment was made to the *wali*, was under his control, and was vulnerable to mismanagement or misappropriation by him. Hence, at the risk of commission of the Orientalist Fallacy, the *Shari'a* rule implies an improvement in the status of women relative to those times.

Once married, the contract confers distinct powers on the husband (*zawj*) and wife (*zawja*). A wife has a right to maintenance from her husband. Moreover, she may choose to eschew a long voyage with her husband, and hold her children back from such voyages. But, as Professor Schacht points out, the husband has "a limited right of correction." <sup>10</sup> He may forbid his wife from leaving the house, and limit access of her relatives to see her. Her disobedience may cause her to lose her right of maintenance. Even more ominously, this right of correction sometimes is understood — or misunderstood — to include physical punishment of the wife.

<sup>8</sup> SCHACHT, *supra*, at 161 (emphasis added).

<sup>9</sup> Kecia Ali, *Marriage in Classical Jurisprudence: A Survey of Doctrines, in THE ISLAMIC MARRIAGE CONTRACT — CASE STUDIES IN ISLAMIC FAMILY LAW* 11, 13 (Cambridge, Massachusetts: Islamic Legal Studies Program, 2008, Asifa Quraishi & Frank E. Vogel eds.). [Hereinafter, Ali.] Parts One and Two of this book contain essays on Islamic marriage in comparative and historical perspective, respectively. Part Three discusses modern practices and reforms, and Part Four discusses Muslim marriages under German and English law.

<sup>10</sup> SCHACHT, *supra*, at 166.

## [B] Witnesses and Conclusion

There must be witnesses to any marriage (*nikāh*) contract, though even this requirement, as well as the qualifications of any requisite witnesses, are matters of debate among the Four *Sunni* Schools and *Shī'ites*.<sup>11</sup> Generally, the contract is concluded by a bridegroom-husband (*ṣawḡ*) and guardian (*walī*) of the bride-wife (*ṣawja*) in the presence of witnesses. Those witnesses must be two men, or under *Ḥanafi* School teaching, one man and two women.<sup>12</sup> The exclusion of female witnesses by the *Mālikī*, *Shāfi'i*, and *Ḥanbali* Schools, and the latter flexibility under the *Ḥanafi* School, unfortunately imply the evidentiary value of a woman is either zero or half that of a man. Both implications have no basis in reality.

As Professor Schacht points out, there are two reasons for the requirement of witnesses.<sup>13</sup> The first, and more obvious, justification is to offer proof of marriage in the event that is needed. The second reason is to offer proof of chastity (for example, that the bride is a virgin). The contract ought to be memorialized in writing, but Muslim jurists do not require a writing, at least not if the agreement is property witnessed.<sup>14</sup>

Interestingly, for a marriage to be valid, the *Sharī'a* requires only the marriage contract itself. Whether there is privacy — called "*khalwa*" — between husband (*ṣawḡ*) and wife (*ṣawja*) is legally irrelevant to the conclusion of a marriage. Likewise, and perhaps even more surprisingly, consummation through sexual intercourse is not essential for the purpose of concluding a legally valid marriage. Consummation of a marriage through intimate relations is known in Arabic as "*dukhūl*." However, *khalwa* and *dukhūl* may be legally relevant if the marriage is subsequently dissolved.<sup>15</sup>

## [C] Impediments to Marriage

In addition to concerns about equality of birth, there are reasons why a marriage (*nikāh*) might be blocked. These reasons are known as "impediments" to marriage, and for the most part are obvious restrictions on the choice of a prospective spouse. The operative provision in the Qur'ān is *surah 4, ayat 22-24*:

<sup>22</sup>Do not marry women that your fathers married — with the exception of what is past — this is indeed a shameful thing to do, loathsome and leading to evil. <sup>23</sup>You are forbidden to take as wives your mothers, daughters, sisters, paternal and maternal aunts, the daughters of brothers and daughters of sisters, your milk-mothers and milk-sisters [*i.e.*, women who breast feed the infant of another couple], your wives' mothers, the stepdaughters in your care — those born of women with whom you have consummated marriage, if you have not consummated the marriage, then you will not be blamed — wives of your begotten sons, two sisters

simultaneously — with the exception of what is past: God is most forgiving and merciful — <sup>24</sup>women already married, other than your slaves: God has ordained all this for you.<sup>16</sup>

Evidently, the impediments are based on a blood relationship between a prospective bridegroom and bride. If a certain blood relationship exists, then marriage is not possible.

Based on the above-quoted provision, the *Sharī'a* delineates three broad categories of impediments to marriage:

### (1) Non-marriageable persons (*Maḥārim*) —

The Arabic term "*maḥārim*" means non-marriageable persons, or more technically, persons related to one another within a forbidden degree of closeness. (The singular term is "*maḥram*." Such persons cannot be married. Who, exactly, are the "*maḥārim*"? They are the following persons in relation to a man:

- Female descendants (*e.g.*, daughters, granddaughters)
- Female ascendants (*e.g.*, mothers, grandmothers).
- Wives of a female descendant.
- Wives of a female ascendant.
- A sister.
- The female descendants of a sister (*e.g.*, a niece or daughter of a niece).
- The female descendants of a brother (*e.g.*, a niece or daughter of a niece).
- An aunt (whether paternal or maternal).
- The sister, or the aunt, of an ascendant (*i.e.*, the sister or aunt of a father or mother, or grandfather or grandmother).
- A mother-in-law (*i.e.*, the mother of a wife), or any other female ascendant of a wife (*e.g.*, the grandmother of a wife).
- A step-daughter (*i.e.*, the daughter of a wife, where the father is another man), and any other female descendant of a wife (*e.g.*, a grand-daughter).

Thus, a man cannot marry a *maḥram*. This list of *maḥārim* is not controversial. It corresponds to incest rules in American Family Law.

### (2) Foster children (*Raḍā'*) —

The Arabic term "*raḍā'*" means "fosterage," which refers to a relationship between or among children through nursing. Even the smallest degree of sucking at the same breast, if done during the first 2 ½ years of life, creates a fosterage relationship between the babies. The wet nurse is thus akin to the mother. Children nursing with the same wet nurse are forbidden from marrying one another, *i.e.*, a

<sup>11</sup> See Ali, *supra*, at 13, 17.

<sup>12</sup> See Ali, *supra*, at 17.

<sup>13</sup> See Schacht, *supra*, at 161.

<sup>14</sup> See Ali, *supra*, at 17.

<sup>15</sup> See Schacht, *supra*, at 161.

<sup>16</sup> THE QUR'AN — A New Translation by M.A.S. Abdel Haleem 4:22-24 at 52-53 (Oxford, England: Oxford University Press, 2004). [Hereinafter, QUR'AN.]



person cannot marry his foster-brother or foster-sister. Professor Schacht observes that two of the impediments can work together and cause blockage of a marriage.<sup>17</sup> For example, a person cannot marry the sister of his foster-mother.

(3) Simultaneous marriage of related women (*Jam'*) —

"*Jam'*" means "combination." It is forbidden to marry two or more women simultaneously who themselves are related within a forbidden degree (*maḥārim*) or connected by fosterage (*radā'*). Not all of the women pose an impediment to marriage — one of them could be married, but not the others. The quintessential example would be a man attempting to marry simultaneously two women who are sisters. The combination (*jam'*) of the two sisters into wives of this man is an impediment to the marriage, making it legally impermissible as well as religiously forbidden.

Further, a man cannot marry simultaneously two women if one of them has an affinity that acts as an impediment to marriage. As Professor Schacht explains, such an affinity can result from sexual interaction short of intercourse.<sup>18</sup> For instance, suppose a man has two wives. One of the wives kisses her step-son (the son of her husband and the other wife) in a lustful manner. That lustful kiss establishes an affinity between the wife and her step-son that becomes an impediment to marriage, namely, the marriage of the wife with her husband. The result is that both of the husband's marriages become legally invalid. They remain invalid until the husband chooses a wife as between the two women. Another example is where there is lustful contact between the two women. The logic is that there cannot be a combination — two or more marriages — if one element of the combination is defective, in the sense of a wrongful relationship.

Additionally, Professor Schacht observes that the *Shar'ā* contains the principle "that adultery creates an impediment to marriage."<sup>19</sup> This principle, he says, is derived from Roman Law, specifically, of the late Byzantine Period, i.e., the Canon Law of the Eastern Churches. It is manifest in both *Sunni*te and Twelver *Shī'ite* Law, as well as the teachings of the Roman Catholic Church.

From an American legal perspective, what is perhaps most striking about the three impediments is what is not considered a barrier to marriage. Consider two categories of persons related to a prospective bridegroom-husband (*zawj*) who, under the *Shar'ā*, are not on the list of *maḥārim*:

- A first cousin.
- The half-sister of a half-brother from another marriage.

In other words, first cousins can marry under Islamic Family Law, whereas such marriages are illegal as incestuous in nearly all (if not all) American jurisdictions. That is true despite the serious genetic risks associated with children of first cousins. It is well known that birth defects are commonly associated with marriages

between first cousins. Tragically, such defects are observed among Arab countries of the Persian Gulf, and in Pakistan. They occur among some high-class and royal families, in part because of their fixation on equality of birth (discussed earlier) among husband and wife.

As for a half-sister of a half-brother, who is considered marriageable, consider the following hypothetical. Assume Nawazish and Zakir have the same father, but different mothers. They have different mothers because their father had more than one wife, which could occur through a polygamous marriage. Nawazish and Zakir are half-brothers. Suppose that from the marriage of their father with a third woman, there is a daughter. That daughter is the half-sister of Zakir. Nawazish could marry her.

### [D] *Fāsid* (Voidable) versus *Bātil* (Invalid) Marriage Contracts

As is true for much of the *Shar'ā*, in Family Law — in particular, the contract of marriage — there is a distinction between "*fāsid*" and "*bātil*." A marriage (*nikāh*) contract that is "*fāsid*" is defective or voidable. In contrast, a marriage contract that is "*bātil*" is invalid, or null and void. What facts make a marriage *fāsid* as distinct from *bātil*? The answer is formulated case-by-case — "casuistically," as Professor Schacht puts it.<sup>20</sup>

To illustrate the distinction between *fāsid* and *bātil* contracts, consider the following hypothetical. Suppose a *fāsid* marriage is consummated (*dukhāl*). That is, the marriage contract is entered into, and the couple engages in intimate relations. Yet, the contract is *fāsid* — defective or voidable. What are the legal consequences? There are three principal ramifications:

- (1) Any children born are considered legitimate.
- (2) The husband (*zawj*) must pay to the wife (*zawja*) a nuptial gift (*mahr*).
- (3) If the marriage is dissolved (i.e., it is voided), then the wife must observe the prescribed waiting periods (e.g., for remarriage).

Suppose one fact is altered in the above hypothetical: the marriage contract that was concluded is *bātil* (invalid), not *fāsid*. What, then, are the legal consequences?

The answer is all the legal repercussions change. The children are illegitimate. The "husband" (which the man technically is not, as the marriage is invalid) need not pay a *mahr*. The "wife" (which she technically is not) need not follow any waiting periods.

<sup>17</sup> See SCHACHT, *supra*, at 162.

<sup>18</sup> See SCHACHT, *supra*, at 163.

<sup>19</sup> SCHACHT, *supra*, at 21.

<sup>20</sup> SCHACHT, *supra*, at 163.

### § 33.03 AUTHORITY OF LEGAL GUARDIAN (WALĪ)

#### [A] Minor Female and Controversial Right of Rescission

Throughout the Islamic world, in a variety of transactions, it is common to use an agent, or "*wakil*." That is true in business transactions, wherein a principal may delegate authority to enter into certain obligations to a *wakil*. An agent in the context of Islamic Family Law is called a "*wali*," who is a legal guardian. In other words, a *wali* connotes a specific type of agency relationship. Likewise, another particular kind of agency relationship, which arises in Islamic Inheritance Law, is a *wasī*. A "*wasī*" is a legal guardian appointed by testament (*i.e.*, in a will) as executor of an estate.

A *wali* exists not only for a woman throughout her life, but also may be appointed to safeguard the interests of a minor, *i.e.*, a child before the age of puberty. As Professor Schacht reports, the *wali* is the "nearest male relative of his female relations, and of his minor male relations."<sup>21</sup> Typically the *wali* of a woman would be her father (before marriage) or husband (after marriage). If the father or husband dies, then the grandfather, eldest uncle, or eldest brother of the woman are likely candidates for succeeding as *wali*. This pattern also holds true in respect of guardianship of a minor. Only one *wali* exists at a time. A woman or minor does not have multiple simultaneous guardians.

A *wali* holds the authority of a parent with respect to a woman or child. Thus, the *wali* has the legal ability to give away in marriage a female relative for whom he serves as *wali*. That is why the contract for marriage (*nikāh*) technically is between the bridegroom-husband and *wali*, and again is a major contrast between the *Shari'a*, on the one hand, and American Family Law and Catholic Christian teaching, on the other hand. Just how much authority does the *wali* have over a prospective bride?

If the bride is a minor, then she is his ward. Therefore, he can consent or refuse permission for marriage, regardless of her will. (A similar rule applies to a minor bridegroom under the charge of a *wali*.) Of course, if the bride is a minor, then the *wali* ought to reject all marriage proposals — precisely because she is a minor and child marriage typically is illegal under the law of most countries. Sadly and shockingly, in reality, this law is not uniformly respected or enforced, particularly in small or remote villages of some Muslim countries. One of the most important variables that affect not only the number of children a woman has, but more generally her level of education, income, and overall freedom, is the age at which she is married. That is why raising the *de jure* age-at-first-marriage to levels like 18 or 21 is important as a legal matter, and encouraging women (and their guardians) to defer marriage until their late 20s or early-to-mid 30s, is critical as a cultural matter.

Once a bride is of age (*i.e.*, she has had her first menstrual cycle), then — according to the majority view in the Four Schools — she has the final say about entrance into a marriage contract. If she happened to have been married off by her

*wali* while she still was a minor, then she has a deferred right of rescission. She cannot exercise it immediately. Rather, the right of rescission vests in her when she comes of age. For example, suppose her *wali* enters her into a contract against her wishes while she is a minor. In theory, she could exercise her right to rescind the contract once she crosses into the age of majority. That age is when she has reached sexual maturity (*i.e.*, had her first menstrual cycle) and is capable of conceiving a child. Thus, her rescission right vesting is linked to her sexual maturity. The way she would exercise this right is through a divorce procedure called "*tafriq*," which means separation.

An interesting question is whether she must exercise the right of rescission, as soon as it vests, or whether she can decide to rescind the marriage contract subsequently, even after a few years. There appears to be no rule mandating immediate exercise, *i.e.*, with respect to this right, she does not required to "use it or lose it." A related question is what happens if the child marriage has produced one or more children, and then the bride exercises rescission. This matter of child custody likely would be handled either amicably by the parties involved, or via an arbitral or adjudicatory proceeding.

As a legal matter, this right is curious. A woman is a third-party participant (both a beneficiary and obligor) of a marriage contract, which is between the bridegroom/husband and her *wali*. But, she holds a right of rescission, which is not usually held by third parties under American Contract Law. Interestingly, men also appear to have a right of rescission. If they are married before puberty, then when they come of age, they too are able to rescind the marriage contract through *tafriq*.

Notably, not all religious scholars (*ulema*) agree with this theory as to women. Some *ulema* believe a bride who has come of age still has no right of rescission if her father or grandfather agreed to the marriage contract. That means that if the *wali* is the father or grandfather, and arranges a marriage of a minor girl, then the girl cannot rescind the contract even after she becomes an adult. In that case, her only route out of the marriage would be divorce — a route that has its own complications.

A scenario that is not uncommon involves the question of whether silence can be an expression of consent. (The Arabic term for "consent" is "*ridā*.") In particular, suppose the *wali* of a minor female virgin asks her about a marriage proposal he has been given for her. He seeks her consent (*ridā*) to the proposed marriage. She says nothing. Can the silence of this young girl serve as consent, *i.e.*, can the omission of a declaration by her substitute for a declaration of consent from her? The answer is "no." But, there is a key exception. Suppose she cries quietly, or laughs quietly. That behavior qualifies as a declaration of consent. That seems to be true regardless of whether the tender-aged girl knew her crying or laughter could be deemed by her *wali* as implicit consent.

The rule about rescission raises a general point, namely, Islamic Family Law contains conditions that must be realized for a legal right to ripen. Until the condition occurs, the legal right (in this case, rescission) is in suspense, or abeyance, called "*wukūf*." Examples suggested by Professor Schacht, in addition to a woman reaching the age of majority, include the marriage of a slave, which must

<sup>21</sup> SCHACHT, *supra*, at 120.



await the consent of the master, the right of a missing person who cannot be traced, which must await the return of the person, and the right of an apostate, which must await repentance by the apostate.<sup>22</sup>

To be sure, as a practical matter there are a number of pressures that could prevent a wife from actually exercising her right of rescission. Her ability to rescind the contract will hinge almost entirely on two factors: family and finance, i.e., the support of her family and, failing that, her ability to live independently. Again sadly in some Muslim countries, family pressure on women to stay in marriages against their will is excruciating, and the women cannot easily walk out, rent a flat in a city, get a job, and lead the life of a single person.

### [B] Mature Female and Controversial Objection Based on Equality of Birth

What about the typical case of a woman who has come of age and seeks to give herself away in marriage? Must she rely on her *wali* to do so? Again the answer requires a distinction between theory and practice. Islamic legal theory is that a majority-age woman is free to choose whom she would like to marry. There is no requirement that a *wali* pick the husband of a mature Muslim woman. But, her freedom is not absolute.

First, in practice, if she lives in a conservative society, she will have few if any opportunities to meet prospective husband on her own accord, and not have them introduced to her by others. Second, as legal matter, a *wali* has a right to object to a marriage if he judges the bridegroom is not of equal birth. This caveat is a major legal constraint. In theory, the right of a *wali* to object protects a woman from marrying "downward." But, the right is not two-way: the *Shari'a* does not obligate the *wali* of a bridegroom to evaluate brides based on equality of birth. The bridegroom is his own *wali*.

How does a *wali* determine "equality" of birth under the *Shari'a*? The theoretical answer is that he should not do so on the basis of tribe, race, ethnicity, or other such distinction. The reality is that in practice, the answer largely is determined by culture.

Indubitably, the Prophet favored the theoretical answer. A female cousin of the Muhammad was married to a black African man named "Bilal." The cousin, like the Prophet, was a member of the *Quraysh* tribe. In contrast, Bilal had been a slave, but the first of the Four Rightly Guided Caliphs, Abū Bakr (who reigned from 632-634 A.D.), purchased Bilal and freed him from his master. Bilal became a Muslim, and after his conversion, became a *muezzin* (*muadhlin*), that is, a caller to prayer. At the time, members of the *Quraysh* tribe were accorded the highest standing, yet Muhammad himself tried to de-emphasize social stratifications, urging that all persons are equal. One follower of Islam said in front of the Prophet to Bilal words of anger, to the effect that "You (Bilal) are the son of a black woman." The *hadith* is recounted by Ibn Al-Mubarak in his two books, *Kitab Al-Birr wa'l-Sila* and *As-Salah*:

<sup>22</sup> SCHACHT, *supra*, at 119.

Abū Dharr, the leader of the tribe of Ghifar, and one who accepted Islam in its early days, narrates:

Once I was conversing with Bilal. Our conversation gave way to a dispute. Angry with him, the following insult burst from my mouth: "You cannot comprehend this, O son of a black woman!"

As Islam expressly forbade all kinds of racial, tribal and colour discrimination, Bilal was both upset and greatly angered.

A while later a man came and told me that the Messenger of Allāh . . . summoned me. I went to him immediately. He said to me:

"I have been informed that you addressed Bilal as the son of a black woman."

I was deeply ashamed and could say nothing. Allāh's Messenger continued his reprimand: "This means you still retain the standards and judgments of the pre-Islamic days of ignorance. Islam has eradicated all those false standards or measures judging people by blood, fame, color or wealth. It has established that the best and most honorable of men is he who is the most pious and upright in conduct. Is it right to defame a believer just because he is black?"

Abū Dharr felt profound remorse. He went straight to Bilal's house and, putting his head on the threshold, said: "This head will not rise from here until the blessed feet of Bilal tread on the face of foolish, impolite Abū Dharr."

Bilal responded: "That face deserves to be kissed, not trodden upon," and forgave Abū Dharr.<sup>23</sup>

<sup>23</sup> This version of the *hadith* is posted at [www.whyslam.org/Forum/forum\\_posts.asp?TID=25636&PN=6](http://www.whyslam.org/Forum/forum_posts.asp?TID=25636&PN=6).

Abdullah Ibn Al Mubarak was a renowned for his scholarship and virtue, related roughly 25,000 *hadiths*, and prayed alongside *Imām* Abū Hanīfa, founder of the *Hanafi* School. Al Mubarak lived from 736-797 A.D. (118-181 A.H.). He was from Khorasan (which in *Parsi* means "the place where the sun rises"), a region spanning parts of modern-day Afghanistan, Iran, Tajikistan, Turkmenistan, and Uzbekistan. Present-day Khorasan is the largest province of Iran, in the northeast of that country, and home to the holy city of Mashhad. Abū Ishaq Al Fazzari posed questions to Al Mubarak, and called him the "*Imām* of the Muslims." Among his many wise words is his response to a query of a man who asked whether there was someone to advise them. Al Mubarak replied that the question was whether there was anyone who would accept the advice.

A slightly different version of the above-quoted *hadith*, also compiled by Ibn Al Mubarak, is as follows:

[A disagreement occurred between Abū Dharr and Bilal and Abū Dharr said to Bilal,] "You son of a black woman." The Messenger of Allāh . . . was extremely upset by Abū Dharr's comment, so he . . . rebuked him by saying, "That is too much, Abū Dharr: He who has a white mother has no advantage which makes him better than the son of a black mother." This rebuke had a profound effect on Abū Dharr, who then put his head on the ground swearing that he would not raise it until Bilal had put his foot over it. These incidents demonstrate that tribal ties have no place in Islam. Muslims are commanded to stick together and not to disassociate themselves from each other just because they come from different tribes.

This version is posted at [www.islamic-world.net/islamic-state/evidence.htm](http://www.islamic-world.net/islamic-state/evidence.htm). Essentially the same version appears in the *Al-Birr* book by Al Mubarak:

Manifestly, the gist of this *hadith* is the Prophet responded with righteous indignation, instructing his followers to cease their racist thoughts.

Nevertheless, after the death of the Prophet (632 A.D.), and during and after the era of the *Rashidun* (632-661 A.D.), Muslims resumed or continued their status hierarchies, and even took socioeconomic distinctions more seriously than ever before. Many of them appeared to do so to keep peace among families. Further, as the decades and centuries wore on, the hierarchy between Arabs, on the one hand, and non-Arabs (such as Persians and Turks), on the other hand, developed — a hierarchy that, from the Arab perspective, naturally favored Arabs.

Accordingly, by way of general guidance, a *wali* evaluates equality, or the lack thereof, in birth between a woman and her prospective husband based on the following hierarchy (in decreasing order or status):

- 1<sup>st</sup>: A member of the *Quraysh* tribe, which is the tribe of the Prophet Muhammad.
- 2<sup>nd</sup>: Other Arabs.
- 3<sup>rd</sup>: Other non-Arabs.

Thus, for example, a *wali* of a woman who is Syrian would regard marriage to a Persian or Turkish man as unequal, because Syrians are Arabs, while Persians and Turks are not. Of course, the legal right of the *wali* to object to such a marriage does not imply a legal obligation for him to do so.

Significantly, the hierarchy pertains only to Muslims. The implication is that a marriage of a Muslim woman to a non-Muslim man is inconceivable. In practice, concern about equality of birth is not unique to Muslim families.

It exists among aristocratic or snobbish-minded non-Muslim families around the world. The British Royal Family has had more than its share of controversies in this respect. Denials to the contrary by some Indian intellectuals and social commentators, and notwithstanding the fact the Constitution of India bars caste-based discrimination, decisions based on caste still are common among Hindu families. Many of them, particularly in rural areas, bar marriage to a lower-caste person. Based on Ancient Hindu scriptures such as the *Bhagavad Gita*, there are four broad Hindu castes (*jātis*, or *varnas*):

- (1) *Brahmin* (broadly, holy persons, scholars, and teachers).
- (2) *Kshatriya* (broadly, kings, warriors, administrators, and law enforcement personnel).

[When a disagreement occurred between Abū Dharr and Bilal, the former said to the latter: "You son of a black woman!" The Messenger of God — on him be blessing and peace — was displeased by Abū Dharr's comment and he rebuked him by saying: "That is too much, Abū Dharr. He who has a white mother has no advantage which makes him better than the son of a black mother." The Prophet's rebuke deeply affected Abū Dharr and he immediately threw himself to the ground, swearing that he would not raise it until Bilal had put his foot over his head.

- (3) *Vaishya* (broadly, commercial persons, such as merchants and traders, and protectors of cows).
- (4) *Shudra* (broadly, farmers, artisans, laborers, and menial workers, such as street sweepers, who serve the top three castes).

Each strata has thousands of sub-strata delineated on profession, region, language dialect, and other characteristics. Beneath the caste system, or wholly outside of it, are Untouchables (*Dalits*), whom Mahatma Gandhi lovingly referred to as "*Harijans*" (children of God). Caste depends entirely on birth. There is no way to escape it in this lifetime. Thus, a motive for conversion from Hinduism to Islam, or to Christianity, especially among poor Indians at the lower rungs, is to escape the oppressive caste system. Sadly, such conversions sometimes creates communal tension, even violence.

The concern about equality of birth also exists among non-Muslim families with avaricious motives for favoring or opposing a marriage. The aspiration for a daughter to "marry into money" is common around the world. Yet, it is important not to be cynical. Concerns about equality and finances sometimes are borne of a genuine interest in the future well-being of the daughter who is to be married. Muslim and non-Muslim families alike worry whether an adult daughter would be happy with a man who is not at a similar level of educational or professional achievement as their daughter.

## § 33.04 DIVORCE

### [A] Overview of Methods

It should not come as a surprise that divorce, at least for a husband, is relatively easy under Islamic Family Law. In that respect, the *Shari'a* is akin to American Family Law, and quite distinct from the teaching of the Catholic Church. As explained earlier, marriage is not a sacrament under the *Shari'a*, which it is according to Catholic Christianity. Rather, it is a contract, as it essentially is in American Family Law.

If marriage is a sacrament, entered into in the presence of God, then it follows that dissolving a marriage ought not to be easy. It is not, according to Catholic teaching, because it requires an annulment, not just a decree of divorce under applicable civil law.<sup>24</sup> Until an annulment is obtained, the Church regards a couple as married in the eyes of God. This precept is based on the statement of Christ recounted in *The Gospel According to Matthew*, namely, that a couple becomes one through marriage, and that as God put the couple together, no person should not separate them:

<sup>24</sup>Some Pharisees [certain ancient Jews who separated themselves in order to observe strictly the traditional, written law] approached him [Jesus], and tested him, saying, "Is it lawful for a man to divorce his wife

<sup>24</sup> Catholic Christian teaching regards divorce as an offense to the dignity of marriage. See *Catechism, supra*, ¶¶ 2382-2386 at 573-574.



for any cause whatever?"<sup>24</sup> He said in reply, "Have you not read that from the beginning the Creator 'made them male and female' and said, 'For this reason a man shall leave his father and mother and be joined to his wife, and the two shall become one flesh'?"<sup>25</sup> So they are no longer two, but one flesh. Therefore, what God has joined together, no human being must separate."<sup>26</sup> They [the Pharisees] said to him [Jesus], "Then why did Moses command that the man give the woman a bill of divorce and dismiss [her]?"<sup>27</sup> He said to them, "Because of the hardness of your hearts Moses allowed you to divorce your wives, but from the beginning it was not so. I say to you, whoever divorces his wife (unless the marriage is unlawful) and marries another commits adultery."<sup>28</sup>

In contrast, if marriage is a contract, as it is under the *Shari'a* and American Family Law, then terminating this contract ought not to be a major ordeal. The parties joined, their arrangement did not work out well, so they ought to be relatively free, as commercial parties are, to end their family deal.

Accordingly, the *Shari'a* has five methods to dissolve a marriage (*nikāh*) contract:

- (1) Repudiation (*ṭalāk*).
- (2) Oath of abstention (*ila'*).
- (3) Separation (*tafriq*).
- (4) Unchastity (*li'an*).
- (5) Apostasy (*riḍḍah*).

A scan of these methods indicates they are grounds for, or circumstances under which, a conjugal community is terminated. They are discussed in turn below.

An additional method of divorce may be based on the marriage (*nikāh*) contract. A wife — or more accurately, her guardian (*walī*) may negotiate a clause in the contract that sets out an instance, or instances, in which she can seek a divorce.

Still another method of divorce is linked to the nuptial gift (*mahr*). It is known as "*al khala'*," which means to "take away" or "pull." It occurs when a wife gives back to her husband her nuptial gift. At that point, when the husband takes back the gift, the marriage ends. The legal source for *al khala'* is a *ḥadīth*. Ibn 'Abbas reports:

The wife of Thabit ibn Qais came to the Prophet, peace and blessings of Allāh be on him, and said, "O Messenger of Allāh! I do not find fault in Thabit ibn Qais [her husband] regarding his morals of faith, but I hate disbelief in Islam." The Messenger of Allāh . . . said: "Wilt thou return to him his orchard?" She said, "Yes." So the Messenger of Allāh . . . said [to Thabit]: "accept the orchard and divorce her."<sup>29</sup>

<sup>25</sup> *The Gospel According to Matthew*, 19:3-9, in *THE CATHOLIC STUDY BIBLE* 41 (New York, New York: Oxford University Press, 1990, New American Bible trans.).

The appellation "Pharisee" is explained by James F. Driscoll, *Pharisees*, in *The Catholic Encyclopedia*, vol. 11 (New York, New York: Robert Appleton Company, 1911), posted at [www.newadvent.org/cathen/11789b.htm](http://www.newadvent.org/cathen/11789b.htm).

<sup>26</sup> [www.sacred-texts.com/isl/hadith/hadith24.html](http://www.sacred-texts.com/isl/hadith/hadith24.html).

In effect, a woman explained to Muhammad that her husband was a good man, but not a believing Muslim, hence she preferred a divorce. Muhammad told her to return the farm, which had been her nuptial gift, and said to her husband he must accept it and grant her a divorce. *Al khala'* is infrequently used, for example, in the United Arab Emirates (UAE).

## [B] Repudiation (*ṭalāk*)

The most straightforward way for divorce to occur under Islamic Law also is the best known among non-Muslims. It is for a husband (*ṣawj*) to repudiate his wife (*ṣawja*). Repudiation of her, i.e., disavowing or rejecting her as his wife, and thus of the marriage (*nikāh*) contract, is called "*ṭalāk*." Only a husband can avail himself of this option; it is not possible for a wife to repudiate her husband by pronouncing "*ṭalāk*."

However, is it possible for a wife to repudiate herself. That is, a wife has the legal power to repudiate herself to her husband (*ṣawj*), and thereby terminate a marriage (*nikāh*) contract. This power is called "*tafwīd*," as distinct from "*ṭalāk*." It must be exercised at a meeting (*majlis*) at which both the wife and husband are present. Presumably, this requirement means she could not e-mail or text message her husband that she is repudiating herself to him as his wife.

The reference to "pronouncing *ṭalāk*" is literally correct. The husband articulates his repudiation. Generally, it has been thought he is not permitted to text message or otherwise transmit his repudiation of his wife electronically. Yet, an April 2009 case from the Kingdom of Saudi Arabia suggests this prohibition may be in flux.<sup>27</sup> A Saudi man was in Iraq to participate in what he described as "*jihād*" (struggle). From Iraq, he sent her via text message a pronouncement of "*ṭalāk*." He followed up the text message with a telephone call to two of his relatives, explaining he intended that the woman no longer be his wife. A court in Jeddah, Saudi Arabia, heard the testimony of the relatives as to the intention of the man, and thereafter finalized the divorce.

There are two types of "*ṭalāk*," and they differ according to their effect or legal consequence. Repudiation may be revocable, or irrevocable. That is, when pronouncing *ṭalāk*, the result may be either of the following:

- (1) Repudiation that is revocable, or "*raj'i*." With a revocable repudiation, the marriage contract is not dissolved. Essentially, the contract is suspended. The wife remains in a waiting period, during which time the husband can withdraw the repudiation.
- (2) Repudiation that is irrevocable, or definite, i.e., "*bā'in*." With an irrevocable repudiation, the marriage contract is dissolved.

An obviously key question is when does a revocable versus irrevocable *ṭalāk* occur?

The answer is that it depends on the way in which a husband expresses the repudiation. Professor Schacht explains that if the husband uses some normal,

<sup>27</sup> See Asma Alsharif, *Court Upholds Divorce by Text Message*, AOL News, 24 April 2009, posted at <http://news.aol.com>.

regular verbal formulation, then the *ṭalāk* is revocable.<sup>28</sup> However, if the husband uses a more formal expression, or if he repudiates his wife before consummation of their marriage through intimacy (*dukhal*), then the repudiation is definite.

Considerable attention has been given in the non-Muslim western world to a scenario in which a husband repudiates his wife by pronouncing *ṭalāk* three times. That is a "formal expression," hence this scenario is of interest for good reason: a three-fold pronouncement results in a definite (*bā'in*) repudiation. It is impossible for the now ex-husband and ex-wife to live again together as husband and wife, i.e., they cannot re-marry, with one significant and odd exception. Suppose following the definite repudiation, the ex-wife marries another man, and consummates that marriage through sexual intercourse with him. Suppose further that the second marriage is irrevocably dissolved. If these events transpire, then the woman can re-marry her former husband.

Thus, the scenario of a three-fold *ṭalāk* is of interest because of the finality of this pronouncement. Professor Schacht observes that because of this legal consequence, "[t]he triple repudiation has therefore become the normal form of divorce."<sup>29</sup> According to a strict application of the *Shari'a*, to effect a triple repudiation, the husband should pronounce "*ṭalāk*" on three distinct occasions. These occasions ought to be ones in which his wife is pure, that is, she is not in the midst of her menstrual period. However, as Professor Schacht points out, it has become customary for a man to pronounce "*ṭalāk*" three times on the same occasion — that is, one declaration in which the repudiation is uttered thrice.<sup>30</sup> While this method of pronouncement of *ṭalāk* is legally valid, it is religiously forbidden (*ḥarām*).

As just indicated, under Islamic Family Law, there is an impediment to re-marriage after a triple repudiation (*ṭalāk*). The impediment is to re-marriage to the first husband. This block is lifted only if the wife marries a different man, consummates that marriage, and then that marriage is terminated. This series of events, while convoluted and unlikely, is facilitated by means of one of the *ḥiyal* devices (legal fictions) in the *Shari'a*, known as "*tahli*l." Through *tahli*l, the entire transaction is pre-packaged: the marriage to a different man is pre-arranged, as is the dissolution of that marriage after its consummation. Via this particular formalism, the impediment to re-marriage created by a three-fold *ṭalāk* is removed.

From a Catholic Christian perspective, *tahli*l makes a mockery of the sanctity of marriage. Notably, the *Hanbali* School rejects the use of *tahli*l in this manner. However, the device is permitted under the *Hanafi*, *Māliki*, and *Shāfi'i* Schools. In considering *tahli*l, it must be remembered that the theory of marriage (*nikāh*) under the *Shari'a* is based on contract, not on sacrament.

One prominent illustration of the aforementioned principles about divorce and re-marriage involving the same woman involves the Saudi Royal family. The veracity of this story is uncertain, thus it is important not to present it — nor many

of the tales surrounding the House of Saud — as fact. This particular yarn concerns the first King of Saudi Arabia, Abdul Aziz ibn Abdul Rahman Al Saud (c. 1880-1953 A.D.), who had his last child at the age of 80. (He is frequently referred to as "King Abdul Aziz (Ibn Saud)," or simply "King Abdul Aziz.") He began his conquest of most of the Arabian Peninsula in 1902, completing and unifying it under the House of Saud in 1932.

The favorite wife of King Abdul Aziz was named Hussa Al Sudari. With her, he had seven children, and they are known as the "Sudari Seven." The Sudari Seven include very prominent members of the Saudi royal family — for example, King Faisal, King Khalid, King Fahd, plus cabinet members serving in important posts such as the Minister of Interior and Minister of Defense. However, King Abdul Aziz and Hussa did not have all of the Sudari Seven children in a row. Initially, they had one child. Thereafter, allegedly the King quarreled with his wife, and he divorced her — the normal way of pronouncing "*ṭalāk*" three times. Then, Hussa Al Sudari re-married; indeed, she married the brother of King Abdul Aziz. With this brother, Hussa had one son. After the birth of that son, King Abdul Aziz allegedly convinced or compelled his brother to divorce Hussa, so that he (King Abdul Aziz) could re-marry her. (Whether the *ḥila* device of *tahli*l was used is unclear, but insofar as it is not accepted by the *Hanbali* School, which prevails in the Kingdom, it would seem not.) The divorce occurred, and King Abdul Aziz re-married Hussa. After the re-marriage, King Abdul Aziz and Hussa lived happily and had the remaining six of the Sudari Seven. The King himself sired more than 50 sons, and since 1953, all of the Saudi Kings have been brothers, and the sons of King Abdul Aziz.<sup>31</sup>

### [C] Oath of Abstention (*ilā'*)

A second method for a husband (*ṣawj*) to divorce his wife (*ṣawja*) is known as "*ilā'*." This method is available only to the husband, and is tantamount to a definitive repudiation (i.e., *ṭalāk* that is *bā'in*). "*ilā'*" refers to an oath of abstinence, which the husband takes, to abstain from sexual intercourse with his wife for four months. If he fulfills this oath, then — at the end of the four-month period — he has repudiated his wife in a definitive sense. Consequently, the marriage (*nikāh*) contract is terminated. Or, at a minimum, the wife has the right to obtain a formal divorce.

The logic behind this methodology is partly historical, which of course raises the problem of the Orientalist Fallacy. The pre-Islamic era (*jāhiliyya*) witnessed the abuse of the practice of *ilā'*, as it would freeze relationships, resulting in neither divorce nor marriage, and it did not have a defined period of time. Islam regulated the practice, by limiting its duration to only four months, after which the wife has the right to obtain a divorce, or the husband could get around his oath by fulfilling a religious expiation (*kaffāra*), such as fasting or prayer. Note, then, that while *ilā'* can be triggered only by a husband, the result is at least to empower a wife to

<sup>28</sup> See SCHACHT, *supra*, at 163.

<sup>29</sup> SCHACHT, *supra*, at 164.

<sup>30</sup> See SCHACHT, *supra*, at 164.

<sup>31</sup> See COLIN WELLS, *THE COMPLETE IDIOT'S GUIDE TO UNDERSTANDING SAUDI ARABIA II* (Alpha: New York, New York, 2003). King Abdullah, who ascended to the throne on 1 August 2005, is not one of the Sudari Seven. His mother is Fahda bint Asī Al Shuraim, who is the eighth wife of Ibn Saud.



obtain a divorce. Yet, note also that *ilā'* can be viewed as a method of disciplining a wife.

The logic behind this methodology also implicates both sexuality and procreation. The availability of a wife to her husband is traditionally considered one of her marital duties, and her failure to perform them can qualify as disobedience that jeopardizes her right of maintenance (*nafaka*). If the husband proactively decides he does not want normal conjugal relations with his wife, then he is effectively relieving her of her duty to perform them. Moreover, insofar as an important purpose of marriage is procreation, he is abrogating that purpose with respect to the wife in question.

At least one point is troubling about the invocation of *ilā'* to effect a divorce. The invocation is unilateral by the husband. To be sure, there may be cases in which he feels prompted to take the oath because of intractable difficulties he argues are caused by his wife. But, the decision ultimately is his, and in many situations there is the possibility he resorts to *ilā'* because of his own bad behavior, poor temperament, or subjective and shifting preferences. In such cases, there may be little the wife can do — she is at the mercy of her husband.

Fortunately, the *Shari'a* contains a partial bulwark against improper invocation of *ilā'*. Suppose the husband does not adhere to the oath. That is, suppose he withdraws it within the four-month period and resumes conjugal relations with his wife. He is free to do so, but he must perform a penance — a self-imposed penalty, which is a religious expiation, or *kaffāra*. After all, he took an oath, broke it, and put his wife through some degree of emotional trauma. In theory at least, the specter of having to do a *kaffāra* should give pause to a husband contemplating *ilā'*. Insofar as it does, *kaffāra* operates as a bulwark against arbitrary or capricious use of *ilā'*. However, the bulwark is partial. It does not block out arbitrary, capricious invocations in which the husband fulfills the oath.

### [D] Separation (*Tafrik*)

The literal meaning of the Arabic word "*tafrik*" is "separation," or "to separate piece by piece." In Islamic Family Law, it refers to the separation of the husband (*zawj*) and wife (*zawja*), who are the "pieces" of the marriage. The result of this separation is dissolution of the marriage (*nikāh*) contract. In other words, "*tafrik*" is separation that results in divorce. Significantly, this method of ending a marriage is available not only to the husband, but also the wife. Indeed, *tafrik* is a (if not the) principal means by which a wife divorces her husband.

An Islamic judge (*qādi*) issues a decree of *tafrik*. The judge does so upon the request of either the husband or wife. Thus, a wife has the right to go to a *qādi* and seek separation from her husband. However, in many if not most cases, she does so through her guardian (*wali*). That is, she, or her *wali* acting on her behalf, goes to a *Shari'a* court, appears in front of a *qādi*, and requests a separation. Manifestly, depending on his disposition, the *wali* may either facilitate or hinder the exercise of this right by the wife. In addition to family support, whether the theoretical right of the wife to seek separation from her husband is a practical reality depends on whether she can support herself (and possibly her children) financially. If she lacks

the support of her family to terminate her marriage, then she must be able to live on her own and earn income. She will need to be able to rent or purchase an apartment or home, and obtain a job. Traditional chauvinistic custom, not Islamic Law, may make such logistics impossibilities. In contrast, a husband faces no such difficulties. His labor market power is assured. As a mature adult, he does not have a *wali*. So, he can go directly to a court and *qādi*.

Interestingly, in limited circumstances, a *qādi* will pronounce a separation on his initiative. The most likely instance of this *sua sponte* (i.e., on his own accord, motion, or will) action would be where there is an impediment to marriage. For example, a wrongful combination, such as a man marrying two sisters, could trigger this action.<sup>32</sup>

It also is possible — but, unusual — for a *wali* to pronounce a *tafrik*. A *wali* has this option as a means of exercising his right to object to a marriage on behalf of a woman who has come of age, but is marrying a man the *wali* finds is not of equal birth. That is not to say the *wali* holds the right to invoke *tafrik* in the same, direct way that the husband and wife have this right. Rather, the *wali* has the right to object to a marriage of unequal birth. If such a marriage occurs, the *wali* can proclaim a separation as a means of enforcing his right of objection. Obviously, his doing so likely would prove highly controversial, hence the rarity of this occurrence.

American Family Law offers a number of grounds on which a wife or husband may seek separation and divorce. One of them is "irreconcilable differences," which essentially means a couple is unable or unwilling to get along and has no prospect of improving their relationship. On what grounds may a wife seek a decree of *tafrik* from a *qādi*? The answer is more limited than under American Family Law, and there appears to be no provision in the *Shari'a* akin to "irreconcilable differences." The answer also is that the Four *Sunni* Schools differ somewhat on the grounds for *tafrik*. The *Māliki*, *Shāfi'i*, *Hanbali* and Schools allow for a larger number of grounds than does the *Hanafi* School.

Across all Four Schools, there is some shared ground, i.e., all of them accept certain justifications as a basis for a wife to seek *tafrik*. These common denominators are:

- (1) The woman was married by her *wali* as a minor, but now she has come of age and seeks to exercise her right of rescission in respect of the marriage contract. (That right becomes vested when she comes of age.)
- (2) The husband is impotent. That is, the husband is unable to have normal sexual relations, and thus cannot conceive with his wife a child through natural means.

These first two grounds are considered standard by the Schools. There are two further, and somewhat controversial, grounds:

- (3) The husband is a lunatic. That is, the husband is seriously mentally deficient.

<sup>32</sup> See SCHACHT, *supra*, at 165.

- (4) The husband has a grave, chronic disease. Presumably, qualifying afflictions would include terminal cancer, but it is unclear as to whether severe paralysis (e.g., quadriplegia) would count.

There is a debate among the *ulema* (religious scholars) and *fukahā'* (legal scholars) as to whether the third and fourth grounds are sufficient to dissolve a marriage.

May a husband avail himself of the aforementioned grounds for *tafriḳ*, i.e., do they apply equally, in a mirror-image fashion, to husband and wife? The answer is "yes." For example, a husband can exercise the right to seek a decree of *tafriḳ* from a *qāḍī* by exercising his right of rescission when he comes of age.

An interesting choice is between *talāk* and *tafriḳ*. What factors influence this choice by a husband? (Effectively, only a husband would have that choice.) That is, when would a husband choose to repudiate his wife versus separation from her pronounced by a *qāḍī*? The answer depends on whether or not the marriage has been consummated through sexual intercourse (*dukhāl*). Professor Schacht posits the following situation: suppose the reason a husband seeks divorce is some problem inherent with his wife.<sup>33</sup> Such a problem could be infertility, though that is not entirely clear. If he obtains a separation before consummation, then he does not incur any financial obligations from the marriage. For instance, he might be relieved from paying the remainder of the nuptial gift (*mahr*). If he repudiates the wife, however, then he has financial obligations to her.

### [E] Unchastity (*Li'ān*)

A marriage can be dissolved as a result of unchastity. The relevant Arabic term is "*li'ān*." Technically, "unchastity" refers to unlawful sexual intercourse, and it is a matter within the ambit of Islamic Criminal Law (*Uqūbāt*). But, *li'ān* is a procedure to obtain a divorce on account of unchaste behavior that avoids recourse to the severe Penal Law regime for unlawful sexual intercourse (*zinā*). In effect, *li'ān* is akin to the justification under Family Law in the United States for a divorce based on infidelity. Unlike American Family Law, however, the *Shari'a* procedure is available only to a husband.

The essential feature of the *li'ān* procedure is that a husband swears under oath that his wife has committed an unchaste act (namely, adultery). Equivalently, he may swear under oath that she has had a child whom he did not father — an accusation concerning the legitimacy of her child. Depending on the case, the wife may offer an affirmation under oath to the contrary. If she does so, then the case could become one of "he said, she said," and must be resolved through a *Shari'a* court by a judge (*qāḍī*), or possibly through arbitration by an arbitrator (*hakam*).

Critically, dissolution of a marriage through *li'ān* is mutually exclusive with prosecution for *zinā* or *kadhf* (false accusation of *zinā*). Hence, suppose a husband initiates the procedure of *li'ān* and the marriage is dissolved. The husband cannot be liable for the crime of *kadhf*, meaning he is not liable for the *hadd* punishment associated with false accusation of unchastity (namely, 80 lashes). Likewise, dissolution through *li'ān* renders the wife free from *hadd* liability for *zinā* (namely,

death by stoning or 100 lashes). For this immunity, she must make an affirmation under oath that she did not commit an unchaste act. This mutual exclusivity is logical. If triggering the *li'ān* procedure also opened the possibility of a *hadd* punishment, then *li'ān* would be useless — no husband ever would resort to it. That would be a tragedy. The procedure allows a couple to divorce in a quiet, less contentious way, with less dire consequences, than under Islamic Penal Law. Use of *li'ān* also avoids the severe evidentiary requirements (namely, four morally upright male witnesses) required for prosecution of *zinā* or *kadhf*.

### [F] Apostasy (*Riddah*)

Arguably the most troubling method of — or, better put, ground for — divorce is apostasy (*riddah*). Under Islamic Family Law, a marriage automatically becomes invalid if either the husband (*zawg*) or wife (*zawja*) becomes an apostate (*murtadd*). That is, if either husband or wife rejects Islam, then the marriage is dissolved.

This ground is "troubling," because it is impinges on freedom of conscience or religion. Spouses are free to grow spiritually within the Islamic faith as their marriage and life progresses. But, they are not free to grow outside the boundary of Islam. To do so would be to destroy their marriage. No other major world religion or legal system regards apostasy as having the automatic consequence of termination of marriage.

### [G] Waiting Period (*'Idda*)

Islamic Law contains a number of terms, in the sense of waiting periods. For example, there are waiting periods regarding the presumption of death. These terms are called "*ajal*," and they must be certain (*ma'lām*) in respect of the length of the duration.

A practical example of an *ajal* concerns re-marriage. Suppose the marriage of a woman is terminated, and the woman wants to re-marry. There is a prescribed waiting period, called "*'idda*." Regardless of the method by which the divorce was obtained, if there is a divorce, and if the previous marriage was consummated through conjugal relations (*dukhāl*), then the ex-wife is not entirely free to re-marry. She must undergo a waiting period, the "*'idda*." Only after this term has elapsed may she marry another man.

The general rule is that the *'idda* is three menstrual cycles of the ex-wife. If she does not menstruate (e.g., if she is post-menopausal), then the waiting period is three months. However, there are two exceptions to the general three periods/three months *'idda* rule. First, for a pregnant woman, the *'idda* lasts until the end of the pregnancy. Second, for a woman who is not pregnant, but whose husband has died (i.e., she is a widow), the *'idda* is four months plus ten days. The additional time beyond the general rule of three periods/three months is for mourning over the death of her husband.

<sup>33</sup> See SCHACHT, *supra*, fn. 1 at 165.



- (4) The husband has a grave, chronic disease. Presumably, qualifying afflictions would include terminal cancer, but it is unclear as to whether severe paralysis (e.g., quadriplegia) would count.

There is a debate among the *ulema* (religious scholars) and *fukahā'* (legal scholars) as to whether the third and fourth grounds are sufficient to dissolve a marriage.

May a husband avail himself of the aforementioned grounds for *tafriḳ*, i.e., do they apply equally, in a mirror-image fashion, to husband and wife? The answer is "yes." For example, a husband can exercise the right to seek a decree of *tafriḳ* from a *qāḍī* by exercising his right of rescission when he comes of age.

An interesting choice is between *talāk* and *tafriḳ*. What factors influence this choice by a husband? (Effectively, only a husband would have that choice.) That is, when would a husband choose to repudiate his wife versus separation from her pronounced by a *qāḍī*? The answer depends on whether or not the marriage has been consummated through sexual intercourse (*dukhāl*). Professor Schacht posits the following situation: suppose the reason a husband seeks divorce is some problem inherent with his wife.<sup>33</sup> Such a problem could be infertility, though that is not entirely clear. If he obtains a separation before consummation, then he does not incur any financial obligations from the marriage. For instance, he might be relieved from paying the remainder of the nuptial gift (*mahr*). If he repudiates the wife, however, then he has financial obligations to her.

### [E] Unchastity (*Li'ān*)

A marriage can be dissolved as a result of unchastity. The relevant Arabic term is "*li'ān*." Technically, "unchastity" refers to unlawful sexual intercourse, and it is a matter within the ambit of Islamic Criminal Law (*'Uqabāt*). But, *li'ān* is a procedure to obtain a divorce on account of unchaste behavior that avoids recourse to the severe Penal Law regime for unlawful sexual intercourse (*zinā*). In effect, *li'ān* is akin to the justification under Family Law in the United States for a divorce based on infidelity. Unlike American Family Law, however, the *Sharī'a* procedure is available only to a husband.

The essential feature of the *li'ān* procedure is that a husband swears under oath that his wife has committed an unchaste act (namely, adultery). Equivalently, he may swear under oath that she has had a child whom he did not father — an accusation concerning the legitimacy of her child. Depending on the case, the wife may offer an affirmation under oath to the contrary. If she does so, then the case could become one of "he said, she said," and must be resolved through a *Sharī'a* court by a judge (*qāḍī*), or possibly through arbitration by an arbitrator (*hakam*).

Critically, dissolution of a marriage through *li'ān* is mutually exclusive with prosecution for *zinā* or *kadhf* (false accusation of *zinā*). Hence, suppose a husband initiates the procedure of *li'ān* and the marriage is dissolved. The husband cannot be liable for the crime of *kadhf*, meaning he is not liable for the *ḥadd* punishment associated with false accusation of unchastity (namely, 80 lashes). Likewise, dissolution through *li'ān* renders the wife free from *ḥadd* liability for *zinā* (namely,

death by stoning or 100 lashes). For this immunity, she must make an affirmation under oath that she did not commit an unchaste act. This mutual exclusivity is logical. If triggering the *li'ān* procedure also opened the possibility of a *ḥadd* punishment, then *li'ān* would be useless — no husband ever would resort to it. That would be a tragedy. The procedure allows a couple to divorce in a quiet, less contentious way, with less dire consequences, than under Islamic Penal Law. Use of *li'ān* also avoids the severe evidentiary requirements (namely, four morally upright male witnesses) required for prosecution of *zinā* or *kadhf*.

### [F] Apostasy (*Riddah*)

Arguably the most troubling method of — or, better put, ground for — divorce is apostasy (*riddah*). Under Islamic Family Law, a marriage automatically becomes invalid if either the husband (*ṣawg*) or wife (*ṣawja*) becomes an apostate (*murtadd*). That is, if either husband or wife rejects Islam, then the marriage is dissolved.

This ground is "troubling," because it is impinges on freedom of conscience or religion. Spouses are free to grow spiritually within the Islamic faith as their marriage and life progresses. But, they are not free to grow outside the boundary of Islam. To do so would be to destroy their marriage. No other major world religion or legal system regards apostasy as having the automatic consequence of termination of marriage.

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<sup>33</sup> See SCHACHT, *supra*, fn. 1 at 165.

### § 33.05 MODERNIST LEGISLATION ON DIVORCE

In Tunisia, because of the Modernist legislation enacted in 1956 — the *Code of Personal Status* — only a court can pronounce a divorce.<sup>34</sup> As is true on the issue of polygamy, in divorce cases in Tunisia, husbands and wives are treated as equals. Accordingly, a request for a divorce can be by mutual consent. Failing that, request can be made to a Tunisian court of competent jurisdiction by either one of the spouses — the husband or the wife. The petitioning spouse may cite as a justification for a divorce any one of the several grounds specified in the *Code*. It also is possible for either of them to request a divorce without specifying one of those grounds. However, in such a case, the court will fix a payment owed by one spouse to another.

### § 33.06 SHĪTE DISTINCTION: TEMPORARY MARRIAGE (MUT'A)

Family Law, and laws regarding personal status, would seem to be an area in which there is considerable room for divergence between *Sunnis* and *Shītes*, if for no other reason than the distinctive religious outlooks and cultural practices across the two communities. Yet, it can be complicated to gauge the extent of divergence, because in many Islamic countries, Family Law remains un-codified. Thus, Rabb observes:

In analogous Islamic constitutions, there is no correlation between the constitutional centrality of Islamic law to legislation ("a source" versus "the source") and the codification of personal status laws. Some countries that render Islamic law "the source" codify the laws of personal status (e.g., Iran, Egypt, and Yemen), while others leave personal status laws uncoded (e.g., Qatar, Saudi Arabia, Oman, and the UAE). Some countries that render Islamic law "a source" similarly codify personal status laws (e.g., Kuwait, Libya, Malaysia, Sudan, and Syria), while others leave personal status laws uncoded (e.g., Bahrain). The decision of whether to codify and the determination of the content of the codification appears to depend very little on constitutional formulations of the Islamic law incorporation and very much on domestic politics and the local history of the state's relationship with Islamic law or its exponents.<sup>35</sup>

Article 6 of the Civil Code of Iran contains a startling claim to universal jurisdiction:

The laws relating to personal status, such as marriage, divorce, capacity and inheritance, shall be observed by all Iranian subjects, even if resident abroad.<sup>36</sup>

Given the different positions of Islamic countries on Family Law codification, it is

<sup>34</sup> See SCHACHT, *supra*, at 108-109.

<sup>35</sup> Intisar A. Rabb, "We the Jurists": Islamic Constitutionalism in Iraq, 10 University of Pennsylvania Journal of Constitutional Law 527, 550-51 (March 2008).

<sup>36</sup> CIVIL CODE OF IRAN, Article 6, posted at <http://hajipour.online.fr/wp-content/civilcode.pdf>. [Hereinafter, CIVIL CODE OF IRAN.]

not easy to generalize whether Article 6 is *sui generis* or commonplace in the Muslim world.

One feature unambiguously distinguishing *Shīte* from *Sunni* Family Law concerns temporary marriage, or "*mut'a*." *Mut'a* literally means enjoyment or use.<sup>37</sup> In this context, it is a marriage for a fixed period of time and for payment to a woman.<sup>38</sup> Upon the expiry of the term, the marriage automatically dissolves.<sup>39</sup>

In a *mut'a*, the wife does not receive a dowry (*mahr*) as in *nikah*, but an *ijra*, or reward, which is essential to the contract of marriage, and if the wife abandons the husband before the expiry of the period agreed the husband may deduct a proportionate part of the *ijra*.<sup>40</sup>

Note there are seven technical legal elements for a valid temporary marriage.

First, a *mut'a* allows a *Shī'a* man to marry a *Shī'a* woman, implying both partners are *Shīte*. One partner cannot be a *Sunni*. As for non-Muslims, the general rules about mixed marriages apparently would apply (including that a Muslim woman is not to marry a non-Muslim man). Second, the union is for a specified, temporary period of time. It is not indefinitely long, nor life-long. Third, dissolution of the union is automatic when the period expires. Fourth, the couple must agree on a payment to the wife, i.e., an *ijra*. Fifth, they must not be barred from entry into a religious marriage by "being related by blood or in terms of a common foster-mother."<sup>41</sup> Sixth, any children conceived during *mut'a* are considered legitimate, and are entitled to inheritance from each parent. Seventh, at the end of a *mut'a*, there is no need for the ex-husband to pay alimony to his ex-wife.<sup>42</sup>

So, a *mut'a* marriage is legal in *Shīte* Family Law, but forbidden (*harām*) under *Sunni* *fiqh*. All Four *Sunni* Schools view temporary marriage as prostitution.<sup>43</sup> They see *nikāh* as the only valid version of marriage, which, if no divorce occurs, is life-long.<sup>44</sup>

<sup>37</sup> KEITH HODKINSON, *MUSLIM FAMILY LAW: A SOURCEBOOK*, 9 (Croom Helm, London & Cambridge: 1984). [Hereinafter, HODKINSON.]

<sup>38</sup> CIVIL CODE OF IRAN, *supra*, Articles 1075 (fixed period) and 1077 (payment).

<sup>39</sup> CIVIL CODE OF IRAN, *supra*, Article 1076.

<sup>40</sup> HODKINSON, *supra*, at 9.

<sup>41</sup> AYATOLLAH JA'FAR SOHRABI, *DOCTRINES OF SHI' ISLAM: A COMPENDIUM OF IMAMI BELIEFS AND PRACTICES* 192 (London, England: I.B. Tauris, 2001) (Reza Shah-Kazemi ed. & trans.). [Hereinafter, SOHRABI.]

<sup>42</sup> See SOHRABI, *supra*, at 192.

<sup>43</sup> HODKINSON, *supra*, at 9. For *hadiths* concerning temporary marriage and its prohibition in *Sunni* *fiqh*, see, e.g., SAHIB MUSLIM — BEING TRADITIONS OF THE SAYINGS AND DOINGS OF THE PROPHET MUHAMMAD AS NARRATED BY HIS COMPANIONS AND COMPILED UNDER THE TITLE AL-JAM'U-S-SAHIH BY ISAM MUSLIM, RENDERED INTO ENGLISH BY ABDEL HAMID SIDDIQI, WITH EXPLANATORY NOTES AND BRIEF BIOGRAPHICAL SKETCHES OF MAJOR NARRATORS, CORRECTED AND REVISED BY DR. HASSAN, vol. II.B, book 16 (Book of Marriage), pp. 342-346, *hadith* nos. 1404-1407R4 (Lahore, Pakistan: Sh. Muhammad Ashraf Booksellers and Exporters, 1990), and THE TRANSLATION OF THE MEANINGS OF SAHIB AL-BUKHARI, ARABIC-ENGLISH BY DR. MUHAMMAD MUHSIN KHAID, vol. VII, book LXII (The Book of *Nikāh* (Wedlock)), pp. 36-37, *hadith* nos. 50-52 (Dar Ahya Us-Sunnah, Al Nabawiya, March 1978).

<sup>44</sup> HODKINSON, *supra*, at 9.



How do *Shi'ite* scholars respond to this criticism? They offer three arguments for the legitimacy of *mut'a*. First, there is tradition, albeit not the *Sunnah* of the Prophet. During the life of Muhammad, his Companions (*Ṣaḥābah*) practiced *mut'a*.<sup>45</sup> Second, there is the Qur'ān, namely, *surah* 23, *ayat* 5-7, and *surah* 70, *ayat* 29-31. These passages concern sexual intercourse, but they do not forbid *mut'a*.<sup>46</sup> Third, there is history. All Muslim sects accepted *mut'a* until the second *Rashidun* Caliph, 'Umar, forbade it. Yet, *Shi'ites* never have recognized the teachings of 'Umar.<sup>47</sup> Thus, to the present, *Shi'a* but not *Sunni* Muslims practice temporary marriage (*mut'a*).<sup>48</sup> Notably, when Saddam Hussein (1937-2006) ruled Iraq (July 1979-April 2003), *mut'a* was banned. After he was toppled during the Second Gulf War (2003-2010), some *Shi'ite* clerics began approving temporary marriages, causing suspicion among *Sunnis*, who criticized these approvals as condoning illicit sexual relationships, especially among young persons.

<sup>45</sup> HODKINSON, *supra*, at 115.

<sup>46</sup> HODKINSON, *supra*, at 115.

<sup>47</sup> HODKINSON, *supra*, at 115. Hodkinson states an additional policy argument for allowing *mut'a* (albeit a controversial one): if a permanent union cannot satisfy the sexual desires of a man, then he should be able to satisfy such desires in a manner "which minimizes the threat to morality[.]" *Id.*

<sup>48</sup> See JAMES A. BILL & JOHN ALDEN WILLIAMS, *ROMAN CATHOLICS & SHI' MUSLIMS: PRAYER, PASSION AND POLITICS* 22 (Chapel Hill, North Carolina: The University of North Carolina Press, 2002).

## Chapter 34

### POLYGAMY AND MIXED MARRIAGES

Sometimes I wonder if men and women really suit each other. Perhaps they should live next door and just visit now and then.

Katharine Hepburn (1907-2003, rated in 1999 by the American Film Institute as the greatest actress in American cinema history, and record-holder for most wins of the Academy Award for Best Actress — 4) (*quoted in Esquire* magazine, 1980)

#### SYNOPSIS

##### § 34.01 POLYGAMY

- [A] Up to Four Wives and Prophet's Special Rules
- [B] Prophet's Special Rules
- [C] Does Qur'ān "Encourage" Polygamy?

##### § 34.02 ARGUMENTS ABOUT POLYGAMY

- [A] Justifying Polygamy and Orientalist Fallacy
- [B] Questioning Polygamy

##### § 34.03 MODERNIST LEGISLATION ON POLYGAMY

##### § 34.04 MIXED MARRIAGES

- [A] Basic Rules and Challenge of Globalization
- [B] Prohibition on Marriage with *Mushrik*: Interpreting *Surah* 2, *Ayah* 221

##### § 34.05 EXCEPTION FOR MUSLIM MEN: *SURAH* 5, *AYAH* 5

- [A] *Hanafi* School Interpretation of *Surah* 5, *Ayah* 5
- [B] *Māliki*, *Shāfi'i*, and *Hanbali* School Interpretations of *Surah* 5, *Ayah* 5

##### § 34.06 PROBING *SURAH* 5, *AYAH* 5 EXCEPTION

- [A] Gender Asymmetry
- [B] Reasons and Counter-Arguments for Prohibiting Muslim Women from Marrying Non-Muslim Men

##### § 34.07 CONTRASTS WITH CATHOLIC CHRISTIANITY

## § 34.01 POLYGAMY

### [A] Up to Four Wives and Prophet's Special Rules

Polygamy is, of course, regarded as an offense against the dignity of marriage in both Catholic and Protestant Christianity. It is understood as not in accordance with the moral law.<sup>1</sup> In sharp contrast, as is quite well known among non-Muslims, the *Shari'a* permits a man to marry up to four wives, i.e., to have four wives simultaneously. What is less well understood is the passage in the Qur'an that sets out the rule on polygamy. The key (and, indeed, only) passage directly addressing the topic appears in *surah* 4, which is titled "Women," *ayah* 3:

If you fear that you will not deal fairly with *orphan girls*, you may marry whichever [other] women seem good to you, *two, three, or four*. If you fear that you cannot be *equitable* [to them], then marry only *one*, or your slave(s): that is more likely to make you *avoid bias*.<sup>2</sup>

There are, of course, impediments to marriage that circumscribe polygamy to some degree. In *surah* 4 *ayah* 23, the Qur'an prohibits marriage with two sisters simultaneously. *Ayah* 22 bars marriage with a mother and her daughter simultaneously.

*Surah* 4, *ayah* 3 (as well as *ayah* 2) was revealed shortly after the Battle of 'Uhud (625 A.D.), in which Muslims were defeated and a considerable number of husbands killed. That is why the Qur'anic passage uses the term "orphans," and why it encourages Muslims to take care of each other's families by marrying widows. In other words, at the risk of committing the Orientalist Fallacy, the passage allowing Muslim men to marry up to four wives is not designed to condone lustful behavior, but rather — as a matter of faith, Muslims say — should be understood in the historical context in which it was revealed.

While it would itself suffice, the Qur'an is not the only authority for the basic rule permitting a man may choose up to four wives. There also exists support sourced in the *Sunnah* of the Prophet. A number of *hadith* collected by *Imam* Bukhari support, or at least relate to, polygamy.<sup>3</sup> Notably, *Shari'a* scholars have elaborated on the rule.

For example, *Imam* Abū Hanifa introduced a refinement, namely, the invalidity of a single marriage (*nikāh*) contract for all four wives.<sup>4</sup> To be valid, each marriage

<sup>1</sup> For Catholic Christian teaching on polygamy, see CATECHISM OF THE CATHOLIC CHURCH § 2387 at 574 (United States Catholic Conference, Inc., Washington, D.C.: Libreria Editrice Vaticana, 2nd ed. 1997). [Hereinafter, CATECHISM.]

<sup>2</sup> THE QUR'AN — A New Translation by M.A.S. Abdel Haleem 4:3, at 50 (Oxford, England: Oxford University Press, 2004) (emphasis added). [Hereinafter, Qur'an.] See also *id.*, 5:208, 62:2, 62:6, and 77:508.

<sup>3</sup> See, e.g., THE TRANSLATION OF THE MEANINGS OF SAHĪH AL-BUKHĀRĪ, ARABIC-ENGLISH by Dr. Muhammad Muhsin Khan, vol. VII, book LXII (The Book of Nikāh (Wedlock)), pp. 4-5, *hadith* nos. 5-7 and pp. 23-24, *hadith* no. 35 (Dar Ahyā Us-Sunnah, Al Nabawiya, March 1978).

<sup>4</sup> See JOSEPH SCHACHT, AN INTRODUCTION TO ISLAMIC LAW 41 (Oxford, England: Oxford University Press (Clarendon Paperbacks) 1982). [Hereinafter, SCHACHT.]

must be arranged for by a separate contract. This refinement amounts to a circumscription of the rule. It creates time and space between two or more marriage ceremonies. A man is supposed to use that gap wisely, namely, deliberate carefully as to his ability to treat multiple wives in an equitable, unbiased manner.

### [B] Prophet's Special Rules

As for the Prophet himself, immediately following the revelation of *surah* 4, *ayah* 3 of the Qur'an, the rule concerning four wives applied to him. Before this revelation, and following the death of Khadyja in 619 A.D., he had taken Sawda bint Zama and 'Aisha bint Abi Bakr as his wives. After this revelation, Muhammad married Hafsa bint Omar, whose husband died during the Battle of 'Uhud. Shortly thereafter, he married Zaynab bint Khuzayma, the widow of a soldier slain in the Battle of Badr (624). Zaynab died after just 8 months of marriage, whereupon Muhammad married Umm Salama Hind, another war widow from the Battle of 'Uhud, who had one son and two daughters.

But, another Qur'anic revelation, *surah* 33, *ayah* 37, launched what in Islamic legal literature is called the "Prophet's Special Rules," including marriage to more than four wives:

When you [Prophet] said to the man who had been favored by God and by you, "Keep your wife and be mindful of God," you hid in your heart what God would later reveal: you were afraid of people, but it is more fitting that you fear God. After Zayd divorced her, We gave her to you in marriage so that there might be no fault in believers marrying the wives of their adopted sons after they had divorced them. . . .<sup>5</sup>

Plainly, the passage refers to the marriage of the Prophet to his cousin, Zaynab bint Jahsh, following her divorce from Zayd, the slave of Muhammad, whom Muhammad freed and adopted as his son. Indeed, after this passage was revealed, Muhammad married the divorcee. As Professor Haleem explains, this passage "shows the marriage [of Muhammad to Zaynab] to be lawful since adoption does not create blood relations that preclude marriage."<sup>6</sup> Of course, modern science shows that marriage of first cousins is genetically unwise.

In any event, generally, the Prophet's Special Rules were aimed to alter rigid social practices deeply rooted on the Arabian Peninsula during the time of the Prophet. (Note the Orientalist Fallacy implicit in this explanation.) Significantly, these Rules are not limited to the marital status of Muhammad. They extend to his prayer life (*surah* 17, *ayah* 79), honors bestowed on him (*surah* 24, *ayah* 63), obedience to him (*surah* 48, *ayah* 10), and respect for him (*surah* 49, *ayah* 2).

<sup>5</sup> Qur'an, *supra*, 33:37 at 269.

<sup>6</sup> Qur'an, *supra*, fn. a to 33:37 at 269.



### [C] Does Qur'ān "Encourage" Polygamy?

The vast majority of Muslim marriages are not polygamous. This majority recoils at the thought of a non-monogamous relationship. Yet, can it be said the Qur'ān actively encourages polygamy? Arguably, for four reasons, the answer is "no."

First, a careful reading of the above quoted passages indicates they are not exhortations to take on more than one wife — merely a permission to do so. Indeed, the right to take up to four wives is not an absolute, unqualified one. A man must treat them equitably, avoiding bias in favor of any one of them.

Second, the key requirement for taking multiple wives in *surah* 4, *ayah* 3 of the Qur'ān (quoted above), "equitable treatment," or "avoid[ing] bias," is difficult to define precisely, and probably impossible to practice perfectly. Conceptually, what does "equitable" treatment mean? Does it mean identical — *i.e.*, completely equal — treatment? That does not seem to be the case, because of what *surah* 4, *ayah* 129 says:

You will never be able to treat your wives with equal fairness, however much you may desire to do so, but do not ignore one wife altogether, leaving her suspended [between marriage and divorce].<sup>7</sup>

If "equitable" means "equal," then the above-quoted passage effectively repeals the permission in *surah* 4, *ayah* 3, to have up to four wives. That is, under the theory of naskh (repeal), *ayah* 129 would be the "*nāsikh*" (repealing passage), and *ayah* 4 would be the "*mansūkh*" (repealed passage). Yet, Islamic practice allows polygamy. Thus, "equitable" seems to mean substantively equal treatment, with minor gradations possible. Such questions ought to provoke a man to think carefully before engaging in polygamy.

As a practical matter, is it ever possible for a man to treat simultaneously two, three, or four women equitably in a meaningful sense? The women are different, and are deserving of different, individualized treatment. Preferences inevitably arise, which lead to distinctions, and not all such distinctions can be dismissed as trivial. Moreover, the man must have the financial wherewithal to take care of his multiple wives on an equitable basis. He cannot put one in a palace, another in an apartment, and a third in a hut, feed one like a queen, one like a commoner, and one like a beggar, and give one designer jewelry, one cosmetic jewelry, and one no jewelry at all. Such treatment hardly would be "equitable" or "unbiased." It would undermine the protective function for women that, supposedly, may be achieved through polygamy.

Third, while "equitable" and "equal" are not synonyms, they often end up being considered nearly so in practice. It is not uncommon for Muslims to express the requirement of *surah* 4, *ayah* 3 of the Qur'ān as one of "equal" treatment. For example, if a husband spends one night and one day with one wife, then he must spend one night and one day with each of his other wives. Moreover, he is not supposed to visit multiple wives in the same night or day. This kind of quantitative

<sup>7</sup> Qur'AN, *supra*, 4:129 at 63.

calculus quickly becomes an issue of organization and management, worthy of an Excel spreadsheet, and for most Muslims is far more trouble than it is worth.

Because of this reality, it bears repeating that the vast majority of Muslim men are not in polygamous marriages, have no interest in them, and actually frown on them. In many countries where such marriages are legally permissible, *i.e.*, where the *Shari'a* on this topic has not been modified by modernist legislation, such as Bangladesh and Pakistan, they are looked upon socially with considerable disapproval. They are an indicator that the man is crude and unsophisticated in his thinking.

Fourth, an incumbent wife or wives of a husband have a say in the selection of an additional wife. It might be an overstatement to suggest the first wife (or if there are already two or three wives, any or all of the incumbent wives) can veto the choice of another wife. But, she has some measure of influence as to the approval of another wife. Her influence may be grounded in legislation, such as in Pakistan under Section 6 of the *Muslim Family Law of 1961*, which requires approval from the first wife for a second marriage — a point that has been affirmed by the Federal *Shari'a* Court of Pakistan, which is the apex Islamic Court in that country.<sup>8</sup> The theory is this approval is a means by which the incumbent wife can protect herself from unjust treatment. The practice depends in no small part on the receptivity of the husband to the views of his existing wife or wives.

## § 34.02 ARGUMENTS ABOUT POLYGAMY

### [A] Justifying Polygamy and Orientalist Fallacy

Reference to "orphan girls" in the first clause of *surah* 4, *ayah* 3 of the Qur'ān is noteworthy. As Professor Abdel Haleem indicates, use of this term refers to the fact that:

{i}n pre-Islamic Arabia, some guardians of orphan girls used to marry them in order to take their property.<sup>9</sup>

Later in *surah* 4, in *ayah* 127, the Qur'ān warns:

They ask you [Prophet] for a ruling about women. Say, "God Himself gives you a ruling about them. You already have what has been recited to you in the Scripture about orphan girls [in your charge] from whom you withhold the prescribed shares [of their inheritance] and whom you wish to marry, and also about helpless children — God instructs you to treat orphans fairly: He is well aware of whatever good you do."<sup>10</sup>

Taken together, *ayah* 3 and 127 are insightful, because they reveal a motivation to countenance polygamy, namely, the protection of women.

<sup>8</sup> See Khurshid Khan Associates, *Pakistan: Apex Islamic Court Recognizes Polygamy But Requires Equal Treatment* (6 January 2000), posted at [www.mondaq.com/article.asp?articleid=8132](http://www.mondaq.com/article.asp?articleid=8132).

<sup>9</sup> Qur'AN, *supra*, fn. c to 4:3 at 50.

<sup>10</sup> Qur'AN, *supra*, 4:127 at 62 (emphasis added).

In pre-Islamic times on the Arabian Peninsula, during which the line between marriage and concubinage was ambiguous, women were easily abused. In seeking to break traditional tribal affiliations, and replace them with a community of believers, the Prophet Muhammad challenged many of the customs of the tribes. Among those customs was loose sexual morality. *Ayah* 127 reminds a man that should he choose to marry an orphan, he is not free to appropriate their property and thereby maximize his own wealth. Rather, he must treat his orphan-wife fairly, and give her property that is due to her, including by inheritance. Further, a man cannot have as many wives as he chooses, and thereby create his own harem. He is restricted to a maximum of four, with the further caveat he take multiple wives only if he treats them in an equitable, unbiased manner. In these respects, the rule on polygamy may be justified as protective of women.

In other words, this protection-of-women justification reads the Qur'an in light of pre-Islamic customary law, under which women had little if any substantive protections. Of course, that justification falls into the trap of committing the Orientalist Fallacy. Moreover, justifying the polygamy rule based on such an old *status quo ante* — pre-Islamic times — is unconvincing. However much a polygamous marriage involving orphans might have helped women in the 7th or 8th centuries, few observers would regard polygamy as beneficial for women in the 20th or 21st centuries. Finally, the justification presumes that a Muslim polygamist indeed would treat four or fewer wives better than a pagan polygamist treats five or more wives. That presumption seems plausible on the numbers, but bespeaks a prejudice against non-Muslim men.

### [B] Questioning Polygamy

It is commonplace for non-Muslim westerners, and indeed many Muslims, to criticize polygamy. They do so for good reason. Query whether polygamy is defensible under any standard of law, religion, or morality.

Surely polygamy is at odds with the principle of human dignity, which is common to all legal, religious, and moral systems: namely, each person is created in the image and likeness of God, and that person is unique, unrepeatable, and of inestimable value. Polygamy debases the human dignity of women. In practice, women inevitably are less privileged than men under a regime of polygamy. That is true even though under the *Shari'a*, a wife in a monogamous or polygamous marriage does have recourse through divorce. She can seek from a *qādi* a decree of dissolution of the marriage (*tafriq*). But, her ability to do so often is more theoretical than real, because it depends on support from her family and her ability to command income in the labor market.

There are plenty of additional reasons for criticizing polygamy. For instance, there appears to be psychological evidence of the negative effects of a polygamous marriage on children, many of whom experience confusion and uncertainty as to paternal and maternal love. Tragically, children may be used as pawns in power struggles and bickering among wives (as, indeed, occurs in some situations of divorce), and between wives and their husband. Children can be emotionally damaged by the reality that one mother loves them more than another, or that their father loves a different mother more than their own biological mother.

Along with psychological concerns are biological ones. There appears to be evidence to the effect that for certain species, including humans, polygamous marriages are unnatural. Moreover, there also may be negative demographic and environmental effects. Because they spawn a large number of children, polygamous marriages lead to family sizes that are not sustainable in respect of resource consumption.

Finally, consider the conventional justification, which is subject to the Orientalist Fallacy, laid out above: polygamy "protects" women relative to the status they had in pre-Islamic times on the Arabian Peninsula. Assume this justification is correct. From what are women being "protected," other than the abusive treatment of women by men? That abuse occurs when a man sees little distinction between a wife and a prostitute, or put it more politely, objectifies women as instruments for his physical gratification. Nevertheless, polygamy victimizes women, for reasons just suggested. The regime, which supposedly assists women, injures them. Worse yet, polygamy fails to address the underlying problem: men. If women need protection from philandering behavior of men, then how can the correct remedy be to denigrate women in polygamous marriages? Surely the proper response is to educate men about women, that they are their equals, and about sexuality, that it is about mutual self-giving love and openness to new life.

### § 34.03 MODERNIST LEGISLATION ON POLYGAMY

Tunisia — renowned as a progressive Muslim country — has gone a step further than other Islamic countries that discourage polygamy via cultural and social norms. Tunisia officially bans polygamy: in 1956, Tunisia enacted modernist legislation forbidding it.<sup>11</sup> This prohibition is effected through the Tunisian *Code of Personal Status*.

The *Code* retained Islamic rules concerning the dowry (nuptial gift, or *mahr*, discussed below), and concerning the status of being a foster-parent as an impediment to marriage. But, the *Code* prohibition was based on the view that polygamy was un-Islamic, because it is impossible to obey the Qur'anic injunction of treating each wife equitably, much less equally. Inevitably, thought the Tunisian government, one wife becomes relatively better off. Stated differently, the Tunisian government argued that it was not disregarding the Qur'an. Rather, it was choosing between two competing principles (the permissibility of having up to four wives, but the requirement of treating each of them equitably), both of which were impossible to follow simultaneously. Thus, in Tunisia, polygamy is a criminal offence. Moreover, any marriage requires the consent of both the groom and the bride. The *Code* also laid out a procedure for divorce.

Even though few, if any other Muslim countries, have followed the lead of Tunisia on this issue, in most Islamic circles it is thought that the Tunisian government argument is correct: it is impossible to treat multiple wives equitably, much less equally. Interestingly, Morocco of late has been considering similar kinds of reforms. The United States and Morocco entered into a free trade agreement

<sup>11</sup> See SCHACHT, *supra*, at 108.



(FTA), which took effect on 1 January 2006. It appears the United States, perhaps as part of the FTA process, has prodded Morocco to make Family Law reforms of the kind Tunisia has implemented. The European Union (EU) maintains a number of trade agreements with Arab Muslim countries in the Mediterranean region, and includes in some of them a human rights clause. Whether this clause extends to women's rights and polygamy, and whether the EU would push that interpretation in the first place, is uncertain.

## § 34.04 MIXED MARRIAGES

### [A] Basic Rules and Challenge of Globalization

Inter-religious marriage is a controversial topic in Islamic Law.<sup>12</sup> There is a basic, broad prohibition on mixed marriages for Muslim men and women. Muslim men and women are supposed to marry within the Islamic faith. This prohibition is founded on *surah* 2, *ayah* 221 of the Qur'ān. There is an exception, which operates asymmetrically in favor of Muslim men, in *surah* 5, *ayah* 5.

For Muslim women, there is no exception to the general prohibition on mixed marriages. Muslim women are forbidden from marrying non-Muslim men. All Islamic jurists (*fukahā*) unanimously prohibit a Muslim woman from marrying a non-Muslim man, even if that man is a "*kitābi*."<sup>13</sup> The Arabic term "*ahl al-kitāb*," or simply "*kitābi*," means "People of the Book" (or "Peoples of the Book"). This term is vague, i.e., its boundaries are not entirely clear. Nonetheless, the vagueness does not work to the benefit of women. It is forbidden (*ḥarām*) for them to marry any *kitābi*, much less a non-*kitābi*.

The Islamic faith passes from one generation to another through the father. Therefore, the fact there is no exception to inter-faith marriage for Muslim women certainly serves the interest of perpetuating the faith. Indeed, that interest is a justification for it. In practice, when a Muslim woman marries a man who was not born into the Muslim faith, then it is typical that the man converts to Islam before the marriage.

As for Muslim men, the exception in *surah* 5, *ayah* 5 is not interpreted identically across all Four *Sunnite* Schools. The *Hanafi* School offers the most liberal interpretation of this exception: a Muslim man is permitted to marry a woman from amongst the People of the Book, i.e., among the *kitābi*, which particularly means a Christian or Jewish woman.<sup>14</sup> He certainly is not encouraged to do so, and the act is often looked at disapprovingly (*makrūh*). The *Māliki*, *Shāfi'i*, and *Hanbali* Schools, plus *Shi'ite* legal scholars, provide a more conservative interpretation of this exception: a Muslim man is prohibited from marrying a woman from any other faith, except for a woman who is a chaste and pious Christian or Jewish woman, who also does not attribute any partners next to God

(Allāh). That is, these three Schools allow for inter-marriage only to a *kitābi*, who also is demonstrably not a "*mushrik*." The latter term, which also is the subject of some ambiguity, generally is translated as "idolator" or "polytheist."

As intimated above, the term "*ahl al-kitāb*" or "*kitābi*" is important in understanding the rules of Islamic Family Law on inter-faith marriage. One understanding of the term is that it refers to any unbeliever — that is, any non-Muslim — who adheres to a religion that possesses a book, in the sense of a sacred scripture. After all, the word "*kitāb*" means "book." But, there seem to be three dimensions to the term. As Professor Schacht indicates, it refers to:

followers of revealed religions who believe in a prophet and possess a scripture. . . .<sup>15</sup>

Here, then, are the ambiguities. What does it mean to say a religion is "revealed"? Who is a "prophet"? What counts as a "scripture"?

Arguably, under a broad understanding, Hindus and Sikhs would be among the "People of the Book." The sacred texts of Hinduism include the *Vedas*, the most ancient of the Sanskrit and Hindu texts ("*Veda*" means "knowledge" in Sanskrit), and the *Upanishads*, which span from the first millennium B.C. to medieval times. The sacred text of Sikhism is the *Guru Granth Sahib* (also called in Punjabi the "*Adi Granth*"), which is 1,430 pages and was composed and collected between 1469-1708, the era of the Ten Sikh Gurus. Both Hinduism and Sikhism have known well the prophetic voice, and their teachings have been revealed over time.

Buddhism also would be included. The principal text is the "*Dhammapada*," (in Pali, "*dhamma*" means "doctrine" or "eternal truth," and "*pada*" means "foot," and together the title means "*path*"). It contains the verses of Buddha (*circa* 563-483 B.C.), who may be regarded as a "prophet" (depending on how that term is defined), and Buddhist teachings have been elaborated over time.

However, there is a narrower approach to the term "*ahl al-kitāb*" or "*kitābi*" common among Muslims. Typically, they understand it to refer to followers of the monotheistic religions, specifically, the Abrahamic Faiths that are older than Islam — Judaism and Christianity. This understanding is unfortunate, because there are other monotheistic faiths, with a prophet or line of prophets, which have a book — Sikhism, the Ten Sikh Gurus, and the *Adi Granth* being a prime example. As to whether Hinduism is monotheistic or polytheistic, and whether Buddhism is more appropriately classified as a philosophy rather than a religion, there is a debate. But, both pre-date Islam and have a sacred text (or texts). In other words, defining "*ahl al-kitāb*" or "*kitābi*" as referring exclusively to Jews and Christians plainly strikes out a large number of people, particularly in Asia on the Indian Subcontinent and in the Far East.

With globalization and the increasing interaction among peoples of different faiths, interfaith marriage is an increasingly prominent modern reality. That also is true in Islam, especially for Muslims living in non-Muslim western countries. Without doubt, acceptance of interfaith marriage has not occurred, and will not come easily, in Muslim countries and cultures. In fact, even marriage among

<sup>12</sup> See LYNN WELCHMAN ED., *WOMEN'S RIGHTS AND ISLAMIC FAMILY LAW: PERSPECTIVES ON REFORM 194* (London, England: Zed Books Ltd., 2004). [Hereinafter, WELCHMAN.]

<sup>13</sup> See WELCHMAN, *supra*, at 194.

<sup>14</sup> See WELCHMAN, *supra*, at 13.

<sup>15</sup> See SCHACHT, *supra*, at 131 (emphasis added).

different "types" of Muslims is not universally accepted in Islamic culture. The practice is frowned upon if both men and (especially) women, from one sect of Islam, marry someone from another sect.

The same is true as to marrying a person from another caste, in the sense of socio-economic order (as Islam, unlike Hinduism, does not have a caste system). For example, some Muslim Rajputs in Pakistan and India still believe their children should marry only from among Rajputs. (Traditionally, "Rajputs" are a martial race and ruling class of Northern India and Gujarat. Many converted to Islam during the Moghul dynasty).

This patently stubborn narrow-mindedness is ironic. Islamic history boasts many examples of Muslim interfaith couples. Even the Prophet Mohammed was married to Safiyah, who was Jewish, albeit in part for the purpose of cementing a peace treaty with a conquered Jewish tribe. Akbar the Great, the third Mogul Emperor of India, married Jodha Bai, a Hindu princess. Mohammad Ali Jinnah, the founder of Pakistan and an Islamic reformist, married a Rattanbai Petit, a Zoroastrian (who converted to Islam). Regrettably and surprisingly, Jinnah embodied the irony: he disowned his own daughter, Dina, when she married a Zoroastrian-born Christian. Modern examples of interfaith marriage in politics include the parents of an American President, Barack Hussein Obama, who had a Muslim father, Abdou Diouf, a Muslim who was the second President of Senegal, and who married a Catholic woman, and India's Hindu parliamentarian Sachin Pilot, who is married to the Muslim daughter of a former Chief Minister of Kashmir. In pop culture, there are famous Muslim interfaith marriages, not to mention well-known interfaith unmarried couples.

#### [B] Prohibition on Marriage with *Mushrik*: Interpreting *Surah 2, Ayah 221*

What is the source of the rules in the *Shari'a* on interfaith marriage? The answer is *surah 2, ayah 221*, of the Qur'an. This passage lays out a prohibition against marriage to a "*mushrik*." This term is loosely translated as "idolator" or "polytheist." But, the proper scope of this term also is the subject of controversy. Consequently, the prohibition has been the subject of elaboration and interpretation. The answer also is *surah 5, ayah 5*. This passage is treated as an exception to the general prohibition — but, the exception it grants is only to Muslim men. These passages raise a key question: why does the *Shari'a* prohibit a Muslim woman from marrying any non-Muslim man, including from the *kitabi*, i.e., a Jewish or Christian man?

The general rule on interfaith marriage is in *surah 2, ayah 221* of the Qur'an:

Do not marry idolatresses until they believe: a believing slave woman is better than an idolatress, even though she may please you. And do not marry your women into marriage to disbelieving men until they believe: a believing slave is better than an idolater, even though he may please you . . . .<sup>16</sup>

<sup>16</sup> Qur'an, *supra*, 2:221 at 25 (emphasis added).

The Arabic term used for "idolators" in this passage is "*mushrikeen*." The rule clearly articulates that marriage to the *mushrikeen* is forbidden.

However, there is conflict among Islamic jurists (*fukahā*) as to the meaning of the word "*mushrikeen*." Some scholars translate it as "idolators." This translation intimates a connection to pagans, i.e., "*mushrikeen*," as "idolators," are pagans. Under this translation, Christians and Jews generally would not be viewed as "*mushrikeen*." Some Muslims might misunderstand certain practices to be akin to idol worship, such as confusing veneration of the Cross with worship of the Cross, or veneration of the Virgin Mary with worshiping an idol (e.g., a statue) of Mary. Yet, overall, Muslim scholars who emphasize "*mushrikeen*" as "idolators" would not think of Christians and Jews as "pagans." Other Islamic scholars translate "*mushrikeen*" as "polytheists," or persons who ascribe partners next to God (Allāh). If the latter definition is accurate, then an important issue is raised concerning the status of Christians and Jews: are they "*mushrikeen*?"<sup>17</sup>

*Surah 2, ayah 221* continues by explaining the reasoning behind the prohibition:

Such people call [you] to the Fire, while God calls [you] to the garden and forgiveness by His leave.<sup>18</sup>

In Islam, a man and his wife are the two halves of humanity.<sup>19</sup> They ought to be committed to each other in a loving, balanced relationship. To that end, a spouse should be loyal to God (Allāh), and help protect and advance the religious practice of his or her family. In other words, the spouse should be a Muslim man or woman. Conversely, marrying a "*mushrik*" pulls a person and his or her family away from God, and toward "the Fire," which is an obvious metaphor for hell. That is, to marry a non-Muslim is to put oneself and one's family at serious risk of losing entry into Heaven.

Of course, every religious faith is self-interested in its preservation. Islam is no exception. Propagation of the Islamic faith through the father, and rules on

<sup>17</sup> In respect of the meaning of "Trinity" in the Christian faith, and an early belief among some Jews that Ezra was the son of God, consider *surah 5, ayah 72*:

Those who say, "God is the Messiah, son of Mary," although the Messiah himself said, "Children of Israel, worship God, my Lord and your Lord," have defiled [what he said]: if anyone associates others with God, God will forbid him from the Garden, and Hell will be his home.

Qur'an, *supra*, 5:72 at 75. See also id., 9:30 at 118-119. Of course, Christians — both Catholic and Protestant — do not regard the declaration of Christ as the Son of God as a "defilement" of what Jesus said, but rather regard Jesus as both fully human and fully Divine. They point to the overwhelming evidence, including the words and deeds of Jesus, to support the Doctrine of the Trinity, found (inter alia) in sacred scripture (namely, the Bible).

<sup>18</sup> Qur'an, *supra*, 2:221 at 25 (emphasis added).

<sup>19</sup> See, e.g., the following verses in the Qur'an:

• *Surah 2, ayah 187* —

... they [your wives] are [close] as garments to you, as you are to them.

• *Surah 2, ayah 228* —

... Wives have [rights] similar to their [obligations], according to what is recognized to be fair, and husbands have a degree [of right] over them. . . .

Qur'an, *supra*, at 21, 26, respectively.



inter-faith marriage that work to this end, serve, and may be justified by, this self-interest.

Three interpretations arise from *surah* 2, *ayah* 221, provided "*mushrikeen*" is defined as "idolaters" as well as "polytheists." The first interpretation leads to a prohibition governing all Muslim men and all Muslim women from marrying all people, including some Muslims, with any type of "polytheistic" belief or practice. Who might such Muslims be? There are many Muslims in India and Pakistan of the *Hanafi* School who pay homage at *Sufi* shrines. (*Sufism* sometimes is described as Islamic mysticism.) These practices are thought to be polytheistic by the *Hanbali* School. Because the first interpretation is the strictest of the three, it yields the broadest prohibition, ruling out the widest swathe of potential brides and grooms. It excludes even some Muslims.

The second interpretation leads to a prohibition on all Muslim men and women against marriage with those people who, like the idolaters in Mecca in pre-Islamic times, hold polytheism to be their true religion. Assuming Hinduism to be a polytheistic religion, then, Hindus would be excluded from eligibility for marriage. Conversely, all those (chaste) people who believe in monotheism are eligible spouses for a Muslim, even if they may have a "polytheistic" practice. This interpretation permits marriage between Muslims and Jews, or between Muslims and Christians, as well as between Muslims and other Muslims who would not qualify under the first interpretation. Jews and Christians, as Children of Abraham, are monotheists — even if some Muslims misunderstand the Doctrine of the Trinity in Christianity to be a borderline "polytheistic" practice.

The second interpretation may allow for marriage between Muslims and Sikhs, and Muslims and Buddhists. It also may condone marriage between Muslims and Hindus, assuming Hinduism is a monotheistic religion, albeit with "polytheistic" practices. Note, therefore, this interpretation distinguishes between a religion that is polytheistic through-and-through, and a religion that has some colorable polytheistic rituals.

The third and final interpretation is the narrowest one. It results in a prohibition of marriage with the people of *Banu Ishmael* alone. The term "*Banu Ishmael*" refers to uneducated people who are polytheists, or who rejected Islam and insisted on or lapsed back into paganism after the advent of Islam. In effect, the "*Banu Ishmael*" are Arab pagans or polytheists. The Qur'an does not describe any other group of people, except for the *Banu Ishmael*, as "*mushrik*."<sup>20</sup> Thus, they clearly ascribe to polytheism and a Muslim man or woman must not marry one of them. In other words, this interpretation relies on people the Qur'an itself identifies as "*mushrik*." Because the Qur'an names only the *Banu Ishmael* (and Arab polytheists), a person falling within these categories are the only ones a Muslim man or woman cannot marry. Jews, Christians, Sikhs, Buddhists, and Hindus are all marriageable persons.

The third interpretation of *surah* 2, *ayah* 221 is a minority one. The first two interpretations are more widely accepted among Islamic jurists. But, there is no

clear consensus. The *fukahā'* are split between the first two interpretations of the passage.

### § 34.05 EXCEPTION FOR MUSLIM MEN: *SURAH* 5, *AYAH* 5

Following *surah* 2, *ayah* 221, the Qur'an, in *surah* 5, *ayah* 5, again addresses marriage with non-Muslims. But, it does so with a critical difference: the later provision addresses Muslim men. *Surah* 5:5 reads as follows:

Today all good things have been made lawful for you. The food of the People of the Book is lawful for you as your food is lawful for them. [Note that *surah* 5, *ayah* 5 specifically excepts pork.] So are chaste, believing, women as well as chaste women of the people of who were given the scripture before you, as long as you have given them their bride-gifts and married them, not taking them as lovers or secret mistresses.<sup>21</sup>

This passage addresses men not explicitly, but implicitly. It would be entirely incompatible with the *Shari'a*, including its rules on marriage and sex crimes, to read *ayah* 5 as including women wedding other women.

*Surah* 5 is a Medinan *surah*. *Ayah* 5, along with the rest of the *surah*, was revealed when Islam already had spread throughout Medina. The cultural and social values of Islam had become the dominant values of Medinan society. Thus, *surah* 5, *ayah* 5 is only considered legal permission in a Muslim state. That is, the passage is not understood as a commandment creating an obligation for men to marry chaste, non-Muslim "women of the Book."

Rather, this passage is an exception that allows a Muslim man to inter-marry, to a limited degree, should he choose to do so. Perhaps ironically, this view crosses into the Orientalist Fallacy. It seems to examine the passage in its historical context, the logic being to the effect that in Medinan society, when the passage was revealed, some Muslim men took Christian or Jewish wives, and this passage ratifies the practice.

#### [A] *Hanafi* School Interpretation of *Surah* 5, *Ayah* 5

In any event, there is a subtle distinction among the Four Sunnite Schools as to *surah* 5, *ayah* 5. Today, the *Hanafi* School has the largest number of followers, and it happens to offer the most liberal interpretation of the passage. Jurists (*fukahā'*) from this School allow interfaith marriage with all believing women. It unequivocally prohibits marriage only with Zoroastrian women, idolatrous women, and Sabeian women. Additionally, if a woman worships the planets, and has no scripture, then the School holds it is not permissible for a Muslim man to marry her.<sup>22</sup>

Stated differently, the *Hanafi* School interpretation allows marriage with all *kitābi* women, even if those women associate partners next to God (Allāh). Jurists

<sup>21</sup> Qur'an, *supra*, 5:5 at 68 (emphasis added).

<sup>22</sup> See THE SAHEEFAH: HANAFI FIQH MANUAL, Section 3.5, posted at [www.ummah.net/AI\\_adaab/fiqh/saheefah.html](http://www.ummah.net/AI_adaab/fiqh/saheefah.html).

<sup>20</sup> See, e.g., the following *surah* and *ayah*: 2:105, 3:67, 9:1–33, and 98:1.

in this School think the "*kitābi*" always have been addressed separately from the "*mushrik*." Moreover, at the time of the Prophet Muhammad, Christians firmly believed in the Doctrine of the Trinity. If Allāh had wanted to group the *kitābi* with the *mushrik*, then He would have done so clearly in His revelation to the Prophet. (After all, as He is omniscient, he surely knew what Christians believed.) Instead, Allāh identifies them as separate groups. The inference *Ḥanafī* School jurists draw is that not all *kitābi* are idolators or polytheists. Some of them may be, but they cannot all be lumped together as such. Women among the *kitābi* who are not *mushrik* are eligible for marriage to a Muslim man.

For example, a Christian woman is "*kitābi*" by virtue of her Christianity. Her belief in the Doctrine of the Trinity does not automatically make her *mushrik*. So long as she is not "*mushrik*," a Muslim man can marry her. This interpretation suggests the *Ḥanafī* School defines "*mushrik*" more in terms of "idolatry" than "polytheism." Or, at least, the School does not regard belief in the Trinity as "polytheistic."

### [B] *Mālikī, Shāfi'ī, and Ḥanbalī School Interpretations of Surah 5, Ayah 5*

All other Schools, the *Mālikī, Shāfi'ī, and Ḥanbalī* School, as well as *Shī'ite* legal scholars, take a more conservative approach to the exception of *surah 5, ayah 5* than does the *Ḥanafī* School. The jurists (*fukahā*) of these three Schools, and of *Shī'ism* say it applies only to those *kitābi* (i.e., Christian or Jewish) women who are not *mushrikeen* (i.e., idolators or polytheists). In other words, Muslim men are prohibited from marrying women from all other faiths, except those women who are chaste and pious Christian and Jewish women, who also do not attribute any partners next to God (Allāh). These three Schools reach this conclusion in light of *surah 2, ayah 221*, and the belief that Christians and Jews may also be "*mushrik*."

Thus, under the strict interpretation by *Mālikī, Shāfi'ī, and Ḥanbalī* and *Shī'ite* jurists, *kitābi* women are not entirely prohibited for Muslim men — but nearly so. (In *Shī'ite fiqh*, the restriction on Muslim men marrying *kitābi* women applies only to standard marriage, not to *mut'a* (temporary marriage).) That there is no blanket ban on marriage to *kitābi* women is because of the permission *surah 5, ayah 5* grants. Moreover, it is because the Qur'an addresses the People of the Book favorably. For example:

- *Surah 3, ayat 110-115:*

<sup>110</sup>[Believers], you are the best community singled out for people: you order what is right, forbid what is wrong, and you believe in God. If the People of the Book had also believed, it would have been better for them. For although some of them do believe, most of them are lawbreakers — <sup>111</sup>they will not do you much harm: even if they come out to fight you, they will soon turn tail; they will get no help — <sup>112</sup>and, unless they hold fast to a lifeline from God and from mankind, they are overshadowed by vulnerability wherever they are found. They have drawn God's wrath upon themselves. They are overshadowed by weakness, too, because they have persistently disbelieved in God's revelation and killed prophets without any

right, all because of their boundless disobedience and transgression.<sup>113</sup> But they are all not alike. There are some among the People of the Book who are upright, who recite God's revelations during the night, who bow down in worship,<sup>114</sup> who believe in God and the Last Day, who order what is right and forbid what is wrong, who are quick to do good deeds. These people are among the righteous<sup>115</sup> and they will not be denied [the reward] for whatever good deeds they do: God knows exactly who is conscious of Him.<sup>23</sup>

- *Surah 3, ayah 199:*

Some of the People of the Book believe in God, in what has been sent down to you and in what was sent down to them: humbling themselves before God, they would never sell God's revelation for a small price. These people will have their rewards with their Lord: God is swift in reckoning.<sup>24</sup>

There are additional verses in the Qur'an that commend Jews,<sup>25</sup> and indicate they are offered salvation if they follow the true teachings of Moses.<sup>26</sup> That also is true of Christians, i.e., there are passages praising them, and observing they are offered salvation if they follow the true teachings of Jesus.<sup>27</sup> Thus, examining these passages, the *Mālikī, Shāfi'ī, and Ḥanbalī* Schools agree the possibility exists that certain *kitābi* women are "good" in a moral and spiritual sense. They are the type of non-Muslim women — but the only type — with whom a Muslim man may be wed.

Thus, the other three Schools, and *Shī'ite* thinkers, reject the interpretation and rationale of the *Ḥanafī* School.<sup>28</sup> Their rejection is based on the conclusion that even though the Qur'an refers to Christians and Jews as the "*kitābi*," this reference does not mean they may not also be "*mushrikeen*."<sup>29</sup> A Christian or Jew, while a "People of the Book," also could be a "polytheist" in the sense of attributing partners next to Allāh. Accordingly, it is necessary that a woman affirmatively not be a "polytheist" (and thus is not *mushrik*), and also affirm that she is a chaste, pious, Christian or Jew (and thus is *kitābi*), before a Muslim man can marry her.

Interestingly, under this strict interpretation, in terms of marriage to a Muslim man, Jewish women should be considered more eligible than Christian women. Present-day Jews do not associate any partners next to God. *Surah 9, ayah 30* of the Qur'an refers to a group of Jews, which at the time of the Prophet Muhammad, made the claim Ezra was the son of God. Few (if any) Jews currently advance that claim. In contrast, it is both standard and integral Catholic Christian teaching that

<sup>23</sup> Qur'an, *supra*, 3:110-115 at 42-43 (emphasis added).

<sup>24</sup> Qur'an, *supra*, 3:199 at 49 (emphasis added).

<sup>25</sup> See, e.g., the following *surat* and *ayat*: 2:40, 2:47-52, 2:57-58, 5:20, 5:44, 10:47, 10:90-93, 14:6, 17:2-3, 20:47-52, 20:77-80, 44:30-32, and 45:16.

<sup>26</sup> See, e.g., the following *surat* and *ayat*: 2:62, 2:121-122, 3:113-115, 3:199, 5:12, 5:65-66, 5:69, and 29:46.

<sup>27</sup> See, e.g., the following *surat* and *ayat*: 2:62, 2:121-122, 3:199, 5:65-66, 5:69, 5:82, and 29:46.

<sup>28</sup> See MOHAMMED HASHIM KAMALI, *SHARIAH LAW: AN INTRODUCTION* 90 (Oxford, England: One World Publications, 2008). [Hereinafter, KAMALI.]

<sup>29</sup> See, e.g., Qur'an, *supra*, 9:30-31 at 118-119.



there is one God, and the mystery of the Holy Trinity involves Three Persons in this one God. In particular, Jesus Christ is the Son of God. That also is true of Protestant Christianity.

In support of their argument for a narrow reading of the exception in *surah* 5, *ayah* 5, scholars of the *Mālikī*, *Shāfiʿī*, and *Hanbalī* Schools refer to a famous *ḥadīth* of the Prophet Muhammad on the issue. This *ḥadīth* is in the collections of *Imām* Bukhari and *Imām* Muslim. Abū Huraira narrated the statement of Muhammad that makes the Islamic faith of a (female) spouse a condition for marriage:

The messenger of Allāh . . . said: women are married for four reasons: for wealth, for family nobility, for beauty and for Deen: You should marry for *Deen*, otherwise may your hands be rubbed in the dirt.<sup>30</sup>

"*Deen*" is a broad term used to connote faithfulness, understanding, and observance of Islam. The scholars use this *ḥadīth* to make the point that Muhammad himself speaks of the critical criterion among prospective brides when a man contemplates marriage.

#### § 34.06 PROBING SURAH 5, AYAH 5 EXCEPTION

##### [A] Gender Asymmetry

The limited exception to the general prohibition in *surah* 2, *ayah* 221 on interfaith marriage that exists for a Muslim man in *surah* 5, *ayah* 5 to marry certain Christian or Jewish women does not extend to a Muslim woman. A Muslim woman is not free to choose a husband from among Christian or Jewish men. To the contrary, a Muslim woman must marry a Muslim man. Expressed from the perspective of a non-Muslim, a male unbeliever, even one who is from among the People of the Book ("*ahl al-kitāb*" or "*kitābī*"), i.e., a Christian or Jew, may not marry a Muslim woman according to the *Sharīʿa*. The prospective bridegroom would have to convert to Islam, which would have the further consequence of ensuring the children are Muslim (a topic discussed later).

Thus, the exception for marriage to the *kitābī* is asymmetric in respect of gender. Why? The question is especially poignant, because the Qurʾān does not specifically forbid a Muslim woman from marrying from among the People of the Book. There is no passage in it that amounts to an injunction stating: "Thou shalt not marry a non-Muslim man." However, *surah* 5, *ayah* 5 (quoted earlier) exclusively mentions the Arabic term "*muḥsanaat*," which means "chaste females" (from among the People of the Book). They are "made lawful" for Muslim men, to whom the verse is addressed. The verse does not say "*muḥsaneen*," or chaste males. Indeed, the verse is not addressed to Muslim females.

Because of this difference, the majority consensus (*ijmaʿ*) among religious and legal scholars (*ulema* and *fukahāʾ*, respectively) in all Four Schools is that under no conditions is a Muslim woman permitted to marry anyone but a Muslim man.<sup>31</sup>

<sup>30</sup> This version of the *ḥadīth* is recorded in *Sahih Muslim*, and posted at <http://hadith.al-islam.com>.

<sup>31</sup> See KARALI, *supra*, at 90.

Indeed, the *Hanafi* School, as well as the Twelver *Shīʿites* (*Jaʿfaris*) go as far as to declare that even a recent convert, i.e., a man who is first in his family to be a Muslim, is not suitable for a woman born to a Muslim father.<sup>32</sup>

This particular declaration, which stresses Islamic lineage as a criterion for marriage, is dubious. Surely marriage to a recent convert is not prohibited, given that the Prophet's own parents were not Muslims. The declaration also wrongly pre-judges converts to Islam. Converts sometimes are among the most knowledgeable and dedicated practitioners of a faith, insofar as they have carefully studied its tenets and precepts, and made a free choice to convert. In contrast, "cradle" followers, i.e., persons who were born into a faith, sometimes admit to a modicum of apathy about their faith, insofar as they may take it for granted. Indeed, in Catholic Christianity, this distinction between "convert" and "cradle" Catholics is often remarked, and there is perhaps no better example of the virtues that a convert can display than G.K. Chesterton (1874-1936), who in 1922 converted from Protestantism (Anglicanism) to Catholicism, and was one of the most intelligent, witty, and influential writers and thinkers of the 20th century.

On the larger matter, the consensus that a Muslim woman is forbidden from marrying a non-Muslim man appears to be based on a negative inference. What the Qurʾān mentions expressly as permissible for men (i.e., to take certain non-Muslim brides) is allowed. But, what it omits (namely, non-Muslim husbands for Muslim women) must be forbidden. Put differently, the implicit logic seems to be as follows: both men and women need to be given express permission to marry a Person of the Book. Only men were granted such permission. Therefore, women must be barred from marrying outside the Islamic faith.

This consensus on the topic of marriageable men for a Muslim woman is vulnerable to four counter-arguments. First, the *ijmaʿ* among Islamic scholars is a consensus largely, if not exclusively, reached among male scholars. The point is obviously not that male scholars are incompetent on the subject. That would be an unfair and prejudicial assertion with no basis in fact. Rather, the point simply is to raise the question of the diversity of views taken into account when reaching a consensus. Put directly, is not a consensus on a matter intimately involving women better informed and reasoned if it accounts for the views of women as they articulate them?

Consider the following perspective. The *ḥadīth* most often cited on the topic of Muslim women and inter-faith marriages concerns the marriage of the Muslim daughter of the Prophet Muhammad, Zainab, with Abul-ʿĀṣ bin Al Rabīʿ. Muhammad ordered Zainab to leave her husband, who remained a disbeliever after the advent of Islam.<sup>33</sup> To be sure, a consensus of the jurists (*ijmaʿ*) is generally considered binding. But, the interpretation of the *ḥadīth* (pertaining to the rights

<sup>32</sup> ASIFA QURAISHI & FRANK E. VOGEL, eds., *THE ISLAMIC MARRIAGE CONTRACT: CASE STUDIES IN ISLAMIC FAMILY LAW* 17 and fn. 125 at 36 (Cambridge, Massachusetts: Harvard University Press, 2008). [Hereinafter, QURAISHI & VOGEL.]

<sup>33</sup> See ENGLISH TRANSLATION OF JAMʿ AT-TIRMIDHĪ, COMPILED BY IMĀM HAFIZ ABU ʿĪSĀ MUHAMMAD IBN ʿĪSĀ AT-TIRMIDHĪ, TRANSLATED BY ABU KHALIL, vol. II, book 9 (The Chapters (On Narrations Reported) On Marriage from the Messenger of Allāh), pp. 512-513, *ḥadīth* no. 1143 (Riyadh, Kingdom of Saudi Arabia: Darussalam).

and position of women), as well as that of the Qur'an, is exclusively by male scholars. They belong to, and indeed are part of the core of, patriarchal societies. This *ḥadīth* could (and perhaps should) be viewed differently. It could be contended that because Zainab was married to a Quraish, the *ḥadīth* is meant as a prohibition against mixed marriages with polytheists and idolators, but not against believers from other faiths.

Second, from the silence of *surah* 5, *ayah* 5 of the Qur'an, either one of two inferences logically may be drawn:

- (1) either this silence means Muslim women are also permitted to marry such non-Muslims as are permissible (of the opposite sex) for Muslim men, or
- (2) it means Muslim women are prohibited from marrying all non-Muslims, including chaste believers.

Virtually all Muslim jurists draw the latter inference. The foundation of this inference is an interpretative approach to a text: only what a text explicitly allows is lawful, whereas silence as to a proposed act means the act is forbidden. Interestingly, in the former Union of Soviet Socialist Republics (U.S.S.R.), the same legal presumption about a text existed: that which was not explicitly permitted by the text was deemed forbidden. This approach is characteristic of communist legal systems, and is a presumption against behavioral freedom and choice. The reverse presumption, which favors freedom and choice, exists in American law: that which is not expressly forbidden in a text is permitted.

Third, there are instances in the interpretation of certain verses in the Qur'an in which a generous inference is drawn. For example, consider *surah* 4, *ayah* 11, which concerns Inheritance Law, and which reads in part:

Parents inherit sixth each if the deceased leaves children; if he leaves no children and his parents are his sole heirs, his mother has a third, unless he has brothers, in which case she has a sixth. . . .<sup>34</sup>

Manifestly, if a deceased person leaves no children, then the share of the father is not mentioned in the relevant passage. The inference could be the father gets nothing, which is a prohibition-type of interpretation akin to holding that Muslim women cannot marry Muslim men. After all, if the text does not expressly provide for the father of a childless deceased offspring, then the father gets nothing (or so the reasoning would go). But, that is not the reasoning Islamic jurists (*fukahā'*) apply. Instead, they unanimously agree his share (i.e., that of the father) is implicit, and the same as the share of the mother.

Fourth, perhaps a specific verse addressing only women is unnecessary. That is, there may be no need for *surah* 5, *ayah* 5 to deal with who women can marry. That is because of *surah* 2, *ayah* 221. Part of that passage addresses women, and only prohibits marriage to "disbelieving" men. By simple common sense, all "believing" men — not just Muslim believing men — are (or ought to be) eligible spouses for Muslim women.

To be sure, the fourth counter-argument hinges on the meaning of "disbelief," or its opposite, "belief." Does a prospective husband believe in Islam? Or, would it suffice for him to believe in a monotheistic God? Manifestly, the passage itself does not answer the question. The narrower interpretation, which imposes a greater restriction on the freedom of choice of women, is to insert implicitly an adjective or phrase to the effect that "believing Muslim men" is intended. One difficulty with reading this qualification into the text of the Qur'an is that it begs a question: what does it mean to be a "believer," whether in Islam or any other monotheistic faith? Different people can adhere to the same faith, but manifest their belief in somewhat different ways, and saints aside, no one is a perfectly devout practitioner. In other words, what level of scrutiny should be given to a prospective husband as to his "belief" in Islam (or other monotheistic faith)? Asked differently, if the idea is that he should be a "good" Muslim, then by what criteria is his "goodness" to be judged? Are they strict, formal adherence to the Five Pillars of Islam, or does the whole pattern of his life matter?

A separate and distinct question concerns the real-world impact of the exception that exists for Muslim men in *surah* 5, *ayah* 5 of the Qur'an. In practice, this exception is null, until or unless, the *kitābi* women are among those who do not commit "*shirk*." The word "*shirk*" is the sin of polytheism. That is, it refers to worshipping a god other than Allāh, associating a partner or partners with Allāh, ascribing the features of Allāh to others, or simply not believing in His characteristics. It is akin to a violation of the First Commandment in Catholic Christianity.

Thus, the practical boundaries on the exception in *surah* 5, *ayah* 5, are that a Muslim male may marry a non-Muslim female only if (1) she is a Christian or a Jew (i.e., she is *kitābi*), and (2) she does not commit *shirk*. The exception does not allow a Muslim male to marry a devotee of, say, Hinduism or Sikhism, nor of Buddhism. Likewise, a Muslim male is not free to marry a Christian or Jew who is a polytheist. Of course, from a Christian or Jewish perspective, it is incompatible with those faiths to practice polytheism, as both Christianity and Judaism are as relentlessly monotheistic as is Islam, even though from a certain Islamic view (which is both in the minority and objectively incorrect), ascribing to Jesus the position of Son of God is *shirk*. It is sometimes said in Catholic Christian circles that the relentless pursuit of money, power, prestige, or sensual pleasures amounts to a violation of the First Commandment, and is akin to polytheism in the sense of worshipping Mammon more than God. Yet, surely that observation transcends Catholic Christianity, and envelopes Islam and all other faiths.

There is an additional boundary on the exception, which literally involves geography. Jurists (*fukahā'*) of the *Hanafi*, *Māliki*, and *Shāfi'i* Schools hold that it is reprehensible (*makrūh*) for a Muslim man to marry even a *kitābi* woman, if the Muslim man lives in a country in which Muslims are a minority. Thus, for example, a Muslim man living in Lawrence, Kansas, could marry a Jewish or Christian woman. But, it is an act that such legal scholars disapprove, as Muslims are a minority in the United States. The reasoning for this rule is that taking a non-Muslim wife and living in a non-Muslim society increases the likelihood that

<sup>34</sup> Qur'an, *raḥmān*, 4:11 at 51.



children of the couple are raised as non-Muslims.<sup>35</sup> That chance is reduced if the couple raises their offspring in a Muslim-majority country.

Note, however, that some jurists say a Muslim man is prohibited from marrying a *kitābi* woman if they live in a non-Muslim country.<sup>36</sup> That is, the act is not reprehensible (*makrūh*), but forbidden (*ḥarām*). Under this view, the gentleman from Lawrence is restricted to taking a Muslim bride. This strict view arises from the *Rashidun* Era, when Muslim leaders were focused on Islamic unity. For instance, the second Rightly Guided Caliph, 'Umar, harshly threatened Muslims who sought to enter into an inter-faith marriage, even though (or perhaps because) it was common practice at that time.<sup>37</sup>

### [B] Reasons and Counter-Arguments for Prohibiting Muslim Women from Marrying Non-Muslim Men

It is sometimes argued that Islam is a religion that is liberating for women.<sup>38</sup> Of course, the plausibility of this argument is open to reasoned debate. One ground for questioning the argument is the asymmetric nature of rights concerning mixed marriages. As discussed earlier, all scholars are unanimous in the verdict that Muslim women are not allowed to marry non-Muslims, even from among the People of the Book ("*ahl al-kitāb*" or "*kitābi*"). In contrast, Muslim men have the ability, subject to restrictions, to take Jewish or Christian women as their wives. Is there a way to "square" the argument that Islam enhances the freedom of women with the strong emphasis of the *Shari'a* as to a Muslim woman marrying within Islam?

The short answer is "yes," but the basis for it is parlous. The rationale is that the rules on inter-faith marriage are not about women. Rather, they are about children and the promulgation of the faith. That is, setting aside debates about the proper interpretation of relevant passages in the Qur'an or from among the *ḥadīths*, there are two main pragmatic reasons for the strict prohibition for Muslim women.

First, in Islam a contract of marriage (*nikāh*) establishes the paternity of a man of the children conceived by his wife.<sup>39</sup> Therefore, it is assumed a Muslim woman married to a *kitābi* man will likely bear non-Muslim children. This result is unacceptable to the jurists (*fukahā*). In other words, Islam as a faith passes through the father. Consequently, as a matter of Islamic Family Law, the offspring of a union between a Muslim man and a *kitābi* woman are considered Muslim. In

<sup>35</sup> See *Fatwā* by Dr. Abou El Fadl: On Christian Men Marrying Muslim Women, posted at [www.scholarofthehouse.org/oninma.html](http://www.scholarofthehouse.org/oninma.html). Dr. Fadl is the Omar and Azmeralda Alfi Distinguished Professor in Islamic Law at the University of California at Los Angeles (UCLA) School of Law. [Hereinafter, *Fatwā*.]

<sup>36</sup> *Fatwā*, *supra*.

<sup>37</sup> See Noryamin Aini, *Inter-Religious Marriage from Socio-Historical Islamic Perspectives*, 2008 BRIGHAM YOUNG UNIVERSITY LAW REVIEW 669, 685 (May 2008), posted at [lawreview.byu.edu/archives/2008/3/1aini.FIN.pdf](http://lawreview.byu.edu/archives/2008/3/1aini.FIN.pdf). [Hereinafter, Aini.]

<sup>38</sup> See, e.g., Dr. Sultana Afroz, *Women In Islam — Myths And Realities*, posted at [http://izenjoro.wordpress.com/2009/07/19/women-in-islam-myths-and-realities/#\\_edn13](http://izenjoro.wordpress.com/2009/07/19/women-in-islam-myths-and-realities/#_edn13).

<sup>39</sup> See QUR'ANISH & VOGL, *supra*, at 12.

contrast, the offspring of a *kitābi* man and a Muslim woman are not considered Muslim. This distinction, of course, generated considerable attention during and after the 2008 American Presidential election in respect of Barack H. Obama. As was widely reported, the father of Mr. Obama was a Muslim from Kenya. By some accounts, his father rejected Islam before the future President was born. By all accounts, he was raised not by his father as a Muslim, but by his mother, a Christian from Kansas. In any event, Mr. Obama became Christian long before becoming President. Perhaps the most important point lost amidst the controversy was that in the United States, with its history of religious freedom and tolerance, the most appropriate response to whether Mr. Obama was born a Muslim or not was "what does it matter?"

Of course, for purposes of the *Shari'a*, such controversy cannot be blithely dismissed. Every religion requires a simple enumeration of the way or ways in which a person can become an adherent. In Islam, the options are two-fold: be born to a Muslim father, or convert. A follow-on question, however, must be asked: as a practical matter, is passage of a religion through the father or mother more likely to result in a child retaining the faith and practicing it as an adult?

An interesting study on this question was done using census data from 1980, 1990, and 2000 from the Yogyakarta province of Indonesia.<sup>40</sup> The study found that on average, 70 percent of children born to inter-religious married couples became Muslim if their mother was Muslim. But, only about 50 percent of the children became Muslim if their father was Muslim. These data do not lend support to the rationale for the traditional *Shari'a* rule that a Muslim woman must not marry a non-Muslim man.

Surely, though, that study is not the end of the matter. There is a lack of evidence regarding the faith of children born to non-Muslim fathers (which is not surprising given the taboo on Muslim women marrying them). Moreover, it may be ventured that the most important determinant of whether a child retains and practices the faith into which she is born is the behavior of the parents — either or both of them — not their nominal religious affiliation. Children are perceptive. They can distinguish whether parents live their faith and radiate it in the home, with their family, friends, and colleagues, or ritualistically go through the motions on Friday at mosque, or Sundays at church.

Before considering the second rationale, a brief digression is worth entertaining. An interesting question under Islamic Family Law concerns a mixed marriage between two unbelievers (*kāfirs*) of different faiths. If the couple produces children, then to what religion do the children belong? The answer is based on a perceived hierarchy among *kāfirs*: in descending order of privilege, they are People of the Book ("*ahl al-kitāb*" or "*kitābi*"), Zoroastrians, and pagans.<sup>41</sup> Thus, the answer is

<sup>40</sup> This study is cited in Aini, *supra*, at 688.

However, these statistics may be skewed. The Yogyakarta province has been marked by Islamic development and "resurgence" as a whole. See Kim Hyung-Jun, *Reformist Muslims in a Yogyakarta Village: The Islamic Transformation of Contemporary Socio-Religious Life* (2007), posted at [eprints.anu.edu.au/islamic/reformist/pdf/reformist-whole.pdf](http://eprints.anu.edu.au/islamic/reformist/pdf/reformist-whole.pdf).

<sup>41</sup> See SCHRACHT, *supra*, at 131-132.

that the children belong to the "higher" religion.<sup>42</sup> Thus, for example, if a Catholic Christian marries a Buddhist, and if Buddhists are slotted with pagans, then the offspring of the couple would be regarded — again, according to the *Shari'a* — as Catholic. Of course, Catholicism and Buddhism propose their own teachings as to the designation of a child as a "Catholic" or "Buddhist." Evidently, Islamic Family Law places no faith in those teachings, to the extent it even is aware of them, and thus does not have anything close to a rule that would give them deference or full faith and credit.

As to the second rationale for the asymmetric exception in Islamic Family Law for men, but not women, to marry from among the People of the Book, it implicates the approach to inter-faith marriages of those other People. In the Qur'an, religious coercion is forbidden. It contains passages describing how Islam offers freedom of faith,<sup>43</sup> freedom of religion,<sup>44</sup> and freedom of thought.<sup>45</sup> In some Muslim circles, it is wrongly believed that Christians and Jews are not specifically prohibited from forcing another to accept their faiths.<sup>46</sup> In these circles, it is thought (again, wrongly) that Christian scriptures condemn inter-faith marriages,<sup>47</sup> and so does Jewish scripture.<sup>48</sup>

In truth, Christians and Jews are forbidden from compelling others to accept their faith. After all, Christians (both Catholic and Protestant) hold that God, not man (or woman), does the converting, in His time, and in His sometimes mysterious ways, and that He wants us to love Him by free choice, not by compulsion. As for Judaism, it is not a religion known to proselytize, much less entertain forcible conversions. Of course it is true non-Christian or non-Jewish women marry Christian or Jewish men, respectively, and in the process of their courtship or marriage, they may convert to Christianity or Judaism. But, as high as expectations may be among some family members for a conversion, particularly in an orthodox setting, the conversion is not to be forced.<sup>49</sup>

Nevertheless, operating on this misunderstanding about the true position of Christianity and Judaism on conversion, in some Muslim circles it is believed that a Muslim woman married to a *kitābi* man is in a more vulnerable position in her

<sup>42</sup> See SCHACHT, *supra*, at 131-132.

<sup>43</sup> See, e.g., the following *sūrat* and *āyat*: 2:272, 3:20, 6:104, 10:99, 10:108, 11:121, 16:82-83, 18:29, 39:41, 42:48, 43:88-89, 73:19, 76:2-3, 76:29, and 88:21-22.

<sup>44</sup> See, e.g., the following *sūrat* and *āyat*: 2:139, 2:256, 10:41, 22:67-69, 42:6, 42:15, and 109:6.

<sup>45</sup> See, e.g., the following *sūrat* and *āyat*: 6:110, 10:11, 11:121, 15:3, 17:84, and 32:45.

<sup>46</sup> See QURASHI & VOGEL, *supra*, at 12.

<sup>47</sup> See Ontario Consultants on Religious Tolerance, 1 Corinthians 7:39, 2 Corinthians 6:14-15, *What the Bible says about Interfaith Marriages*, posted at [www.religioustolerance.org/1fm\\_bibl.htm](http://www.religioustolerance.org/1fm_bibl.htm). [Hereinafter, Ontario Consultants.]

<sup>48</sup> See Ontario Consultants, *supra*.

The Jewish Scriptures contain a few cases of inter-faith marriages that appear to be approved by God. For example, when Moses marries a non-Israelite woman from a different religion, Aaron and Miriam criticize Moses. But, God supports his decision, and punishes Miriam by making her leprosy. Other references to inter-faith marriage look askance at the practice. See, e.g., Exodus 12:1, 34:12-16, Deuteronomy 7:1-4, Ezra 10:2-3, Nehemiah 13:25-27, Malachi 2:11.

<sup>49</sup> See Ontario Consultants, 1 Corinthians 7:12-14, *supra*.

relationship to convert than is a *kitābi* woman married to a Muslim man. Further, it is observed that a Muslim woman loses her extra rights granted to women in Islam, such as the right to divorce in accordance with the *Shari'a*, should she marry a non-Muslim man.<sup>50</sup> To each point, a counter-argument exists.

First, it is chauvinistic to claim that a woman is more vulnerable to conversion than a man. No less an example than the Virgin Mary, who is respected by Muslims and Christians alike, and who was Jewish, need be recalled to show the strength of a woman as to faith. It was faith that Mary had at the Annunciation, and faith that she had at the foot of the Cross. That faith of a woman is an inspiring example to all. Second, the loss of divorce rights under Islamic Family Law may well be made up, and even enhanced, by the divorce rights provided by the legal system in which the Muslim woman in question resides. That surely would be the case in the United States.

A final counter-argument is an empirical one. There simply is a lack of evidence to support the stereotype that exists among some Muslim circles that the majority of even non-orthodox Christian or Jewish husbands force their Muslim wives to convert (any more than Christian or Jewish wives may force their Muslim husbands to convert). In sum, the reasoning for the complete bar on Muslim women marrying non-Muslims based on the Qur'an and the *hadith*, seems rather weak. In truth, this *fiqh* (jurisprudence) is based on culture, traditions, and, worst of all, misunderstanding of other faiths.

## § 34.07 CONTRASTS WITH CATHOLIC CHRISTIANITY

In Roman Catholic teaching, technically a "mixed marriage" is one between a Catholic and baptized non-Catholic, whereas a marriage between a Catholic and non-baptized person is called a "disparity of cult." The *Catechism of the Catholic Church* takes up the topic of mixed marriages, recognizing that a "[d]ifference of confession between the spouses does not constitute an insurmountable obstacle for marriage."<sup>51</sup> However, the *Catechism* also teaches:

the difficulties of mixed marriages must not be underestimated. They arise from the fact that the separation of Christians has not yet been overcome. The spouses risk experiencing the tragedy of Christian disunity even in the heart of their own home. Disparity of cult can further aggravate these difficulties. Differences about faith and the very notion of marriage, but also different religious mentalities, can become sources of tension in marriage, especially as regards the education of children. The temptation to religious indifference can then arise.<sup>52</sup>

Clearly, unlike Islamic Law, Roman Catholic doctrine does not limit mixed marriages for men, bar them for women, or put up distinctions between men and women. While both paradigms emphasize the education of children born into a mixed marriage, Catholic doctrine highlights two further areas of concern: tension

<sup>50</sup> For a discussion of the historical basis of such an argument, see Aini, *supra*, at 687.

<sup>51</sup> CATECHISM, *supra*, ¶ 1634 at 408 (emphasis added).

<sup>52</sup> CATECHISM, *supra*, ¶ 1634 at 408 (emphasis added).



in the marriage, and religious apathy. The saddest outcome is one in which the husband, wife, and children ignore the faith traditions in their family, because they would rather eschew the hard work of forging a union among themselves and God, and take the easier path of a secular life.

The *Catechism* then discusses the issue of children in a mixed marriage:

According to the law in force in the Latin Church, a mixed marriage needs for liceity the *express permission* of ecclesiastical authority. In case of disparity of cult an *express dispensation* from this impediment is required for the validity of the marriage. This permission or dispensation presupposes that *both parties know and do not exclude the essential ends and properties of marriage; and furthermore that the Catholic party confirms the obligations, which have been made known to the non-Catholic party, of preserving his or her own faith and ensuring the baptism and education of the children in the Catholic Church.*<sup>53</sup>

In effect, the permission of the relevant authority in the Catholic Church is required for a valid, sacramental marriage between a Catholic and non-Catholic party.

That permission is given on two pre-conditions. First, neither the husband nor wife excludes the "essential ends and properties of marriage." Producing children is one such "essential end and property." Second, both the husband and wife appreciate the obligation of the Catholic spouse as to the baptism and education of the children in the Catholic faith. In other words, both parents know of and do not exclude the obligation of the Catholic parent (whether it is the mother or father) to raise the children as Catholics. In respect of the second pre-condition, does the non-Catholic spouse have to pledge to raise the children Catholic? The answer is "no." The United States Conference of Catholic Bishops explains:

The non-Catholic spouse does *not* have to promise to have the children raised Catholic.<sup>54</sup>

Does the second pre-condition mean the Catholic spouse must succeed in raising the children Catholic? Again, the answer is "no," as the Conference of Bishops explains:

The Catholic spouse must promise to do *all that he or she can* to have the children *baptized and raised* in the Catholic faith.<sup>55</sup>

In other words, the non-Catholic spouse cannot be forced to raise the children Catholic. The Catholic spouse cannot be expected to guarantee that the children will "turn out" Catholic for the rest of their lives. But, the Catholic spouse must do his or her absolute best to have the children baptized and receive the other relevant sacraments, namely, first reconciliation (confession), first Holy Communion, and

<sup>53</sup> *CATECHISM, supra*, ¶ 1635 at 408 (footnotes omitted, emphases in first and second sentences original, emphasis in third sentence added).

<sup>54</sup> United States Conference of Catholic Bishops, *Laity, Marriage, Family Life, and Youth — Frequently Asked Questions About Marriage*, posted at [www.usccb.org/laity/marriage/marriagefaq.shtml](http://www.usccb.org/laity/marriage/marriagefaq.shtml) (response to Question #8, *When a Catholic marries a non-Catholic, must the non-Catholic promise to raise the children in the Catholic faith?*). [Hereinafter, Conference of Catholic Bishops.]

<sup>55</sup> Conference of Catholic Bishops, *supra*.

confirmation, and to bring the children to Mass in accordance with the normal life of the Church.

A final, key question concerns conversion of the non-Catholic spouse. The *Catechism* addresses this question clearly:

In marriages with disparity of cult the Catholic spouse has a particular task: "For the unbelieving husband is consecrated through his wife, and the unbelieving wife is consecrated through her husband [citing 1 Corinthians 7:14.]" It is a great joy for the Christian spouse and for the Church *if* this "consecration" should lead to the *free* conversion of the other spouse to the Christian faith. Sincere married love, the humble and patient practice of the family virtues, and perseverance in prayer can prepare the non-believing spouse to accept the grace of conversion.<sup>56</sup>

To "consecrate" is to "set apart as sacred," or "sanctify" — in essence, to make holy.<sup>57</sup> Thus, the non-believing spouse is drawn closer to God through the Catholic spouse — at least insofar as the Catholic spouse tries to lead a holy life. But, plainly, the Catholic spouse is not to force the non-Catholic spouse to convert. Couched in hopeful terms, the non-Catholic spouse is not required to convert, but it is a blessing if that occurs.

<sup>56</sup> *CATECHISM, supra*, ¶ 1637 at 408 (footnotes omitted, emphasis added).

<sup>57</sup> THE NEW SHORTER OXFORD ENGLISH DICTIONARY vol. I at 484 (Oxford, England: Oxford University Press, 1993) (entry for "consecrate").

## Chapter 35

### RIGHTS OF WIFE

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But I do think it is their husbands' faults  
If wives do fall.

William Shakespeare (1564-1616),  
*Othello* (1603) Act IV, Scene III (Emilia)

#### SYNOPSIS

##### § 35.01 COMMUNITY VERSUS INDIVIDUAL PROPERTY

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[A] Three Key Sentences of *Surah 4, Ayah 34*

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##### § 35.05 BIBLICAL CONTRAST

##### § 35.01 COMMUNITY VERSUS INDIVIDUAL PROPERTY

Several American states are known as “community property states.” This appellation means that under the Family Law of the state, all assets a husband or wife obtains during the marriage are jointly owned by the couple. Should the couple divorce, these assets — the property of the marriage — are split equally by the parting parties. More technically, “community property” refers to:

Assets owned in common by husband and wife as a result of its having been acquired during the marriage by means other than an inheritance or a gift to one spouse, each spouse generally holding a one-half interest in the property.<sup>1</sup>

The nine community property states (as of 2009) are Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin. A number of

<sup>1</sup> BRYAN A. GARNER ED., *BLACK'S LAW DICTIONARY* 317 (St. Paul, Minnesota: West, 9th ed., 2009).



interesting cases arise as to what constitutes community property. For instance, is a law degree earned during the marriage by one spouse and financed through the work of the other spouse "community property?"

Islamic Family Law takes the polar opposite approach to assets and marriage (*nikāh*) from a community property regime. With respect to all assets, there is no marital community. An asset is either the property of the husband (*zawg*), or of the wife (*zawja*). Assets that a bridegroom or bride own individually on the eve of their marriage remain their personal property throughout their marriage. For example, books owned by a bride, accumulated through her school years, remain in her library (even if co-mingled with books of the bridegroom). Assets that either the husband or wife acquires during the marriage remain owned by the husband or wife, respectively. For instance, if the husband buys land for a second home in his name, then that land is his. To be sure, the husband subsequently can re-title the land, placing it in the name of his wife. Thus, more generally, the couple is free to give or trade assets between them during the marriage.

## § 35.02 NUPITAL GIFT (MAHR)

### [A] Basic Terms

An essential element of the contract of marriage (*nikāh*) is the nuptial gift. In Arabic, this nuptial gift is called "*mahr*." The wife (*zawja*) — not the husband (*zawg*) — has a right to this marital gift. This legal entitlement is consistent with the Chinese custom, in which a bridegroom-husband gives a gift to his bride-wife. But, it is at odds with the Hindu tradition of dowry, in which the bride or her family pays the bridegroom, essentially on the theory that he will have to earn money to take care of his wife.

The nuptial gift (*mahr*), once made, becomes the property of the wife (*zawja*). It is her property for as long as she is alive. That is true regardless of the status of her marriage — whether the marriage remains intact, or whether it ends in divorce. Should the marriage terminate by divorce, or should her husband predecease her, her *mahr* could prove critical to her financial security. The *mahr* may provide her with some or all of the funding she needs to defray her basic living expenses. Accordingly, the wife has the right to keep her *mahr* in a separate bank account that is her own. Should she choose to commingle her *mahr* with the assets of her husband in a joint account, the *mahr* nonetheless stays her property.

Under the *Shar'ia*, what must the minimum *mahr* be? The answer is 10 *dirhams*, but this answer is not specified in either the Qur'an or *Sunnah*. Neither of these sources prescribes a minimum nuptial gift. Instead, the source of the rule is analogical reasoning (*qiyās*), albeit a rather crude analogy at that. The *ulema* analogized *mahr* to the minimum value of stolen goods. Under Islamic Penal Law, that minimum value in relation to the crime of theft (*sarika*), as set by the Ancient Schools of Iraq in Basra and Kufa, is 10 *dirhams*. They set this amount rather arbitrarily, and the subsequent analogy to the nuptial gift is crude. Still, over time the minimum nuptial gift became 10 *dirhams*.

The basis for the analogy is that a husband ought not to be legally permitted to use the body of his wife for a sum less than the threshold that authorizes the *hadd* punishment — which is loss of a limb — for theft.<sup>2</sup> As occurred with the threshold in theft cases, there was an effort to cloak questionable analogical reasoning with sacred tradition. To lend greater authority to this 10 *dirham* threshold, the *ulema* expressed it as a tradition, namely, a doctrine that had commenced at the time of Caliph 'Ali (who reigned from 656-661 A.D., 35-40 A.H.).

Notably, the *Māliki* School accepts a different threshold — 3 *dirhams* — as the minimum *mahr*. *Imām* Malik adopted the analogical reasoning of some of the Iraqi *ulema* in the Ancient Schools, comparing a minimum value for stolen goods that would trigger the *hadd* punishment with a minimum nuptial gift.<sup>3</sup> However, Malik started the calculation with a different minimum amount — 3 *dirhams*.

In practice, the minimum value is irrelevant. Invariably, it is not what is actually paid. Rather, if no amount is fixed, what is paid is a "fair *mahr*," or "*mahr al-mithl*." Consequently, in practice the issue for the families of the bridegroom and bride is an age-old one, namely, what is a "fair" amount? The answer depends on the social position and other attributes of the bride. The higher her socioeconomic status, the higher the figure she can command. The answer does not hinge on the nature or status of the bridegroom.

The full *mahr* may be paid up-front, at the time of entry into the marriage contract. However, typically, the *mahr* is paid in installments, typically, two installments. The installments can be equal (50 percent-50 percent), or unequal (such as 30 percent first, and 70 percent later). A back-end loaded structure (i.e., one where over half of the payment comes in the second installment) is viewed as an inducement, particularly to the bride, to follow through on the contract and get married. The split across the installments is a matter for negotiation. Technically, the portion of a *mahr* that is paid immediately is known as "*mu'ajjal*," while the deferred portion is called "*mu'akhkhar*." Thus, a *mahr* may be paid entirely as a *mu'ajjal*, entirely as a *mu'akhkhar*, or a combination thereof.

When payment of the *mahr* is by installments, the bridegroom pays this first part immediately to the bride, at the time the marriage (*nikāh*) contract is entered into. Payment of the second part is deferred until no later than —

- (1) if the marriage is not repudiated (i.e., through *talāk*), the death of the husband,
- (2) if the marriage is repudiated, consummation, or
- (3) in the case of divorce, when divorce occurs.

In practice, the second installment often is paid shortly after the marriage occurs. In certain cases the *mu'akhkhar* may be paid only in the event the husband divorces his wife, or predeceases her (with the sum then coming from the estate of the decedent-husband).

<sup>2</sup> See JOSEPH SCHACHT, AN INTRODUCTION TO ISLAMIC LAW 39 (Oxford, England: Oxford University Press (Clarendon Paperbacks) 1982). [Hereinafter, SCHACHT.]

<sup>3</sup> See SCHACHT, *supra*, at 39.

Interestingly, the government of the United Arab Emirates (UAE) gives 70,000 UAE *dirhams* to bridegrooms to use as the *mahr* in their first marriage. (No funds are given for a subsequent marriage.) The government also provides land to a married couple to build its first home or apartment 2 years after their marriage. These schemes (as of 2008), which inure to the benefit only of Emirati citizens, were started in 1992-93 by Sheikh Zayed bin Sultan Al Nahyan (1918-2004), the late UAE President (1971-2004).

What if a marriage is repudiated before consummation (and the husband does not die)? That is, what effect is there on the *mahr* if there is a full repudiation before intimacy? The answer matters. If the wife has no right to the balance of the nuptial gift (*mahr*) in this scenario, then the husband is free to repudiate with no financial penalty. Fortunately, the Qur'an makes clear the wife has the right to half the stipulated *mahr*. If no amount is stipulated, then *surah 2 ayat 236-237* says she has the right to an indemnity:

<sup>296</sup>You will not be blamed if you divorce women when you have not yet consummated the marriage or fixed a dowry for them, but make fair provision for them, the rich according to his means and the poor according to his — this is a duty for those who do good.<sup>297</sup> If you divorce wives before consummating the marriage but after fixing a dowry for them, then give them half of what you had previously fixed, unless they waive [their right], or unless the one who holds the marriage tie waives [his right]. Waiving [your right] is nearer to godliness, so do not forget to be generous towards one another: God sees what you do.<sup>4</sup>

In practice, the indemnity is (at least) a set of clothing. This indemnity is called "*mut'a*," which is a distinct meaning from the same term when used to signify a temporary marriage, which is allowed for under Twelver *Shi'ite* doctrine. Thus, the husband has a strong disincentive to repudiate a marriage before consummation: he will have to pay the balance due of the nuptial gift.

### [B] Conditions and Stipulations

Could an unscrupulous bridegroom circumvent his duty to pay a fair nuptial gift (*mahr al-mithl*) by contracting out of that duty? After all, it is possible to insert conditions or stipulations in a marriage (*nikāh*) contract that impinge on the nature or amount of the nuptial gift (*mahr*). For instance, Professor Schacht posits a case in which a marriage contract says a husband (*zawj*) must not marry any other woman, i.e., an anti-polygamy clause, or that the bride must be a virgin, i.e., a specification concerning the state of one party.<sup>5</sup> As a general rule, conditions or stipulations inserted in a marriage contract are not binding. Applying the general rule to these examples, the man is free to marry another woman, and the bride need not be a virgin. In turn, even if the conditions are not fulfilled, the marriage contract still is valid — and the bride is entitled to the *mahr*.

<sup>4</sup> Qur'an, *supra*, 4:236-237 at 27 (emphasis added).

<sup>5</sup> See SCHACHT, *supra*, at 163.

But, what if the amount of the *mahr* is established in whole or in part based on a condition or stipulation in the marriage contract? Two scenarios are possible. First, payment of the correct amount of the *mahr* is tendered. This payment fulfills the express contractual term. Second, the condition or stipulation is not fulfilled, i.e., the bridegroom-husband does not pay. Is the marriage contract still valid? The answer is "yes." However, a new amount for the *mahr* is set, to replace the prior, unfulfilled condition for an exact figure. The new amount is set as the "fair" *mahr* (*mahr al-mithl*).

The general rule, then, is that conditions and stipulations in a marriage contract are legally unenforceable. In this respect, a marriage contract is not perfectly analogous to a commercial agreement. However, as a practical matter they can be enforced — one side could conditionally repudiate the marriage contract.<sup>6</sup>

### § 35.03 MAINTENANCE (NAFAKA)

Along with the right of a wife (*zawja*) to a nuptial gift (*mahr*), the most important right she has under a contract of marriage (*nikāh*) is a right to maintenance. The right to maintenance is known in Arabic as "*nafaka*." Under it, the wife has no obligation to pay for any part of her maintenance costs. Rather, her husband (*zawj*) has the duty, namely, he must contribute a portion of his income to his wife as part of her maintenance.

That is not to say a wife is forbidden from supporting herself in whole or part. She has every right to work, earn income, and provide for her own needs as well as those of her husband and children. The point is that because of *nafaka*, a wife is assured her husband has a legal obligation to take care of her. Particularly if the wife chooses not to work, or cannot work — for example, because she is fully occupied caring for children or aged parents, or is herself incapacitated — the allocation of this duty to the husband should provide her with certainty and predictability.

Notably, the mirror image of her right to *nafaka* does not exist. A wife has no obligation to support her husband. In fact, a wife has no duty to share any income she earns with her husband. She is entitled to keep all of her earnings for herself. That is true even if her earnings exceed those of her husband.

What does "maintenance" entail? The simple answer is it includes food, clothing, and shelter. "Food" need not mean dining at a five-star restaurant nightly, nor does it mean providing a subsistence diet of 1,200 calories daily. The proper maintenance amount depends on the ability of a husband to provide food. Likewise, "clothing" is defined neither in terms of Chanel apparel nor tattered rags. "What is the best I can provide, according to my means?" is the question a husband ought to ask, knowing that God (Allāh) will judge him in part on how he responds. As for "shelter," customarily it means a separate room that can be locked, or possibly an entirely separate house — again, depending on the resources of the husband. If those resources are plentiful, then "shelter" may include a personal servant for the wife.

<sup>6</sup> See SCHACHT, *supra*, at 163.



Because the wife has a right to both a *mahr* and *nafaka*, the property that comes to her via either route is hers, and hers to keep. That is, not only is the marital gift her own, but so also is the property she receives on account of her husband fulfilling his obligation to provide her with maintenance. He can no more take back her clothes, for example, than he can cash he gave her when they were married. Similarly, at no point does any such property become shared, in the sense of jointly owned by the wife and husband. Professor Schacht, therefore, concludes that this scheme of property ownership puts a wife in a "strong position as against the husband."<sup>7</sup>

This conclusion is not entirely correct. It is true in that a husband who tries to escape his duty to pay maintenance (*nafaka*), for example, by leaving the household, can be the target of a decision by a *qāḍī* (Islamic judge). A *qāḍī* can authorize the wife to obtain maintenance by pledging the credit of her husband. She could then borrow funds to obtain food, clothing, and shelter, commensurate with the creditworthiness of her husband, and the husband would be obligated to repay the indebtedness. The conclusion also is accurate in that even if the marriage is terminated, and a waiting period (*idda*) transpires, the wife has a right to maintenance during that period. As the following two passages from the Qur'an state:

- *Surah 2, ayah 241* —

Divorced women shall also have such maintenance as is considered fair: this is a duty for those who are mindful of God.<sup>8</sup>

- *Surah 4, ayat 19-21* —

<sup>19</sup>You who believe, it is not lawful for you to inherit women against their will [as occurred under the pre-Islamic Arabian custom, whereby her stepson or another man from the family of the stepson could inherit the widow], nor should you treat your wives harshly, hoping to take back some of the dowry you gave them, unless they are guilty of something clearly outrageous. Live with them in accordance with what is fair and kind: if you dislike them, it may well be that you dislike something in which God has put much good.

<sup>20</sup>If you wish to replace one wife with another, do not take any of her dowry back, even if you have given her a great amount of gold. <sup>21</sup>How could you take it when this is unjust and a blatant sin? How could you take it when you have lain with each other and they have taken a solemn pledge from you?<sup>9</sup>

There are two limited exceptions, namely, if the wife bears the fault for the dissolution through apostasy (*riddah*) or *li'an* (unchastity).<sup>10</sup> In brief, the rule

<sup>7</sup> SCHACHT, *supra*, at 167.

<sup>8</sup> QUR'AN, *supra*, 2:241 at 28.

<sup>9</sup> QUR'AN, *supra*, 4:19-21 at 52. See also *id.*, fn. b to 4:19.

<sup>10</sup> See SCHACHT, *supra*, at 167.

Some Muslim legal scholars suggest an ex-wife, and her children with her ex-husband, are entitled to maintenance (*nafaka*) if the divorce occurs via repudiation (*talāq*), oath of abstinence (*ilā'*), and even apostasy (*riddah*) or unchastity (*li'an*). They point out that some judges (*qāḍīs*) rule that the children, but

established by the above-quoted passages is a right of an ex-wife to alimony so long as she is not at fault. Note that this right also benefits children. A husband is obligated to provide maintenance (*nafaka*) to his ex-wife, and their children, after divorce.

But, the conclusion is incorrect insofar as it is overly optimistic. The right of a wife to *nafaka* is not absolute, but rather conditional, or contingent, on four key factors. If any one of these factors is present, then her right is suspended (but not cancelled) until there is an appropriate change in circumstances. The rationale for the suspension is that where a factor is present, the wife is not fulfilling her marital obligations to her husband.

First, as intimated above, a husband who is poor is not obliged to provide maintenance. This contingency is sensible enough. By definition, a penurious (in the sense of destitute) husband cannot cover all food, clothing, and shelter expenses.

Second, the right to maintenance is suspended if the wife is a minor. The right remains suspended until she comes of age. This contingency is distressing. It may allow a husband to treat his child-wife abusively. It also appears the husband is under no obligation to deposit in an account for the wife a sum of funds that aggregate to what he would have spent on her food, clothing, and maintenance had she been a mature woman from the time of their marriage.

Third, the right of a wife to maintenance is suspended if she performs the *Hajj* (pilgrimage) without her husband, is imprisoned on account of her own debt, or is abducted (in effect, the victim of usurpation, or *ghaṣb*). This contingency is vexing. It explicitly implies a wife cannot go on *Hajj* and leave her husband behind, at least not without his permission. Notwithstanding travel restrictions that might be imposed on women traveling alone by officials in Saudi Arabia, any Muslim husband in the world can threaten to withhold food, clothing, or maintenance from his wife should she seek to perform a Pillar of Islam without him. This threat amounts to control by the husband over her travel. As for suspension of *nafaka* in the event the wife is imprisoned for her debt or is abducted, arguably a loving husband with sufficient resources would set aside funds for his wife, either to pay off her debt, or any expenses — such as medical treatment, if she is harmed by her abductors, or even, possibly, ransom — in connection with her abduction.

The fourth contingency is even more concerning than the first three. The right of a wife to *nafaka* depends on her obedience to her husband. In other words, with her right to maintenance comes a correlative duty of obedience. What does "obedience" mean? The answer is two-fold.<sup>11</sup> First, refusal to have sexual intercourse with her husband is "disobedience." Second, leaving the house without the permission of her husband is "disobedience." Again, the logic behind these instances is that the right of the wife ought to be suspended, because she cannot, or refuses to, perform her marital duties — those being physical intimacy and presence.

not the wife, are entitled to maintenance after separation (*tafriq*). This pattern may be observed in the UAE. As for the infrequent use of *al khala'* (take away, pull, i.e., where the wife returns her nuptial gift (*mahr*)) in the UAE, when it occurs, the ex-wife is not entitled to *nafaka*, but her ex-husband must pay support for their children.

<sup>11</sup> See SCHACHT, *supra*, at 168.

Does the duty of obedience mean a Muslim wife owes sex on demand to her husband, and is a prisoner in the home with her husband holding the keys? That interpretation indeed is what some husbands, Muslim and non-Muslim alike, follow in practice. There is an obvious concern about rape within the context of a marriage, and other forms of domestic abuse. Prosecutions of rape in that context are all but unknown in Muslim countries, and much domestic abuse goes unreported and untreated. Still, such husbands are neither in the majority, nor are they correct in their thinking if they believe they have free reign over their wives. Consider *surah* 2, *ayah* 223:

Your women are your fields, so go into your fields whichever way you like, and send [something good] ahead for yourselves. *Be mindful of God: remember that you will meet Him.*<sup>12</sup>

The first sentence of this *ayah* metaphorically suggests a husband may sow his seed in the fields of his wife or wives. But, the second sentence reminds the husband of the Day of Judgment. Having his way with his wife without her consent — in effect, rape — is a behavior that prejudices his case for entry into Heaven. Moreover, this *ayah* must be kept in context, which (as *ayah* 222 indicates) is about the pain of menstruation and the obligation of men to keep away from women during their cycle. This *ayah* also addresses a concern that Muslims had when they migrated to Medina.<sup>13</sup> They had heard from Jews that if a man has sexual intercourse with a woman from behind, then any resulting child will be born with a squint. The above-quoted passage debunks the concern.

## § 35.04 HUSBAND'S RIGHT OF CORRECTION AND WIFE BEATING

### [A] Three Key Sentences of *Surah* 4, *Ayah* 34

A husband enjoys a right of correction as against his wife — a right that is very troubling indeed. As a general matter, *surah* 2, *ayah* 228 of the Qur'an states:

... Wives have [rights] similar to their [obligations], according to what is recognized to be fair, and *husbands have a degree [of right] over them*: [both should remember that] God is almighty and wise.<sup>14</sup>

This passage speaks of a similarity and fairness, and admonishes both spouses that God (Allāh) is watching. But, the italicized language vaguely identifies an enhanced status for a husband (though not absolute superiority in all instances), and there is no immediate counter-balancing phrase for a wife. More specifically, along with the threat of suspension of *nafaka*, there is a right of correction as a means to enforce obedience. What, exactly, is this right, and whence does it come?

At one level, the answer depends on the translation of the relevant passage from the Qur'an, which is *surah* 4, *ayah* 34:

Husbands should take full care of their wives, with [the bounties] God has given to some more than others and with what they spend out of their own money. Righteous wives are devout and guard what God would have them guard in their husbands' absence. If you *fear high-handedness* from your wives, *remind* them [of the teachings of God], then *ignore* them when you go to bed, then *hit* them. If they obey you, you have no right to act against them: God is most high and great.<sup>15</sup>

This passage is one of the most heavily examined ones in the entire Qur'an.

As translated, the first sentence should be uncontroversial. A husband has a duty to take care of his wife commensurate with his ability to do so. In effect, the first sentence is a Qur'anic textual basis for the correlative right of the wife — duty of the husband concerning maintenance (*nafaka*).

The second sentence intimates this right is not unconditional. A wife, if she is righteous, is a believer. She is a woman of integrity, in that she behaves in the absence of her husband as she would when he is present. The second sentence does not define specifically what she is to "guard," but (based in part on other passages from the Qur'an), among the candidates would be her body, particularly her private parts.

The third sentence is highly controversial. It establishes a right of correction on the part of the husband, and thus indicates the right to maintenance (*nafaka*) is conditional on obedience of the wife. The right is triggered by a "fear" of "highhandedness." Consider each word, in turn.

What is the test for "fear"? Is it an objective one, in which any man in the situation of the husband in question would have fear of high-handedness? That is, is the test one of the "reasonable husband," who in the same position would have the same emotional reaction? Or, is the test subjective — only the state of mind of the husband in question matters? Further, what evidence is required for "fear"? Is it actions by the wife, her words, or both? Are actions and words to be judged equally? May the actions or words relate to prospective future behavior — a threat — or must they pertain to an event that already has transpired?

As for "highhandedness," Professor Abdel Haleem explains:

The verb *nashaza* from which *nushuz* is derived means "to become high," "to rise." See also verse 128, where the same word is applied to husbands. It applies to a situation where one partner assumes *superiority* to the other and behaves accordingly.<sup>16</sup>

As for the use of the same verb subsequently in *surah* 4, *ayah* 128 states:

If a wife fears high-handedness or alienation from her husband, neither of them will be blamed if they come to a peaceful settlement, for peace is best. Although human souls are prone to selfishness, if you do good and are

<sup>12</sup> Qur'an, *supra*, 2:223 at 25 (emphasis added).

<sup>13</sup> See Qur'an, *supra*, fn. b to 2:223 at 25.

<sup>14</sup> Qur'an, *supra*, 2:228 at 26 (emphasis added).

<sup>15</sup> Qur'an, *supra*, 4:34 at 54 (emphasis added).

<sup>16</sup> Qur'an, *supra*, fn. a to 4:34 at 54 (emphasis added).



mindful of God, He is well aware of all that you do.<sup>17</sup>

Patently, this *ayah* does not authorize a wife to take any physical action — whether refusing sexual intercourse, gently tapping, or hitting — against her husband. In other words, *ayah* 128 is not the mirror image of *ayah* 34, because the latter verse condones physical retaliation, even if albeit slight or modest, whereas the former verse does not and instead speaks of settlement.

In any event, translating “high handedness” in terms of “superiority” of attitude, which then manifests itself in behavior, does not impose much of a barrier to physical violence against a wife. In every marriage, no matter how loving and equal, there are moments in which one spouse behaves in a superior manner relative to the other one. In part, that is because of human frailty. One side or the other is bound to be insecure about some dimension of life. For example, a husband may be jealous of the professional success, or personal popularity, of his wife. Is she to be punished for her strengths?

In other part, the inevitability of a “superior” attitude exists because the wife and husband come to the marriage with different abilities, skills, and talents. For instance, in some marriages, it is the wife who is the better financial manager than the husband. In these instances, it is sensible for her to exercise her comparative advantage, vis-à-vis her husband, and make choices about savings and investment for the household. Is this “superiority,” which becomes manifest in her dealings with commercial bankers and stock brokers, grounds for her husband to ignore her in bed, and perhaps hit her?

Suppose, then, that “high-handedness” connotes not mere superiority, but arrogance. Indeed, the *Oxford English Dictionary* lists “high-handed” as a synonym for “arrogant.”<sup>18</sup> To be “high-handed” is to disregard the feelings of another, or to be over-bearing.<sup>19</sup> It is not part of an ordinary, healthy marriage for a wife to treat her husband (or vice versa) in an egotistical way — i.e., in an aggressively assertive or presumptuous manner. Further, such supercilious behavior is morally incorrect, whether it is displayed to a spouse or stranger. With this rigorous definition of “high-handedness,” the problem still exists: is it appropriate to apply a corporal punishment on the wife?

The source of the problem, of course, is in the third sentence of *surah* 4, *ayah* 3. It creates the right of correction, a right held exclusively by the husband, and establishes a gradation of punishment. First, the husband is to “remind” his wife about Islamic teachings; never mind the possibility the wife may have a broader, deeper understanding of those precepts than the husband. It is the husband who does the “reminding.” Whether he is persuaded by the wife’s rendition of the teachings depends on the particular couple. Assuming not, then the second level of punishment is applied: the husband is instructed to ignore his wife when he goes to bed. That surely indicates he is to treat her as *persona non grata* in the marital bed, meaning he is not to have sexual relations with her, and can snub her in all other

<sup>17</sup> Qur’an, *supra*, 4:127 at 62.

<sup>18</sup> THE OXFORD AMERICAN DICTIONARY AND THESAURUS 73 (New York, New York: Oxford University Press, 2003) (entry for “arrogant”). [Hereinafter, OXFORD DICTIONARY.]

<sup>19</sup> See OXFORD DICTIONARY, *supra*, at 691-692 (entry for “high-handed”).

respects. Assuming the wife remains “highhanded,” then the third and most serious punishment is triggered: the husband may “hit” his wife.

## [B] Conventional Translations

Thus the debate is joined: does the Qur’an really authorize a husband to beat his wife? By some accounts, such as that quoted above in the translation of *surah* 4, *ayah* 34, provided by Professor Abdel Haleem, the right of correction includes “hitting” the wife. Other accounts use the verb “beat.” For example:

- From the 1955 edition of *The Koran Interpreted*, translated by Professor A.J. Arberry:

Men are the *managers* of the affairs of women for that God has preferred in bounty one of them over another, and for that they have expended of their property. Righteous women are therefore obedient, guarding the secret for God’s guarding. And those you *fear* may be *rebellious* admonish; banish them to their couches, and *beat* them. If they then obey you, look not for any way against them; God is All-high, All-great.<sup>20</sup>

The translator not only served as Head of the Department of Classics at Cairo University, Egypt, but also from 1947-1969 was the Sir Thomas Adams Professor of Arabic at Cambridge University, England.

- From the 2002 edition of *An Interpretation of the Qur’an — English Translation of the Meanings, A Bilingual Edition*, translated by Professor Majid Fakhry:

Men are *in charge* of women, because Allah has made some of them excel the others, and because they spend some of their wealth. Hence righteous women are obedient, guarding the unseen which Allah has guarded. And those of them that you *fear* might *rebel*, admonish them and abandon them in their beds and *beat* them. Should they obey you, do not seek a way of harming them; for Allah is Sublime and Great!<sup>21</sup>

The translator, born in Lebanon, is an Emeritus Professor of Philosophy at the American University of Beirut, and held an Associate Professorship at Georgetown University. The translator assures the reader of having “attempted to give as faithful an English rendering of the Arabic text as possible” and “correct[ing] the errors or lapses” of previous translations, including those by Professor Arberry (quoted above) and Marmeduke Pickthall (quoted below), such as “deliberate departure[s] from the original [Arabic text], for purposes of literary fluency or elegance.”<sup>22</sup> The translation by Professor Fakhry is officially approved by one of the most respected educational institutions in the Arab Muslim world, Al-Azhar

<sup>20</sup> THE KORAN INTERPRETED 4:34 at 105-106 (New York, New York: Simon & Schuster, 1955) (A.J. Arberry, trans.) (emphasis added). Note the numbering of *ayat* in this edition suggests the passage is from 4:38, though this enumeration appears to relate to paragraphs.

<sup>21</sup> AN INTERPRETATION OF THE QUR’AN — ENGLISH TRANSLATION OF THE MEANINGS, A BILINGUAL EDITION 4:34 at 86 (New York, New York: New York University Press, 2002) (Majid Fakhry, trans.) (emphasis added). [Hereinafter, AN INTERPRETATION OF THE QUR’AN.]

<sup>22</sup> Majid Fakhry, *Introduction*, AN INTERPRETATION OF THE QUR’AN, *supra*, at 3-4.

University in Cairo, Egypt. Notwithstanding all these points, the operative verb in the translations by Professor Fakhry and Arberry is the same: "beat."

To be sure, many Muslims understand the verb "hit" or "beat" to connote nothing more than a "tap" of the wife, say on her wrist. That understanding may resolve the debate for a couple, but it is not a systemic answer.

What, then, do other accounts indicate? Consider two further translations of *surah 4, ayah 34* of the *Qur'an*:

- From *The Meaning of the Glorious Koran*, rendered around 1919 by Marmaduke Pickthall —

Men are *in charge* of women, because Allah hath made the one of them to excel the other, and because they spend of their property (for the support of women). So good women are the obedient, guarding in secret that which Allah hath guarded. As for those from whom ye fear rebellion, admonish them and banish them to beds apart, and *scourge* them. Then if they obey you, seek not a way against them. Lo! Allah is ever High Exalted, Great.<sup>23</sup>

This translation is the first by an Englishman who also was a Muslim, and is one of the best known renditions in the English language.

Instead of "beat," the operative verb is "scourge." Yet, it is a difference with no substantive distinction. To "scourge" is to punish with a whip, and its synonyms include "lash," "flog," "beat," "belt," and "flagellate."<sup>24</sup> (The "Scourging at the Pillar" is an infamous scene in the last days of the life of Christ, and one of the Sorrowful Mysteries in the Catholic Rosary Prayer.) Its synonyms also include "chastise."<sup>25</sup>

- From the 2002 edition of *The Holy Qur'an, Arabic Text with English Translation and Commentary*, translated by Maulana Muhammad Ali —

Men are the *maintainers* of women, with what Allāh has made some of them to excel others and with what they spend out of their wealth. So the good women are *obedient*, guarding the unseen as Allāh has guarded. And (as to) those on whose part you fear *desertion*, admonish them, and leave them alone in the beds and *chastise* them. So if they obey you, seek not a way against them. Surely Allāh is ever Exalted, Great.<sup>26</sup>

The first edition of this Qur'an was published in 1917 in Great Britain, and was the first English-language version of the Qur'an to be generally available in the western world and widely accessible to western non-Muslim readers. The translator was a renowned author of several works on Islam. He died in 1951, having spent seven years (1909-1916) on the first edition, and five further years (1946-1951) on a revised edition.

<sup>23</sup> THE MEANING OF THE GLORIOUS KORAN 4:34 at 83 (New York, New York: Dorset Press, c. 1919) (Marmaduke Pickthall, trans.) (emphasis added).

<sup>24</sup> See OXFORD DICTIONARY, *supra*, at 1354 (entry for "scourge").

<sup>25</sup> See OXFORD DICTIONARY, *supra*, at 1354 (entry for "scourge").

<sup>26</sup> THE HOLY QUR'AN, ARABIC TEXT WITH ENGLISH TRANSLATION AND COMMENTARY 4:34 at 205-206 (Dublin, Ohio: Ahmadiyya Anjuman Isha'at Islam Lahore, Inc., U.S.A., new 2002 ed., Maulana Muhammad Ali, trans.) (emphasis added). (Hereinafter, THE HOLY QUR'AN.)

The operative verb is to "chastise." This verb means to "rebuke or reprimand severely," and to "punish especially by beating."<sup>27</sup> Its synonyms include "punish," "beat," "thrash," "whip," "flog," and "cane," as well as "scourge."<sup>28</sup> Manifestly, the use of this verb in the translation indicates imposition of serious corporal punishment is within the right of a husband. But, are appearances deceiving?

The translator, Maulana Muhammad Ali, elaborates, first as to what might trigger punishment — namely, "desertion," and, second, as to what kind of punishment is appropriate:

The word *nushūz*, which I have translated as *desertion*, primarily means *rising*, and as spoken of a woman in connection with her husband it means *her rising against her husband*. This is explained in a number of ways; according to one of these explanations it means *her leaving the husband's place and taking up an abode which he does not like* (AH) [i.e., *Bahr al-Muhīt* (Commentary), by *Imām* Athīr al-Dīn Abū 'Abd Allāh Abū Ḥayyān al-Undlūsī]. LL [i.e., *Arabic — English Lexicon* by Edward William Lane] quotes various authorities showing that *nushūz* on the part of the woman means that *the wife resisted her husband and hated him* (S, Q) [i.e., *Al-Sihāh Taj al-Lughah wa Sihāh al-'Arabiyyah* (Dictionary) by Ismā'īl ibn Hammād al-Jawhārī, and *Al-Qāmūs al-Muhīt* (Dictionary), by Shaikh Majd al-Dīn Muḥammad ibn Ya'qūb al-Fīrozābādī, respectively] and *deserted him* (T) [i.e., *Taj al-'Arūs* (Dictionary), by *Imām* Muḥibb al-Dīn Abū-l-Faīd Murtaḍā].

The remedy pointed out in the case of the wife's desertion is threefold. At first she is only to be admonished. If she desists, the evil is mended, but if she persists in the wrong course, her bed is to be separated. If she still persists, chastisement is permitted as a last resort (Rz) [i.e., *Al-Tafsīr al-Kabīr* (Commentary), by *Imām* Fakhr al-Dīn Rāzī]. Regarding this last remedy two things must, however, be borne in mind. Firstly, it is a mere permission, and sayings of the Prophet make it clear that, though allowed, it was discouraged in practice. Thus the Prophet is reported to have said, on the complaint of certain women as to the ill-treatment of [i.e., by or from] their husbands: "You will not find these men as the best among you" (AD 12:42) [i.e., *Kitāb al-Sunan* (Hadith), by *Abū Dawūd* Sulaimān]. According to Shāfi'ī, it is preferable not to resort to the chastisement of the wife (Rz). In fact, as the injunctions of the Qur'an are wide in their scope, the example of the Holy Prophet and his constant exhortations for kind treatment towards women, so much so that he made a man's good treatment of his wife the gauge of his goodness in general — *the best of you is he who is best to his wife* — show clearly that this permission is meant only for that type of men and women who belong to a low grade of society. Secondly, even this permission cannot be adopted indiscriminately, for sayings of the Holy Prophet make it quite evident that chastisement, when resorted to in extreme cases, must be very slight. I'Ab says it may be with

<sup>27</sup> See OXFORD DICTIONARY, *supra*, at 235 (entry for "chastise").

<sup>28</sup> See OXFORD DICTIONARY, *supra*, at 235 (entry for "chastise").



a toothbrush or something like it (AH). The Prophet is reported to have said: "You have a right in the matter of your wives that they do not allow anyone whom you do not like to come into your houses; if they do this, chastise them in such a manner that it should not leave an impression" (Tr. 10:11) [i.e., *Al-Jāmi'* (Hadith), by Abū 'Isā Muḥammad ibn 'Isā *Tirmidhī*]. Thus very slight chastisement was allowed only in extreme cases.<sup>29</sup>

This elaboration is hardly persuasive. As to the trigger event for chastisement, if a wife cannot rise up against her husband, by deserting him, then she is a prisoner at his mercy. There are unfortunate but real cases in which the best course of action — in terms of the mental and physical security of a wife — is to remove herself from the vicinity of her husband, and possibly also take her children with her. Moreover, the purported *ḥadīth* is of little comfort. It essentially informs a woman of a fact of which she already is aware: she is stuck with a lousy husband. But, it offers her no recourse against him, other than the hope the husband will come to realize he cannot be among the "best" among husbands unless he improves his behavior to his wife.

As for the remedy, the elaboration offered by Maulana Muḥammad Ali suffers from three defects. First, to say that permission to chastise a wife actually is intended only for "men and women who belong to a low grade of society" is more than snobbish. It is un-Islamic. Islam proclaims a message for all, regardless of socioeconomic status. Aside from long-antiquated provisions on slavery, and entirely understandable exhortations and rules concerning magnanimity toward the poor, Islam does not differentiate high from low class people. Further, the statement denies the equal dignity of women. Why is it permissible to chastise a woman of a lower socio-economic order, but not one from an upper-crust background? If all women (and men) are created in the image and likeness of God, then each is entitled to respect regardless of his or her position in a community.

Second, to invite "very slight" chastisement, such as a tap with a toothbrush, in "extreme" cases is to begin a dangerous journey down a slippery slope. Different husbands may interpret the key terms differently, with some versions rendering their wives susceptible to actual or threatened abusive treatment. To be sure, it is mildly comforting to hope this elaboration is correct (i.e., that if the proper translation is "chastise"), then that verb is not to be taken literally, but rather scaled back in its meaning to connote nothing more than a "very slight" rebuke that may be offered in an "extreme" case. Yet, the reality is that for all-too-many women, that hope is a faint one.

Third, might this approach be criticized on jurisprudential grounds? It uses *ḥadīths* from the Prophet Muḥammad, and scholarly opinion from Imām Shāfi'i, to restrict the meaning of a term in the Qur'ān. This sacred scripture is understood by Muslims as the Word of God (Allāh), and is to be followed scrupulously. Is it appropriate to use the non-prophetic utterances of Muḥammad, or the research of a renowned jurist, to depart from the plain meaning of a word like "chastise," and

in effect reinterpret the passage? Traditionists would argue that doing so undermines the traditional hierarchy of sources in the *uṣūl al-fiqh*, in which the Qur'ān is pre-eminent, the *Sunnah* second to it, and scholarly consensus (*ijma'*) a distant third in rank. Modernists would reply that both the verb "chastise" and the passage require interpretation through the use of independent or personal reasoning (*ijtihad*).

Note, finally, the above translation characterizes a husband as the "maintainer" of his wife. Not only does he have a duty to provide *naḥaka*, but also she is dependent on him. Consequently, he is in a superior position relative to her. Further, a wife, if she is "good," is "obedient" — but to whom? The translator declares:

Obedience here signifies obedience to Allāh. This significance of the word is made clear by a comparison with 33:31, 33:35, and 66:5.<sup>30</sup>

However, query whether this limitation — that obedience refers to Allāh, not to her husband, is correct. The entire *ayah* is about the rights and duties running between a husband and wife, not between a wife and God. Arguably, to render a harmonious interpretation, it may be that she shows her obedience to Allāh by her obedience to her husband. But, this interpretation puts a husband in an absolute position, and runs counter to the emphasis on equality found in other parts of the Qur'ān.

Manifestly, all of the above renditions are substantively equivalent. They represent the conventional wisdom in Islam about the *Shari'a* and wife beating. All of these translations are done by men. In sharp contrast, only the translation by Dr. Laleh Bakhtiar, an American female convert to *Shi'ism*, is substantively distinct.

### [C] Bakhtiar Translation

The 2009 edition of *The Sublime Quran — English Translation* is the first English language translation in history to eschew the verb "to beat" and instead use the verb "to go away from" (them), or synonymously, "to leave" (them). Translated by Dr. Bakhtiar, *surah* 4, *ayah* 34 reads:

Men are *supporters* of wives, because God has given some of them an advantage over others and because they spent of their wealth. So the ones in accord with morality are the ones who are morally obligated and the ones who guard the unseen of what God has kept safe. And those whose *resistance* you fear, then admonish them and abandon them in their sleeping places and *go away* from them. Then if they obey you, then look not for any way against them. Truly God has been *Lofty, Great*.<sup>31</sup>

<sup>29</sup> THE HOLY QUR'AN, *supra*, fn. 34b to 4:34 at 206. (emphasis added).

The translator is less certain about what it is women are "guarding." He writes:

The meaning is that their guarding the husband's rights is really a favour from Allāh as it is Allāh that guards them. Or the meaning may be, Allāh has guarded their rights.

*Id.*, fn. 34d to 4:34 at 206.

<sup>31</sup> THE SUBLIME QURAN — ENGLISH TRANSLATION, REVISED EDITION (www.sublimequran.org; Laleh Bakhtiar, trans., 6th ed., 2009) 4:34 at 94 (emphasis added). [Hereinafter, *SUBLIME QURAN*.]

<sup>29</sup> THE HOLY QUR'AN, *supra*, fn. 34e to 4:34 at 206 (emphasis original). The abbreviations of the sources, such as "AH," are explained by the translator at *id.*, 1-21-23, taken therefrom, and inserted in square brackets above.

This translation is the first by an American Muslim woman, but is explicitly not designed as a feminist translation.<sup>32</sup> To the contrary, she uses the method of formal equivalence.

As for the translator herself, Laleh Bakhtiar, holds a doctorate in Educational Psychology, has had many years of tutoring in Classical Qur'anic Arabic grammar, and has translated over 25 books.<sup>33</sup> Her father, a spiritual but not religious person, and a physician, lived in Iran. Dr. Bakhtiar was raised by a single American Christian mother, went to Catholic school, and desired at age 8 to become Catholic (to which her mother did not object). But, at age 24 she traveled to Iran with her former husband and children. She took classes at Tehran University, including in Classical Arabic, which led her to translate the Qur'an, and convert to Shī'ite Islam.

An initial and remarkable feature of this translation is the articulation of the relationship of husbands to wives — husbands "support" their wives. They do not "maintain," nor are they "in charge of," them. Moreover, Dr. Bakhtiar does not say "disobedience" by a wife is the trigger event authorizing a husband to sanction his wife. Rather, it is "resistance" by the wife. Dr. Bakhtiar explains why:

What jurists claim is that the "beating" is only given to a wife whose "*nushūz*" the husband fears. The jurists explain "*nushūz*" as "disobedience." As a matter of fact, "*nushūz*" does not mean "[dis]obedience, as that is a completely different word in the Quran, derivatively, *atā'a*. Using resistance for "*nushūz*," we see while in 4:34 the Quran says: "husbands who fear "resistance" (*nushūz*) on the part of their wives," in 4:128 the Quran says: "wives who fear "resistance" (*nushūz*) on the part of their husbands." In truly a fair and just fashion as the Quran always is, however we translate the word in regard to a wife must be translated and interpreted the same for a husband. If "*nushūz*" is interpreted as meaning "disobedient," then it must apply in both cases, a disobedient wife and/or a disobedient husband.<sup>34</sup>

In other words, previous translations of *surah* 4, *ayah* 34 and *surah* 4, *ayah* 128 are inconsistent. They translate the same Arabic verb ("*nushūz*"), which is used in both passages, to mean "disobedience" in 4:34, but not in 4:128 — despite the fact "disobedience" is an entirely separate word (stemming from "*atā'a*"). There is no evidence God (Allāh) intended for a different meaning for wives versus husbands. To the contrary, the spouses are to treat each other equally. The way in which to provide a consistent rendition of both passages, and thereby effect this equality, is to translate the term ("*nushūz*") as "resistance."

#### [D] Five Arguments in Defense of Bakhtiar Translation

What reasons exist to support the translation by Dr. Bakhtiar of *surah* 4, *ayah* 34, of the Qur'an? Asked differently, how might her interpretation be defended as preferable to the conventional translations? Dr. Bakhtiar answers the question

<sup>32</sup> See *SUBLIME QURAN*, *supra*, Preface at xiv.

<sup>33</sup> See *SUBLIME QURAN*, *supra*, Preface at ix-x, xv-xvi.

<sup>34</sup> See *SUBLIME QURAN*, *supra*, Preface at xxix.

herself. She explains her translation of this highly controversial passage as follows:

Just as I found a lack of internal consistency in previous English translations, I also found that little attention had been given to the woman's point of view. While the absence of a woman's point of view in *Quranic translation and commentary* for almost 1,500 years since the revelation began clearly needs to change, it must be acknowledged that there are many men who have been supportive of the view of women as complements to themselves, as the completion of their human unity. To them, I and other Muslim women are eternally grateful. They relate to women as the Quran and *Hadith* intended. The criticism women have is towards those men and women who are not open to this understanding, who are exclusive in opposition to the Quran and *Sunnah's* inclusiveness. Clearly the intention of the Quran is to see man and woman as complements of one another, not as superior — inferior.

Consequently, in the introduction and translation, I address a main criticism of Islam made in regard to a human rights issue, namely, that a husband can beat his wife (4:34) after two stages of trying to discipline her.<sup>35</sup>

As Dr. Bakhtiar indicates in the above-quoted passage, she offers an extended, detailed defense of her rendition of *ayah* 34 in the Introduction to *The Sublime Quran*. This defense proceeds in five key steps.

First, Dr. Bakhtiar offers a careful analysis of the Arabic verb "*idrib*," which she points out has multiple meanings:

The root letters *ḍ r b* [i.e., as in "*idrib*"] mean to propound or to strike (a parable), to smite, stamp (or stomp one's foot), beat or strike; or to cite (an example or a dispute). Other meanings without any special preposition include: To encompass; to cast, throw, or fling upon the ground; to set a barrier; to engender; to turn about; to make a sign or to point with the hand; to prohibit, prevent, or hinder from doing a thing one has begun; to seek glory; to avoid or shun or leave; to turn away oneself; to be with shame; to be in a state of commotion; to be in a state between hope and fear; and to go away.<sup>36</sup>

Thus, from a lexicographic standpoint, it is perfectly reasonable to translate the relevant Arabic verb into English not as "to beat," but as "to go away." The question then becomes why such a choice should be made — why is the latter meaning better than the former meaning? The answer lies in the second and third arguments Dr. Bakhtiar makes.

Second, Dr. Bakhtiar resorts to the *Sunnah*, highlighting the fact Muhammad did not "beat" his wives:

For the Muslim, the Prophet is the living Quran; that is, he practiced exactly whatever God revealed in the Quran. If it was a command to good:

<sup>35</sup> *SUBLIME QURAN*, *supra*, Preface at xiv-xv (emphasis added).

<sup>36</sup> *SUBLIME QURAN*, *supra*, Introduction at xxi (emphasis added).



Fasting, daily formal prayers, pilgrimage, alms, charity, he performed these commands. If it was to prevent a wrong like drinking alcohol, gambling, or eating pork, he refrained from these things. As the living Quran, the life, behavior, and sayings of the Prophet serve as a model for all Muslims.

As the Quran refers to the Prophet as a mercy to humanity and the model whose example should be followed, it is clear that he would have carried out any and all of the commands (imperative forms of the verb) in the Quran that related to his life . . . yet we find an exception in *q r b* [i.e., as in "*idrib*"] according to the interpreters over the centuries.

. . . [I]n all of the canonical works there is no reference to [the] Prophet Muhammad . . . having ever beaten women. It is the misinterpretation of the word "*idrib*" in 4:34 that this translation challenges and emphasizes that this misinterpretation must *revert back to the way the Prophet understood it through his behavior* when facing the exact same situation. Therefore, it is *not a personal interpretation, but one that calls for a return to the Sunnah*.

. . . [A]nyone who claims to follow the *Sunnah* of the Prophet must do the same thing because the *Sunnah* of the Prophet is *not* to beat, hit, hurt, spank, or chastise any woman. The word "*idrib*" is a command, an imperative form of the verb, yet a command the Prophet did *not* carry out if it means "*beat them*." However, he *did* carry it out when it means "*go away from them*."<sup>37</sup>

Why did Muhammad not "beat" his wives? Dr. Bakhtiar offers the following reasons:

Based on his character, a model for all of humanity, he [the Prophet] knew innately that it was wrong to harm another human being. He knew that according to 16:126, one is commanded to chastise with the same chastisement that that person has been given. [Surah 16, *ayah* 126, is a rule of proportionality in self-defense, instructing a person that if he or she has to respond to an attack, then the response should be calibrated equivalently to the attack.] . . .

Therefore, conceivably, if a husband harms his wife by beating her, according to 16:126, his wife would be allowed to chastise her husband in return. The Prophet would have intuitively known that if husband were to beat his wife, she would have recourse to [i.e., against] her husband. He clearly believed that it was not within his *Sunnah* to do such a thing. Therefore, he showed by his behavior that 4:34, and the use of the word "*daraba*," means "go away from them" or "leave them" and let the emotions subside.

. . . [T]he Prophet's respect for the female gender was legendary. This included not only his wives, the mothers of the believers, but his daughters as well. He had a very special relationship with his daughter, Fatima, the only one of his daughters to survive him. How could he beat his wives and not consider that someone might beat one of his beloved daughters?

. . . [T]he Prophet knew that marriage was based on mutual respect and love. The Quran often tells husbands and wives to consult on issues with each other. It would be unfair and unjust to think that God would have revealed a verse that allowed husbands to beat their wives instead of separating for a short period of time and allowing the anger to subside. Then they would be able to once again consult with one another.<sup>38</sup>

In sum, Dr. Bakhtiar offers three reasons Muhammad did not "beat" his wives: (1) the possibility of a cycle of violence, legitimized by *surah* 16, *ayah* 126; (2) his respect for women in general, and his daughter, Fātimah, in particular, whom he did not want to see beaten by her husband; and (3) his view that marriage is based on mutual love and respect, which flourishes with consultation, not violence.

Remarkably, in making this argument, Dr. Bakhtiar applies individual reasoning at two levels. She herself uses *ijtihad* to develop the three-pronged argument. Further, she imputes to Muhammad the use of individual reasoning in his own deliberation about what God (Allāh) truly meant in revealing *surah* 4, *ayah* 34 and using the verb "*daraba*."

The third argument of Dr. Bakhtiar is closely related to the second one. In the style of an empiricist, she calls for verification. She not only relies on independent reasoning (*ijtihad*), but also on a specific type of such reasoning — verification:

The misinterpretation is not in the Arabic of the Quran, the eternal Word of God revealed to [the] Prophet Muhammad . . . , but it is how commentators over the centuries have interpreted the Word of God that is at issue and whether *ijtihad*, or strenuous endeavor to reason an issue, has to be applied, or *tahqiq* [literally, verification] as I prefer, reviving the intellectual tradition of Islam, the proponent being a *muhqiq* [someone who sees an issue or thing as it is, without obfuscation, i.e., one who sees the matter clearly] — to know by verifying and realizing The Truth and Reality of something for oneself.

. . . [T]he understanding of this verse [4:34] must revert back to the interpretation given it by the Prophet Muhammad . . . through his actions. He never beat anyone, much less any of his wives. When there was any marital discord, he went away.<sup>39</sup>

The verification, or empirical analysis, Dr. Bakhtiar conducts relates to the *Sunnah*. She asks what Muhammad himself did — did he beat his wives? The answer is "no," which she explains in her second argument. As he did not do so, then the correct

<sup>37</sup> *SUBLIME QURAN, supra*, Introduction at xxi, xxiv, xxvi (emphasis added).

<sup>38</sup> *SUBLIME QURAN, supra*, Introduction at xxvi.

<sup>39</sup> *SUBLIME QURAN, supra*, Introduction at xxiv-xxv (emphasis added).

translation of the Arabic verb is "verified" by his behavior.

Fourth, Dr. Bakhtiar shows how translating the Arabic verb "*idrib*" creates a contradiction in the Qur'an that does not otherwise exist:

One can only understand the sublimity of the Quran if one begins with some standard that establishes a system based in justice and fairness in order to be able to enter the world of the spiritual and intuition. One has to begin with some criterion, that is another of the names the Quran gives itself, *al-furqan* or The Criterion: The discernment between right and wrong, good and evil, lawful and unlawful, truth and falsehood. The Quran, as The Criterion, is the standard by which to determine the correctness of a judgment or conclusion. It is the measure, the reference point against which other things may be evaluated.

*The most conclusive arguments in Islamic tradition to prove or disprove something is [sic] to use the Quran to prove another point in the Quran. This method is called tafsir al-qur'an bi-l-qur'an. This I will do. I will show how the present erroneous interpretation of 4:34 and the verb idrib creates a contradiction not [found] in the Quran itself and denies, at least in two cases, rights that the Quran clearly gives to women.<sup>40</sup>*

What precisely are the two contradictions?

Dr. Bakhtiar argues the first contradiction is between *surah* 4, *ayah* 34, if the verb *idrib* is translated as "to beat," and *surah* 2, *ayah* 231. The latter passage (as translated by Professor Abdel Haleem) states:

When you divorce women and they have reached their set time, then either keep or release them in a fair manner. *Do not hold on to them with intent to harm them and commit aggression*: anyone who does this wrongs himself. . . .<sup>41</sup>

In other words, the Qur'an tells husbands not to harm their wives who want to be set free, not to hold them back by injuring them. The word "injuring" (*dirar*) also means hurt, harm, use force, or commit aggression. Dr. Bakhtiar offers the not-so-hypothetical example of a Muslim wife who tries in vain to help her husband manage his inappropriate anger. After repeatedly enduring physical abuse at his hands, she informs him of her wish for a divorce. Enraged, he fails to remember the rule of *surah* 2, *ayah* 231, namely, that he must hold back and not injure his wife. Instead, he beats her, under the erroneous impression that beating is condoned by *surah* 4, *ayah* 34. Dr. Bakhtiar writes:

. . . We begin with two premises: Islam encourages marriage, and divorce, while allowed, is discouraged. The Prophet said: Marriage is half of faith. He also said: Divorce is deplorable.

. . .

. . . [W]e see a disconnect between 4:34 and 2:231. *Jurists have created a contradiction that is not in the Quran by encouraging divorce and discouraging marriage* so that we can conclude a Muslim woman who wants a divorce must be set free without injuring, hurting, or using force against her, but a Muslim woman who wants to remain married does so under the threat of being beaten! If Muslim wives knew their rights, which one would want to stay married under such circumstances? Is this encouraging marriage? Does this make sense? 4:34 as presently interpreted contradicts 2:231. How can we eliminate the contradiction? There is a very simple solution: Revert the interpretation back to how the blessed Prophet understood it though his behavior.<sup>42</sup>

Put differently, to translate the relevant Arabic verb as "to beat" creates a perverse incentive scheme in a marriage.

Translating the key word in *ayah* 34 as "beat" is incongruous with the support Islam seeks to give to marriage. This translation encourages divorce. That is because to stay married, and avoid divorce, and thereby comport with a basic precept of the *Shari'a*, a woman must subject herself to actual or threatened beatings — hardly what she would prefer to do. Moreover, should a woman seek divorce, then she is clearly not to be beaten, as per *surah* 2, *ayah* 231. That is her right, conferred by this passage, namely, not to be beaten. As Dr. Bakhtiar puts it:

. . . [A] wife who agrees that her husband divorce her cannot hold her back by injuring her. This protects a wife who wants to be set free. This is a right she is given in the Quran — not to be injured!<sup>43</sup>

Yet, interpreting "*idrib*" as "beat" undermines this right.

Obviously, the regime ought to be the other way round. A woman stays married in part because her husband does not beat her, but becomes interested in a divorce only if he does. That is what Islam intends: it seeks to encourage marriage, which is a moral state, and discourage divorce, which is immoral. To discourage morality, and encourage immorality, is hypocrisy — a point made in *surah* 9, *ayah* 67.<sup>44</sup> The only way to manifest the correct intention (encouraging the moral state, marriage) is to interpret 4:34 as counseling the husband to "go away," and appreciate that 2:231 obligates him to behave in a non-violent manner. In sum, there is to be no beating in any instance.

The second contradiction created by interpreting "*idrib*" as meaning "beat" is between *surah* 4, *ayah* 34, on the one hand, and *surah* 24, *ayah* 6-9, on the other hand. The latter passage concerns false accusation of unlawful sexual intercourse (*kadhif*). Suppose a husband accuses his wife of adultery. There are no other witnesses, other than the husband. *Surah* 24, *ayah* 6-9 protects the wife by allowing her to defend herself against the accusation. Her protection is with God (Allāh). Because there are no other witnesses, the husband must call Allāh to witness that he (the husband) is telling the truth, and he must do so on four occasions. Then, on

<sup>40</sup> *SUBLIME QURAN, supra*, Introduction at xc-xxi (emphasis added).

<sup>41</sup> *QUR'AN, supra*, 2:231 at 26 (emphasis added).

<sup>42</sup> *SUBLIME QURAN, supra*, Introduction at xxvii-xxviii (emphasis added).

<sup>43</sup> *SUBLIME QURAN, supra*, Introduction at xxix-xxx.

<sup>44</sup> See *SUBLIME QURAN, supra*, Introduction at xxx.



a fifth occasion, the husband must ask Allāh to reject him (the husband) if he is lying (*i.e.*, falsely accusing his wife). The wife has the right to call Allāh to her side, that is, to witness that her husband is lying. She must make this call on four separate occasions. Then, on a fifth occasion, the wife must ask Allāh to reject her if her husband indeed is telling the truth.

If *surah* 4, *ayah* 34 authorizes a husband to "beat" his wife, then her protection against a false accusation of adultery eviscerates. Why? Because the wife is not free to call Allāh on five occasions, but instead endures physically abusive treatment. That is, amidst one or more beatings, the wife hardly is in a sound physical or psychological position to have the discourse with Allāh to which the Qur'ān says she is entitled.

The fifth argument Dr. Bakhtiar offers is more of a rebuttal to critics. It concerns a point of grammar, namely, the distinction between a transitive and intransitive verb:

We are told by jurists that the word "beat" in this verse (4:34) is a transitive verb. That means it can only take a direct object. As this verb is transitive, it can only mean "beat them." If it means "to go away from them," the verb becomes intransitive, taking an indirect object ("from them"). There are two arguments against this rationalization of an immoral act.

First of all, we have to ask: When this verb was revealed to the blessed Prophet and he heard the word *idrib*, that jurists and commentators have said for almost 1,500 years means "beat them," *did he sit back and discuss within himself whether the verb that God was revealing was a transitive or intransitive one? No! By his behavior, we know that he understood it to mean "go away from them."* Otherwise, we would have to conclude, God forbid, that the Prophet did not understand the Quran as well as the later legal jurists did, those who make this distinction.

Secondly, we are talking about translation, not about the original Arabic which is the eternal Word of God. *When you translate from an original text into a target language, you have to go with the rules of the target language. There are many times when an English word requires an indirect object, whereas the Arabic word does not. Do you then distort the meaning? No. You go with the target language.* We could say in English, "leave them," and we would be following the grammar of the jurists, but perhaps implying more than what the Prophet understood.<sup>45</sup>

In sum, Dr. Bakhtiar maintains *surah* 4, *ayah* 34 has been interpreted erroneously to deny rights to women that the Qur'ān clearly gives them, and wrongly translated as "beat."

Manifestly, the thoughtful translation by Dr. Bakhtiar is a refreshing departure from the conventional wisdom. Her version does not list any form of physical action against a wife by a husband as justified. The ultimate sanction is for the husband "to go away." Even her translation is in agreement with the others as to admonishing

a wife or neglecting her in the bedroom. Yet, all other renditions countenance "hitting" — the verb used by Professor Abdel Haleem — or even worse, triggered by her disobedience and the ineffectualness of the lesser two sanctions, admonition and ostracism.

### [E] Is Translation Irrelevant?

Much of the preceding discussion implies that translation is important. How a verb from Arabic is translated into English matters. Is this implication specious? Might the real problem be not one of translation, but rather of interpretation? Evidently, what Dr. Laleh Bakhtiar does in *The Sublime Quran* is something more than "translate." She "interprets" what the permissible sanctions are for a husband against his wife. She does so in light of what American lawyers would call the "totality of the circumstances." She examines the Qur'ān in its entirety, and meditates on the intention and spirit that resonate through its passages. It is her understanding that violence by a husband against his wife is not consonant with the teachings of God (Allāh), the practice (*Sunnah*) of Muhammad, or the principles of translation. More generally, she might well say, how could there be such an overwhelming emphasis on mercy and forgiveness, on the one hand, and yet permission for violence in the home, on the other hand?

The point, then, is to consider whether translation really matters. Unless the translator is like Dr. Bakhtiar — willing to interpret and apply personal or independent reasoning (*ijtihad*) — the results are more or less the same. But, of course, the concern is how far beyond the original Arabic text it is fair to stray, in the name of a proper interpretation? There is a spectrum, or continuum, with strict literalism at the one end, and flexible liberalism at the other end. Perhaps there is no "right" point on the spectrum. Rather, different translations are welcome, and it is for the individual Muslim to choose. Such an approach is akin to what exists with respect to Bibles in the Christian world.

In a depressingly practical sense, translation is or ought to be irrelevant for another reason. Any amount of physical contact, including a "tap," may be a potentially threatening situation for a wife. A wife whose wrist has been tapped may know that what follows is a slap across the face, then a blow to the head, and then an outright beating. Sadly and inexcusably, that slippery slope is one that women are pushed down by their husbands every day, around the Muslim and non-Muslim world alike. From anecdotal stories to battered wives shelters, the evidence is ample. What appears to be unique about the Muslim world is that the preeminent source of Islamic Family Law, the Qur'ān, is read (or mis-read) by some men to justify their push.

By no means is every Muslim husband inclined to behave thusly. To suggest as much would be a grave injustice to the vast majority of gentle, loving husbands — as it would be to husbands of like demeanor in non-Muslim communities. But, as an example of the need for *ijtihad* to re-interpret the Qur'ān, surely this topic is "Exhibit A."

<sup>45</sup> *SUBLIME QURAN, supra*, Introduction at xxviii-xxix (footnote omitted, emphasis added).

Not surprisingly, then, Dr. Bakhtiar links interpretation with *jihād al-akbar*, that is, the greater struggle.<sup>46</sup> She argues that reason must overcome the heart, and moral healing must occur. The indicia of moral healing are: (1) seeking justice for others, (2) exercising humility, (3) acknowledging one's own vulnerabilities, and (4) displaying mercy, compassion, self-sacrifice, and forgiveness. When moral healing occurs, "reason succeeds in attracting the heart to itself."<sup>47</sup> Then, the self turns away from the fleeting material world to the permanent spiritual world. In brief, self-control gains mastery over anger and lust — which, means there is no inclination toward wife-beating. This struggle also reinforces the values for which the model person, the Prophet Muhammad, stood.

### § 35.05 BIBLICAL CONTRAST

It is worth commenting that there is a passage in Chapter 5 of the *Letter of Saint Paul to the Ephesians* which, like *surah* 4, *ayah* 34 of the Qur'ān, has received considerable scrutiny. This passage, addressing wives and husbands, states:

<sup>21</sup>Be subordinate to one another out of reverence for Christ. <sup>22</sup>Wives should be subordinate to their husbands as to the Lord. <sup>23</sup>For the husband is head of his wife just as Christ is head of the church, he himself the savior of the body. <sup>24</sup>As the church is subordinate to Christ, so wives should be subordinate to their husbands in everything. <sup>25</sup>Husbands, love your wives, even as Christ loved the church and handed himself over for her <sup>26</sup>to sanctify her, cleansing her by the bath of water with the word, <sup>27</sup>that he might present to himself the church in splendor, without spot or wrinkle or any such thing, that she might be holy and without blemish. <sup>28</sup>So [also] husbands should love their wives as their own bodies. He who loves his wife loves himself. <sup>29</sup>For no one hates his own flesh but rather nourishes and cherishes it, even as Christ does the church, <sup>30</sup>because we are members of his body.<sup>48</sup>

Controversy has centered in large part around the verb "subordinate."

Verses 22 and 23 could be misunderstood to suggest women are inferior to men. They are not. Catholic Christian teaching is that while women and men are inherently different as part of the way in which they are created by God, and thus play distinct roles and make singular contributions, women are by no means inferior. This teaching arises in part because verses 22-23 are interpreted in their textual context. Verse 21 is an imperative to both husbands and wives for mutual subordination to each other and to God. This mutuality undermines any claim of

exclusive domination by one party over another, and emphasizes that each is subordinate to one another under Christ.<sup>49</sup> Verses 25-26 command husbands to "love" their wives, and "sanctify" them. Verses 28-29 explain that husbands should "love" their wives as they love themselves, meaning they should nourish and cherish them.

Throughout, there is a parallel between Christ as head of the Church, who sacrificed himself on the Cross, and husbands, who as head of their households, should behave in a self-sacrificing manner. Verse 30 stresses the unity of the household and Church in relation to the mystical body of Christ. Marriage is analogous to the relationship between Christ and the Church; wives should serve their husbands the way the Church serves Christ, and husbands should care for their wives with the devotion of Christ to the Church.<sup>50</sup>

Indeed, "Ephesians is the great Pauline letter about the church."<sup>51</sup> The letter indicates that unlike "ordinary Greco-Roman society [in which] the lines of authority and of subservience were clearly drawn," and husbands had great power over wives (as did parents over children and masters over slaves), Christians are to live in a manner worthy of the call from God they have received, namely, to bear with one another through love.<sup>52</sup> That is, "[t]he ordinary hierarchical system that obtains in the world is superseded by a new way of relating to one another in Christ."<sup>53</sup>

Manifestly, then, Chapter 5, verses 21-30 of Saint Paul's *Letter to the Ephesians*, and *surah* 4, *ayah* 34 of the Qur'ān, are not analogous. Nothing in the *Letter* comes remotely near condoning any kind of physical violence — not even a mere tapping — of a wife by her husband. The verb "subordinate" is not interpreted expansively to include corporal measures. Rather, it is interpreted contextually, which requires an appreciation for the deep analogy drawn between a household and the church. In all events, "beating" a wife would be utterly incompatible with the passage.

<sup>46</sup> *SUBLINE QURAN, supra*, Introduction at xxx-xxxi (footnote omitted, emphasis added).

<sup>47</sup> *SUBLINE QURAN, supra*, Introduction at xxxi.

<sup>48</sup> *The Letter to the Ephesians*, 5:21-30, in *THE CATHOLIC STUDY BIBLE 300* (New York, New York: Oxford University Press, 1990, New American Bible trans.) (emphasis added). [Hereinafter, *BIBLE*.] See also *id.*, *The First Letter of Peter*, 3:1-7, fn. 3, 1-6, and fn. 3, 7 at 379 (concerning the relationship between Christian spouses, the importance of wives being virtuous so they may facilitate the conversion of their husbands, as distinct from being subordinate simply in keeping with ancient tradition, the essentiality of husbands respecting their wives if the prayers of husbands are to be heard, and the equality of men and women in terms of being recipients of the Divine gift of salvation).

<sup>49</sup> See *The Letter to the Ephesians*, in *BIBLE, supra*, fn. 5, 21-6, 9 at 309.

<sup>50</sup> See *The Letter to the Ephesians*, in *BIBLE, supra*, fn. 5, 21-23 at 309.

<sup>51</sup> See Introduction, *The Letter to the Ephesians*, in *BIBLE, supra*, at 302.

<sup>52</sup> See *The Letter to the Ephesians*, 4:1-2, in *BIBLE, supra*, at 307; *Ephesians — Readers Guide, The Letter to the Ephesians*, in *BIBLE, supra*, at RG 512-513.

<sup>53</sup> See *Ephesians — Readers Guide*, in *BIBLE, supra*, at RG 513.



## Chapter 36

### WOMEN AND CLOTHES

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- Look for the woman in the dress. If there is no woman, there is no dress.
- Elegance is refusal.
- Fashion fades. Only style remains the same.

Gabrielle Bonheur (Coco) Chanel (1883-1971), French Fashion Designer, and only *Couturier* to be named on *Time Magazine's* list of 100 Most Important People of the 20th Century

#### SYNOPSIS

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## § 36.01 OBAMA VERSUS SARKOZY ON WHAT MUSLIM WOMEN SHOULD WEAR

### [A] Distinct Positions

Aside from terrorist atrocities committed in the name of "Islam," no topic relating to Islamic Law attracts more attention, and provokes more heated debate, in the Muslim and non-Muslim world alike, than the clothes Muslim women wear. There is no better example of the attention this topic attracts than that given it by the White House and Élysée Palace. In an extraordinary speech delivered in early June 2009 at Cairo University, American President Barack H. Obama stated:

[I]t is important for Western countries to avoid impeding Muslim citizens from practicing religion as they see fit — for instance, by dictating what clothes a Muslim woman should wear. We can't disguise hostility towards any religion behind the pretence of liberalism.

... I reject the view of some in the West that a woman who chooses to cover her hair is somehow less equal, but I do believe that a woman who is denied an education is denied equality. (Applause.) And it is no coincidence that countries where women are well educated are far more likely to be prosperous.<sup>1</sup>

Speaking to a largely Islamic audience, President Obama hardly was likely to tell Muslim women what they should wear. He took what might be encapsulated as a classic American approach: he identified the underlying issue as one of freedom of choice, and argued Muslim women ought to have that freedom, not only as to apparel, but also in all other matters, including schooling and careers. He also reflected classic American optimism: if only Muslim women could obtain a good education, they would be free.

Three weeks later, French President Nicolas Sarkozy took a different line. Speaking on his territory, before the French legislature gathered at the Palace of Versailles, he said:

We must not fight the wrong battle. In the [French] Republic, the Muslim religion must be respected as much as other religions.

The problem of the *burkha* [which covers a woman from head to toe, including her face] is not a religious problem. It is a problem of liberty of women, it is a problem of dignity of women. The *burka*, it is not a religious symbol, it is a sign of subservience and debasement. I want to say solemnly, it [the *burkha*] will not be welcome on the territory of the French Republic. We cannot accept in our country women who are prisoners behind netting, cut off from all social life, deprived of identity. That is not the idea that the French Republic has of women's dignity.

<sup>1</sup> President Barack H. Obama, *On A New Beginning*, Speech at Cairo University, Cairo, Egypt, 4 June 2009.

But I tell you, we must not be ashamed of our values. We must not be afraid of defending them.<sup>2</sup>

President Sarkozy was more than happy to tell Muslim women what they should not wear — and that is a *burkha*, meaning a veil that covers all of their faces, including their eyes.

France has roughly 5 million Muslims, the largest such population in Western Europe. But, the French Interior Ministry reports approximately 2,000 Muslim women don a full-face veil. Far more common is the *niqāb*, which leaves a slit open for the eyes.<sup>3</sup>

Invoking the image of French soil, President Sarkozy spoke to the hearts of the French, conjuring up the core values of the French Republic: liberty, equality, and fraternity. To be French is to be equal and free with others. Educational and employment opportunities matter. But, clothes are a, if not the, starting point: a woman manifests her equality and dignity by what she wears. When a Muslim woman covers her face, and her entire body, in a *burkha*, she is neither free nor equal, her dignity is debased.

Not surprisingly, 70 percent of French voters support a total ban on the *burkha*.<sup>4</sup> As the Table 36-1 shows, the French are not out of step with the rest of Western Europe. Moreover, the French and their counterparts in other countries singled out the *burkha* for banning, as support for a general prohibition on wearing religious icons in public (such as a Christian Cross or Crucifix, Jewish yarmulke, or Sikh turban) is low. Is this dichotomy evidence of anti-Muslim sentiment? Or, is it based on a genuine distinction between the *burkha*, because it covers the full face (not to mention the rest of the body), and all other religious symbols, none of which involves complete coverage.

<sup>2</sup> Nicolas Sarkozy, President of France, State of the Nation Speech to Both Houses of Parliament, Château de Versailles, France, 22 June 2009 (downloaded and translated from the website of the French Presidency, Élysée Palace, [www.elysee.fr](http://www.elysee.fr), and as quoted in *Sarkozy Speaks Out Against Burkha*, BBC NEWS, 22 June 2009, posted at [bbc.co.uk](http://bbc.co.uk), and Angelique Chrisafis, *Nicolas Sarkozy Says Islamic Veils Are Not Welcome in France*, THE GUARDIAN (England), 22 June 2009, posted at [guardian.co.uk](http://guardian.co.uk)).

<sup>3</sup> See Ben Hall, *French Assembly Votes by Big Majority to Ban Full-Face Veil*, 14 July 2010; *France MPs' Report Backs Muslim Face Veil Ban*, BBC NEWS, 26 January 2010, posted at <http://news.bbc.co.uk>.

<sup>4</sup> See James Blitz, *FT Poll Shows Support for Burkha Ban*, FINANCIAL TIMES, 2 March 2010 (reporting on a February 2010 poll by the *Financial Times*). [Hereinafter, Blitz.] See also Ben Hall, *France Prepares to Restrict Burqa But Resist Full Ban*, FINANCIAL TIMES, 26 January 2010, at 7 (reporting on a January 2010 poll by *Le Point* magazine that 57 percent of the French support a total ban on the *burkha*).



Table 36-1:  
Percentage of Voters Supporting *Burkha* Ban  
Versus  
General Ban on Any Religious Icon  
(*Financial Times* Poll, February 2010,  
ranked from high to low on *Burkha* Ban<sup>5</sup>)

Country	Percentage of Voters Favoring a Complete Ban on the Public Wearing of a <i>Burkha</i>	Percentage of Voters Favoring a General Ban on the Public Wearing of Any Religious Icon
France	70 percent	22 percent
Spain	65	19 (approximate)
Italy	63	20 (approximate)
United Kingdom	57	9
Germany	50	10 (approximate)
United States	33	2 (approximate)
China	27 (approximate)	9 (approximate)

### [B] French *Burkha* Ban

The French National Assembly agreed with President Sarkozy. In January 2010, a Parliamentary committee issued a 200-page report proposing a ban on the *burkha* in all government offices, courts, hospitals, schools, and on public transport. The report further recommended that French residence cards and citizenship should be denied to any person demonstrating a visible sign of "radical religious practice."<sup>6</sup> The central rationale of the report was the *burkha* posed an unacceptable challenge to the French Republican principles of equality and secularism and must be condemned as such. Moreover, the ban was needed for security purposes. In presenting the report, the Speaker of the French National Assembly, Bernard Accoyer, said:

It [the *burkha*] is the symbol of the repression of women, and . . . of extremist fundamentalism. This divisive approach is a denial of the equality between men and women and a rejection of co-existence side-by-side, without which our Republic is nothing.<sup>7</sup>

Following issuance of the report, the Assembly began drafting and debating legislation to implement a *burkha* ban in all public spaces. The ban intentionally aimed to make it impossible for a woman to go about her daily business while in a full-face veil. In the draft bill, the sanction contemplated for violating the ban was denial of the otherwise available public services on offer, such as state benefits or a ride on the train. The State Council (which must issue a legal opinion before enactment of any major legislation) indicated that a general, absolute *burkha* ban

<sup>5</sup> See Blitz, *supra*. The figures marked "(approximate)" are based on a reading of the histogram published in the *Financial Times*.

<sup>6</sup> *France MPs' Report Backs Muslim Face Veil Ban*, BBC NEWS, 26 January 2010, posted at <http://news.bbc.co.uk>. [Hereinafter, *France MPs' Report*.]

<sup>7</sup> Quoted in *France MPs' Report*, *supra*.

might violate both the French Constitution and European Convention for the Protection of Human Rights and Fundamental Freedoms, but a ban limited to public spaces could pass muster.<sup>8</sup>

In May 2010, the 557-seat French National Assembly approved legislation by a vote of 335-1 banning the *burkha*, with many opposition Socialist Party members, who opposed the bill as xenophobic, agreeing to abstain after lobbying from feminist groups that supported the bill. The Minister of Justice, Michele Alliot-Marie, declared the vote a victory for French values, namely:

Values of freedom against all the oppressions which try to humiliate individuals; values of equality between men and women, against those who push for inequality and injustice.<sup>9</sup>

In September, the Senate, the other chamber of the French legislature, approved the ban nearly unanimously. Writing in *The New York Times*, Jean-François Copé, the Majority Leader of the Assembly and Mayor of Meaux, defended the legislation:

How can you establish a relationship with a person who, by hiding a smile or a glance — those universal signs of our common humanity — refuses to exist in the eyes of others?

. . . in both France and the United States, we recognize that individual liberties cannot exist without individual responsibilities. This acknowledgment is the basis of all our political rights. We are free as long as we are responsible individuals who can be held accountable for our actions before our peers. But the niqab and burqa represent a refusal to exist as a person in the eyes of others. The person who wears one is no longer identifiable; she is a shadow among others, lacking individuality, avoiding responsibility.

From this standpoint, banning the veil in the street is aimed at no particular religion and stigmatizes no particular community. Indeed, French Muslim leaders have noted that the Koran does not instruct women to cover their faces, while in Tunisia and Turkey, it is forbidden in public buildings; it is even prohibited during the pilgrimage to Mecca. Muslims are the first to suffer from the confusions engendered by this practice, which is a blow against the dignity of women.<sup>10</sup>

His point, said *The Washington Post*, was that "full participation in French culture requires face-to-face interaction."<sup>11</sup>

In October 2010, the Constitutional Council of France approved the legislation, amending it only to state the ban would not apply in a place of worship, so as to

<sup>8</sup> See *French PM Advised Against Total Islamic Veil Ban*, BBC NEWS, 30 March 2010, posted at <http://news.bbc.co.uk>.

<sup>9</sup> Quoted in *French MPs Vote to Ban Islamic Full Veil in Public*, BBC NEWS, 13 July 2010, posted at <http://news.bbc.co.uk>.

<sup>10</sup> Jean-François Copé, *Tearing Away the Veil*, THE NEW YORK TIMES, 4 May 2010, posted at [www.nytimes.com/2010/05/05/opinion/05scope.html](http://www.nytimes.com/2010/05/05/opinion/05scope.html).

<sup>11</sup> Robin Givhan, *The Burqa in France: Removing the Veil Without Facing Society's Shortcomings*, WASHINGTON POST, 3 October 2010, posted at [www.washingtonpost.com/wp-dyn/content/article/2010/09/30/AR2010093007367.html](http://www.washingtonpost.com/wp-dyn/content/article/2010/09/30/AR2010093007367.html).

comport with freedom of worship guaranteed by the French Constitution. Consequently, the legislation took effect in spring 2011. The legislation imposes two kinds of punishment:

- (1) A fine of 150 euros (approximately U.S. \$190) and/or a citizenship course for a woman who wears a *burkha* in public; and
- (2) A 1 year in prison or a fine of approximately 15,000 euros (about \$19,000) for anyone (e.g., a man) who compels a woman to do so.

Significantly, the sanctions apply to a *niqāb* and to minors, meaning that it is an offense for anyone to force a woman or child to wear either it or a *burkha*. And, both sanctions apply to tourists, as well as French residents. Police began enforcing the new law the day it took effect (on 11 April 2011), issuing a ticket to a 27-year old woman in a shopping center in Paris, thus requiring her to pay a fine or take citizenship classes.<sup>12</sup>

France may well have triggered a movement. In April 2010, the lower house of the Belgian Parliament approved a ban on any clothing that obscures the identity of the wearer, including face coverings, from all public places, with exceptions for certain festivals.<sup>13</sup> (Out of roughly 500,000 Muslims in Belgium, only about 30 women wear a full face veil.) Violators would be subject to a fine of 15–25 euros, or a 7-day jail sentence. In October 2010, the Dutch government (compelled in part by minority coalition politics) agreed to a *burkha* ban. Yet, Spain rejected such ban, as did the United Kingdom, with the British Minister of Immigration, Damian Green, declaring in July 2010 that it would be “un-British” because it would be inconsistent with the “tolerant and mutually respectful society” there.<sup>14</sup>

Significantly, some Muslim countries impose restrictions on veils. Turkey, of course, is the most renowned example. Headscarves are banned in public buildings. Syria, whose Baath Socialist government is wary of Islamist extremism, is a lesser known illustration.<sup>15</sup> In 1982 Hama, it crushed the Muslim Brotherhood, killing over 10,000 adherents. In July 2010, the Minister of Education, Ali Saad, said the *niqāb* undermines the “objective, secular methodology” in schools, and the head of the Syrian Women’s Observatory, Bassam Al Kadi, said it “is a Wahhabi way of influencing Syria and is a form of violence against women.” Accordingly, the Syrian Baath Socialist government transferred to other jobs the roughly 1,200 teachers who had been wearing the *niqāb*.

<sup>12</sup> See *France Issues First Fine for Woman in Islamic Veil*, BBC News, 12 April 2011, posted at [www.bbc.co.uk](http://www.bbc.co.uk).

<sup>13</sup> See *Belgian Lawmakers Pass Burkha Ban*, BBC News, 29 April 2010, posted at <http://news.bbc.co.uk>.

<sup>14</sup> Quoted in *Damian Green Says Burkha Ban Would Be “Un-British”*, BBC News, 18 July 2010, posted at <http://news.bbc.co.uk>.

<sup>15</sup> See *Take It Off*, *The Economist*, 17 July 2010, at 53.

### [C] Religious Symbols and Secularism

Two queries are worth exploring: what defines a symbol as being “religious,” and what does “secularism” mean? First, President Sarkozy intones the *burkha* is not even a “religious” symbol. If that were literally true, then would the *burkha* be inconsistent with the French value of secularism? In other words, is there a conflict between arguing for a ban based on equality and arguing for a ban based on secularism?

Possibly, one reply is that no garment that renders a woman subservient, such as the *burkha*, could be justified as “religious.” A genuinely religious symbol would not do such a thing, so the problem it would pose would be not inequality but religiousness. Thus, arguably, the conflict between the two rationales is a false one: a symbol is incongruous with the value of equality or secularism, but not both. The problem with this reply involves delineation. If the dividing line between authentic and inauthentic symbols is the subservience of women, then what are the criteria for “subservience”? Does the requirement that Sikh men wear a turban and carry a dagger (even a small one) render women inferior? Further, how would a large, glittering cross of the type worn by some hip-hop musicians be viewed — a religious symbol, or an adornment to a gangster-type entertainment costume that conjures up images of abuse of women by men?

Second, in his speech, President Obama elides the topic as to what garments are legitimately “religious.” In doing so, President Obama manifests a characteristic common in modern-day America: moral relativism. In essence, he says “your clothes are your clothes, my clothes are my clothes, and they are all equally good. Focus on education.” President Sarkozy adopts a position of moral absolutism: “Not all garments and adornments are equal. Some clothes are better than others, and ones that demean women are worse than others.” At one level, the arguments of the two leaders are diametrically opposed. However, consider again the French Constitutional principle of secularism. On the one hand, secularism might be taken as an absolute value: no religious symbols are permitted in pursuit of separating the state and religion. If so, then the arguments of the French President are philosophically consistent. On the other hand, moral relativism might be viewed as a key feature of secularism: “secularism” judges all religions equal, and no one moral regime superior to another, and demands they be kept on the same level. If that is true, then the arguments of President Sarkozy might not be so consistent.

This fascinating debate has two negative side effects. First, it ignores an important point about Islam: there is moral, social, and legal significance to the dress — that is, the personal clothing attire — of both males and females. The debate focuses on women, but the *Shari’a* calls on men, too, to dress in an appropriate manner. Indeed, men and women are obliged to be modest in their dress, speech, and overall appearance. Second, the debate can create a misimpression, among Muslims and non-Muslims alike, that the test of fidelity to Islam is directly related to the conservativeness of dress. The specious view is that the more extensive the veil a woman wears, the more devout she must be; the more scantily clad a woman, the less devout of a Muslim she must be. The first side effect takes pressure off men. The second side effect exacerbates pressure on women.



### § 36.02 FIVE REQUIREMENTS FOR BOTH GENDERS

Both the "guide," which is the Qur'an, and the "guide to the guide," which is the *hadith*, offer assistance to Muslim men and women on appropriate clothing. There are four passages from the Qur'an that are critical:

- *Surah 24, ayah 30:*

<sup>30</sup>[Prophet], tell believing *men* to lower their gaze and guard their private parts: that is purer for them. God is well aware of everything they do.<sup>16</sup>

- *Surah 24, ayah 31:*

<sup>31</sup>And tell believing *women* that they should lower their gaze, guard their private parts, and not flaunt their charms beyond what [it is acceptable] to reveal; they should let their headscarves fall to cover their necklines and not reveal their charms except to their husbands, their fathers, their husbands' fathers, their sons, their husbands' sons, their brothers' sons, their sisters' sons, their womenfolk, their slaves, such men as attend them who have no sexual desire, or children who are not yet aware of women's nakedness; they should not stamp their feet so as to draw attention to any hidden charms. Believers, all of you, turn to God so that you may prosper.<sup>17</sup>

- *Surah 33, ayah 5:*

For *men and women* who are devoted to God — believing *men and women*, obedient *men and women*, humble *men and women*, charitable *men and women*, fasting *men and women*, chaste *men and women*, *men and women* who remember God often — God has prepared forgiveness and a rich reward.<sup>18</sup>

- *Surah 33, ayah 59:*

Prophet, tell your *wives*, your *daughters*, and *women* believers to make their outer garments hang low over them so as to be recognized and not insulted: God is most forgiving, most merciful.<sup>19</sup>

From these passages, the five basic obligations the *Shari'a* places on both genders emerge. In addition, *surah 24, ayah 31*, and *surah 33, ayah 59*, are bases for requirements particular to women.

First, in respect of obligations common to men and women, both are instructed to "lower their gaze." This instruction is not meant to be at odds with the western ideology of looking someone in the eye out of respect, nor the old-fashioned American western virtue (common in Kansas, for example) of "looking someone in the eye" in the sense of being honest, straightforward, and trustworthy. Rather, the Qur'an orders both men and women to lower their gaze if looking at the other

gender begins to elicit feelings of desire or impurity.<sup>20</sup> An initial glance at the opposite gender is permitted and is deemed innocent — and, in fact, is necessary in a practical sense of positioning people so as not to bump into them. But, subsequent gazing out of sexual desire is not permitted, as the *Shari'a* regards it as impure.<sup>21</sup> In other words, men and women are not to ogle one another. They are not to look at each other as sexual objects for their own sensual gratification. Rather, they are to regard each other with humility, and appreciate that all of them — men and women — have equal dignity that ultimately comes from God (Allāh). In that sense, the instruction in *surah 24, ayat 30-31* empowers both men and women, as it asks them to treat each other as fully human subjects, not material objects.

Moreover, "lowering their gaze" does not preclude normal observation. The overwhelming majority of scholars agree that looking without desire or temptation is permitted, just as 'Ā'isha, the favorite wife of Muhammad wife after Khadija, did. According to one *hadith*, the Prophet let 'Ā'isha watch Ethiopian men play with their spears on *Eid al-Fitr* (the celebration to signify the end of *Ramādān*) and *Eid al-Aḍha* (the celebration to mark the beginning of *Hajj*), until she felt she had watched enough.<sup>22</sup>

'Ā'isha said, "While the Ethiopians were playing with their small spears, Allāh's Apostle . . . screened me behind him and I watched (that display) and kept on watching till I left on my own." So you may estimate of what age a little girl may listen to amusement. ['Ā'isha was 15 years old at the time of the event.]<sup>23</sup>

Two inferences are possible: safety or segregation. First, the Prophet was protecting 'Ā'isha from the possibility of being hit by a spear. In turn, as per the majority view, "lowering their gaze" does not prohibit Muslim women from watching male athletes play sports, male actors in a dramatic production, or male musicians in concert. Second, the purpose of a screen is to preclude male performers from seeing them. If so, then the prohibition stands.

Context is a key qualification to the instruction to lower one's gaze, as well as to dress modestly. The dress requirements are relevant in the presence of a person of the opposite gender who is not a "*maḥram*." A "*maḥram*" (plural, "*maḥarim*") is a person who an individual is either not permitted to marry, or to whom the person already is married. Essentially, it means close family relatives of the opposite gender. Specifically, the Qur'an defines a "*maḥram*" for a female as her husband, father, father in law, son, husband's sons, brother, and nephews. Thus, the instruction is not applicable to a man or woman dealing with close family relatives, that is, with non-*maḥarim*.

<sup>20</sup> See FATMA UMAI NASEEF, *WOMEN IN ISLAM: A DISCOURSE IN RIGHTS AND OBLIGATIONS* 109 (Cairo, Egypt: International Islamic Committee for Women and Child, 1999). [Hereinafter, NASEEF.]

<sup>21</sup> See NASEEF, *supra*, at 109.

<sup>22</sup> See NASEEF, *supra*, at 109 (based on the *hadith* quoted above).

<sup>23</sup> THE TRANSLATION OF THE MEANINGS OF SAHIH AL-BUKHARI, ARABIC-ENGLISH by Dr. Muhammad Muhsin Khan, vol. VII, book LXII (The Book of *Nikāh* (Wedlock)), p. 86, *hadith* no. 118 and fn. 1 (Islamic University, Medina, Kingdom of Saudi Arabia: Dar Ahyā Us-Sunnah, Al Nabawiya, March 1978). [Hereinafter, BUKHARI.]

<sup>16</sup> THE QUR'AN — A New Translation by M.A.S. Abdel Haleem 24:30 at 222 (Oxford, England: Oxford University Press, 2004) (emphasis added). [Hereinafter, QUR'AN.]

<sup>17</sup> QUR'AN, *supra*, 24:31 at 222 (emphasis added).

<sup>18</sup> QUR'AN, *supra*, 33:35 at 269 (emphasis added).

<sup>19</sup> QUR'AN, *supra*, 33:59 at 271 (emphasis added).

Second, concerning modest dress, both men and women are directed to "guard their private parts." To what does the phrase "private parts" refer? The common understanding in the non-Muslim world is that it means, for men, the genitalia and buttocks. For women, it means the genitalia, buttocks, and breasts.

If this interpretation were the one held in the Muslim world, then it would imply neither men nor women should appear in public, i.e., in front of non-*maḥarim* (non-close family relatives) with these parts of their bodies exposed. It would be forbidden (*ḥarām*), therefore, for a Muslim man or woman to go nude to a nude beach, or topless to a topless beach — though being at such a beach, in suitable bathing clothes, would be a different matter. Conversely, hands and feet, arms and legs, head and neck, face, and portions of the mid-section and back, are not normally understood to be "private parts" — at least not throughout the non-Muslim world.

However, this interpretation is not commonly held in the Muslim world. It certainly is not the one most Muslim religious and legal scholars (*ulema* and *fukahā*, respectively) traditionally advocate. Rather, the key to the meaning of "private parts" is the Arabic word "*awrah*," which often is translated as "nakedness." Scholars have discussed and debated its meaning, and (as discussed below) arrived at a definition — or, better said, one definition for women, and another definition for men.

These basic instructions in *surah* 24, *ayah* 30-31 — to lower one's gaze and guard one's private parts — apply to men and women alike. They do not apply in all circumstances, however. Obviously, in the privacy of the home, and the intimate environment between a husband and wife, they are not pertinent. *Ayah* 31 makes this clear when it refers to the "*maḥarim*." The dress obligations incumbent on women apply to them when they are in public, that is, when they are in the presence of non-*maḥarim*. By extension, the instruction to lower one's gaze and guard one's private parts apply to men and women when persons other than close family relatives are present.

Third, dressing for the sake of vanity is prohibited. A woman should avoid choosing clothes on the basis of fame and pride.<sup>24</sup> Similarly, men should not seek glory, or be vainglorious, through their attire. This requirement is based on a consistent precept of the Prophet. He preached modesty in every aspect of appearance. An excessively fancy dress that is worn as a status symbol or to gain the admiration of others is inappropriate.

Fourth, cross-dressing is forbidden. A woman must avoid male costumes. Conversely, men must eschew garb distinctive to women. In one *ḥadīth*, *Imām* Bukhari records the narration of Ibn 'Abbās that:

Allāh's Apostle . . . cursed those men who are in the similitude (assume the manners) of women and those women who are in the similitude (assume the manners) of men.<sup>25</sup>

From this, Muslim religious and legal scholars (*fukahā* and *ulema*, respectively)

<sup>24</sup> See JAMAL BADIWI, Ph.D., *WOMEN UNDER THE SHADE OF ISLAM: A DISCOURSE ON WOMAN'S ISSUES 54* (Cairo, Egypt: El Falah for Translation, Publishing, and Distribution, 1997). [Hereinafter, BADIWI.]

<sup>25</sup> *BUKHARI, supra*, vol. VII, book LXXII (The Book of Dress), p. 513, *ḥadīth* no. 773.

understand that wearing attire or acting in a fashion to imitate the opposite gender is not desired. The distinct, complimentary nature and roles of women and men, as created by God (Allāh), justifies this understanding. To cross-dress is to obfuscate the gender distinctions with which Allāh created people, and thus is an affront to the Almighty.

Fifth, *surah* 33, *ayah* 35 is a passage commonly cited by women, including Muslim feminists, in respect of the fundamental equality of men and women in the eyes of God (Allāh). The passage does not discuss personal attire in particular — it is broader than that. It speaks of belief, obedience, humility, charity, abstinence (in the form of fasting and chastity), and remembrance. These characteristics are virtues in Islam, as indeed they are in Catholic Christianity. The passage assures all persons, male and female, that Heaven awaits them, should they practice these virtues in this life. This comfort is reinforced by one *ḥadīth* of the Prophet, narrated by Abū Huraira, speaks on the issue of women's dress, linking it to entry into Heaven:

Two are the types of the *denizens of Hell* whom I did not see: people having flogs like the tails of the ox with them and they would be beating people, and the *women who would be dressed but appear to be naked*, who would be inclined (to evil) and make their husbands incline towards it. Their heads would be like the *humps of the camels* inclined to one side. They will not enter Paradise and they would not smell its odor whereas its odor would be smelt from such and such distance.<sup>26</sup>

Likewise, in Catholic Christianity, the practice of these virtues matters for salvation. The link to dress is clear enough: men and women can practice virtue by the way they dress.

## § 36.03 SPECIAL REQUIREMENTS FOR WOMEN

### [A] Applicability

It is proper to start a discussion of the Islamic dress requirements peculiar to women with *surah* 24, *ayah* 31 of the Qur'ān. This passage contains specifications about appropriate attire for women that go beyond what *ayah* 30 states for men. To understand *ayah* 31, it is helpful to start mid-way through it, with the clause beginning with the word "except." That is because the "except clause," if it may be called that, establishes the environment or context in which the specifications are particularly relevant.

The "except clause" in *surah* 24, *ayah* 31 establishes that a woman is not obligated to cover in front of her *maḥarim* (husband or other close family

<sup>26</sup> *SANĪH MUSLIM — BEING TRADITIONS OF THE SAYINGS AND DEEDS OF THE PROPHET MUHAMMAD AS NARRATED BY HIS COMPANIONS AND COMPILED UNDER THE TITLE AL-JAM' US-SANĪH BY IMAM MUSLIM, REINTERPRETED INTO ENGLISH BY ABDUL HAMID SIDDIQI, WITH EXPLANATORY NOTES AND BRIEF BIOGRAPHICAL SKETCHES OF MAJOR NARRATORS, CORRECTED AND REVISED BY DR. HASSAN VOL. III.B, book 37 (Book Pertaining to Clothes and Decoration), pp. 419-420, ḥadīth no. 2128 (Lahore, Pakistan: Sh. Muhammad Ashraf Booksellers and Exporters, 1990).*



relatives).<sup>27</sup> In addition, a woman is not required to cover up in front of other free or slave women, or male servants with no desire (eunuchs). Finally, she need not don special coverings in front of small male children who have not attained the age of puberty.

It may be inferred that the category of "*maharim*" for a man is the same as for a woman, with the appropriate change from "husband" to "wife," and reference to his father, father in law, daughter, wife's daughters, brother, and nephews. In turn, the additional group of people in front of whom a female need not cover up entirely applies to males, with substitution of "female" for "male." Of course, for both adult women and men, the display of private parts to family members other than a spouse, is inappropriate.

### [B] Meaning of "*Awrah*"

Essential to understanding the Islamic dress code for women and men is the Arabic word "*awrah*." "*Awrah*" refers to the part of the body that should be covered at all times — the "private parts" in the language of *surah* 24, *ayah* 30-31.<sup>28</sup> There are two sets of requirements for covering the '*awrah* that apply to women in the presence of non-*maharim* persons: general and specific.

The general requirements are that clothing should be loose, thick, and modest. "Loose" need not be baggy. "Thick" refers to transparency more than weight. Light-weight materials made with the benefit of high technology, synthetic fabrics (such as Nike Dri-Fit or Adidas Clima-Cool) presumably are permissible, as long as they are not transparent or translucent. Clothing never should describe (in the sense of trace out by virtue of a tight fit) or reveal in detail what lies beneath that which it covers. "Modest" does not mean un-fashionable, let alone unappealing. Rather, "modest" refers to garments that are dignified and respectful. Additionally, clothing of vanity is not permitted, nor is it allowed to dress in clothes specific to men.<sup>29</sup>

The specific requirements for women are based on the work of the *ulema* and *fukahā'*. Traditionally, most *ulema* and *fukahā'* state that the "*awrah*" for a woman in front of men includes her entire body except for hands, face, and arguably feet, while her "*awrah*" in front of other women is from her navel to her knees.<sup>30</sup> That is, in front of non-*maharim* men, a woman needs to cover her arms down to her wrists, her legs down to her ankles (at least), head, and face. In front of non-*maharim* women, a woman may be topless, and be exposed beyond her knees.

As is true for women, for men there are two sets of requirements for covering the '*awrah* that apply to men in the presence of non-*maharim* persons: general and specific. The same general requirements for covering the '*awrah* apply to men as

well as women: the clothing should be loose, thick, and modest. Dress should never describe or reveal in detail what lies beneath the covering. Additionally, clothing of vanity is not permitted, nor is it allowed to dress in clothes specific to women.<sup>31</sup>

As to specific requirements, the *ulema* and *fukahā'* do not prescribe a dress code for men in the detailed way they do for women. Or, put differently, the scholars simply allow men to expose more of their body, because they define the "*awrah*" more narrowly, than they do for women. Traditionally, most of the *ulema* and *fukahā'* agree that the "*awrah*" for men is between the navel and the knee.<sup>32</sup> Thus, it is permissible for a Muslim male to wear a sleeveless shirt, or shorts that cover the knee. To be sure, in some parts of the Gulf region, such clothes are frowned upon, even for non-Muslims.

### [C] *Hijāb* (Veil) and "Descent of the *Hijāb*" in *Surah* 33, *Ayah* 53

The *Sharī'a* does not oblige men to cover their heads or faces. Women are, and thus the topic of the "*hijāb*" is joined. "*Hijāb*" literally means "a veil, curtain, or barrier."<sup>33</sup> It is a general term for any type of veil. Typically, it connotes a headscarf, of which there is a myriad of styles and colors. In the non-Muslim world, the most common type of *hijāb* is a square- or rectangular-shaped scarf worn over the head and neck, which leaves the full face clearly exposed. Some women wear this kind of *hijāb* loosely, showing a bit of hair; others wear it tightly, scrupulously endeavoring to reveal no hair.

The passage in the Qur'ān most directly relevant to the *hijāb* is *surah* 33, *ayah* 53. This passage is as the "Descent of *Hijāb*," (or better put in English, the "Descent of the *Hijāb*"). It is widely discussed in the Four *Sunnite* Schools, and the prominent *Shī'ite* sects, and it was revealed after the Prophet Muhammad married Zaynab.<sup>34</sup>

The story behind the Descent of the *Hijāb* itself sets the context for the passage. On the occasion of the wedding of Muhammad and Zaynab, a gentleman named Anas Ibn Malik, one of the Companions of the Prophet (*Ṣahābah*), lingered with a couple of other guests at the wedding dinner party longer than everyone else. He did so to the dismay of Muhammad, who was waiting to spend time with his new bride. Because Muhammad was by nature a shy individual, he was too bashful to say anything to Anas. At this moment, a verse of the Qur'ān was revealed. *Surah* 33, *ayah* 53 states:

Believers, do not enter the Prophet's apartments for a meal unless you are given permission to do so; do not linger until [a meal] is ready. When you are invited, enter; then, when you have taken your meal, depart. Do not stay on and talk for that would offend the Prophet, though he would shrink

<sup>27</sup> Notably, under Saudi law, only a *maharim* can travel with a single woman to Mecca to perform the *Hajj*. No other man is authorized to go on *Hajj* with her.

<sup>28</sup> See BADAWI, *supra*, at 55.

<sup>29</sup> See BADAWI, *supra*, at 56.

<sup>30</sup> See BADAWI, *supra*, at 55.

<sup>31</sup> See BADAWI, *supra*, at 56.

<sup>32</sup> See BADAWI, *supra*, at 55.

<sup>33</sup> See FATIMA MERNISSI, *THE VEIL AND THE MALE ELITE* 85 (Reading, Massachusetts: Addison-Wesley Publishing Company, Inc., 1991). [Hereinafter, MERNISSI.]

<sup>34</sup> See MERNISSI, *supra*, at 85.

from asking you to leave. God does not shrink from the truth. *When you ask his wives for something, do so from behind a screen: this is purer both for your hearts and for theirs.* It is not right for you to offend God's Messenger, just as you should never marry his wives after him: that would be grievous in God's eyes.<sup>35</sup>

In effect, the verse contained not only an order to individuals dealing with a wife of Muhammad, but also an instruction to Muhammad himself, namely, to place a *hijāb*, or curtain, between his new wife and the other believing men — that is, between Zaynab and the over-staying guest, Anas Ibn Malik.<sup>36</sup>

This passage was the first of its kind Qur'ān. No previously revealed verse had introduced a *hijāb* for women, nor ordered a division in the space of Muslims between women and men. Based on this passage, two *Sunnite* Schools — the *Shāfi'i* and *Hanbali* — derived the requirement for women that they wear a "*niqāb*," A "*niqāb*," also called a "*burkha*," is a full face and hand covering.<sup>37</sup> However, a technical distinction exists between the two types of veil. A "*burkha*" covers the entire face, as well as body. It has a mesh screen through which a woman sees, or if not, the woman simply has to peer through the fabric of which her *burkha* is made. A "*niqāb*" leaves the eyes uncovered, with a narrow opening for them, and is worn with an accompanying headscarf. A separate veil, covering the eyes, may or may not be worn with the "*niqāb*."

The derivation of the apparel obligation for women by the *Shāfi'i* and *Hanbali* Schools is an extension, and appears based in part on analogical reasoning (*qiyās*). Yet, whether there is or even can or should be an analogy between the wives of the Prophet and other women is debatable. Thus, in contrast to the *Shāfi'i* and *Hanbali* Schools, the *Hanafi* and *Māliki* Schools view *surah* 33, *ayah* 53 as bounded by time and place. They regard the passage as a unique command to the wives of the Prophet to conceal themselves visually from the eyes of the men at the time. The *Hanafi* and *Māliki* School draw no analogy from the passage to women other than the wives of the Prophet.

There is an obvious comment that may be made in respect of the interpretations of the Descent of the *Hijāb* offered by all Four of the Schools. All Four Schools examine the italicized language above and identify the pertinent issue as what covering, if any, should be placed on women. But, a straightforward reading of this language alone, without recourse to any other text or to *hadith*, clearly indicates all it demands is that a "screen" exist between men and the wives of the Prophet (or by extension, all women), and that men speak to the wives (or any woman) from behind it. Taking this passage at its plain meaning, there are three ways to satisfy what it requires:

- (1) Put a veil over the wives of the Prophet (or all women);
- (2) Put a veil over men; or

<sup>35</sup> Qur'AN, *supra*, 33:53 at 270 (emphasis added).

<sup>36</sup> See MORRIS, *supra*, at 85.

<sup>37</sup> See NABEEL, *supra*, at 109.

- (3) Put a veil in between the two groups (*e.g.*, attaching it to a ceiling or wall, or using a portable screen).

Why, then, do the *ulema* and *fukahā'* focus only on the first method?

One answer is the scholars are largely, if not exclusively, men. They have no interest in veiling themselves and other men. Insofar as the custom and practice on the Arabian Peninsula at the time of the Prophet was for women to adorn a head covering, it was easy for the scholars at that time and in the subsequent decades and centuries to maintain continuity with traditional dress behavior. Consequently, it may be speculated that the scholars never regarded the second method as a serious option. The third option, perhaps, was judged by them to be cumbersome and inconvenient.

There is a second answer, which on occasion some Muslim men admit in private. Men may be prone to look at women in a sexual manner — to "check them out," in common American parlance. A veil protects women from the wandering eyes of men. To protect women in this manner is to respect, and even exalt, them. This answer is seriously flawed and easily rebutted. Assuming the problem is the greater propensity of men to cast impure glances at women than *vice versa*, then why penalize women for the weakness of men by requiring them to veil? Why not, instead, endeavor to change the hearts of men, to strengthen them through education and prayer as to the proper ways in which they ought to relate to women? Why not allow for freedom of choice for both men and women as to all three options, and create space for creativity to develop yet more options?

## § 36.04 FIVE PRACTICAL DRESS REQUIREMENTS SPECIFIC TO WOMEN

What, in a practical sense, must or ought Muslim women wear in public? There is no easy answer to this question, which of course demands a workable, everyday response. The passages in the Qur'ān quoted earlier, particularly *surah* 24, *ayah* 31, speak to the adornment of Muslim women, specifically the permissibility of revealing what "is acceptable to reveal," and veiling the rest. Professor Abdel Haleem offers the following observation about what this phrase means:

Literally, ["beyond what is acceptable to reveal"] means "beyond what [ordinarily] shows." *This phrase is ambiguous in Arabic.* Recourse is commonly made to the *hadith* (Prophetic tradition), which uses the same verb *dahara* in the sense of it being permissible for a woman to show only her face and her hands in front of strangers.<sup>38</sup>

Simply put, in the face of ambiguity, Islamic scholars logically looked to the *hadith*, wherein they found an appropriate verb. They defined that verb in terms of the custom and practice on women's dress on the Arabian Peninsula during the life of Muhammad. Yet, even in that era, it was permissible for a woman to show her face and hands.

<sup>38</sup> Qur'AN, *supra*, fn. a to 24:31 at 222 (emphasis added).



What are the practical requirements today? Many Muslim women follow the strictest of interpretations, covering their entire bodies and faces. Others follow the interpretation just mentioned, showing only their faces and hands. Still others dress in a manner indistinguishable from non-Muslim women. In other words, Muslim women are hardly monolithic in how they answer the question. Many cosmopolitan Muslim cities readily reveal the wide continuum: in places such as Cairo, Istanbul, Jakarta, Lahore, and Kuala Lumpur, Muslim women at all points on the continuum can be seen.

Dr. Jamal Badawi, an Egyptian-American scholar, summarizes the opinions of the Four *Sunni* Schools on *surah* 24, *ayah* 31 of the Qur'ān. He concludes over the centuries a consensus (*ijma'*) has emerged across them. In particular, most *ulema* and *fukahā'*, respectively, derive and agree upon three main rulings from *ayah* 31:<sup>39</sup>

1. A Muslim woman should not display her beauty and adornment (*zeenah*), except for "that which must ordinarily appear of it" (in Arabic, "*ma thahara minhā*"), or "that which is apparent"<sup>40</sup> —

The word "*zeenah*" is a broad one. It can express natural or bodily beauty. It also can express an acquired adornment, such as rings, bracelets, or even clothes themselves. It can be translated as "charms," as it is in the above rendition of *surah* 24, *ayah* 31. In yet other parts of the Qur'ān, "*zeenah*" refers to children, wealth, and natural beauty.<sup>41</sup>

According to the *ijma'* of the scholars, including the *Hanafi*, *Māliki*, *Shāfi'i*, plus some scholars in the *Hanbali* School, "*zeenah*" in the context of *ayah* 31 comprises all of the body of a woman, except for the following portions:

- Face and hands —

It is generally understood that "hands" start at the wrist, thus covering should extend to the wrist. Apparently, then, normally a wristwatch would be hidden. As for the "face," evidently from the diversity of veils in the Islamic world, there is debate as to whether certain features — such as the forehead, eyes, nose, mouth, cheeks, and chin — count as part of the "face" and thus need not be covered. Notably, scholars exempt the "face" (and hands) by referring to the dress requirements for women during the *Hajj*. During the Pilgrimage, a Muslim woman is not allowed to cover her face and hands, but is required to cover everything else. Similarly, during prayer, a Muslim woman is to cover all but her face and hands (and her feet, depending on which scholar is followed).

- That which appears naturally or during an uncontrollable situation —

For example, wedding rings, jewelry, and what may appear when the wind blows. Note, however, that hand jewelry is not a liberalization in terms what women can display, as they are permitted to display their hands.

Accordingly, face, hands, and features or adornments that appear naturally, or in an

uncontrollable environment, are exempt from the command in *ayah* 31 that women "not flaunt their charms."

What about the feet of a woman, and adornments on it — must they be covered? The scholars differ on whether the feet of a woman are considered "*zeenah*." Some urge that feet, and adornments on it such as anklets or toe rings, are not to be displayed.

It may be observed not all men agree, in a subjective sense, to a broad definition of "*zeenah*." That also is true in respect of women in respect of men. Quite obviously, in real life, different features of a person of the opposite gender attract different people. Some may indeed be captivated by hands, while others by eyes or legs, and so forth.

2. Women are to draw their head covering over their neck to cover their breasts —

The word "*khumūr*" is the plural of the Arabic word "*khimār*," which means "head cover," or "veil covering the head." Additionally, the word "*juyūb*" is the plural of the Arabic word "*jāyib*," the primary meaning of which is the neck slit of a dress. "*Juyūb*" also has a secondary meaning, which is connected logically to the first meaning, and that is the bosom or bust of a woman.

Scholars opine that the wording of *ayah* 31 indicates "*khumūr*" were not introduced as an article of clothing for women by that verse. In other words, the scholars agree *ayah* 31 implies cloaks already existed at the time of the revelation of this passage. Consequently, *ayah* 31 demands that the scholars render an interpretation that alters a familiar article of clothing — or, more specifically, the way and purpose for which it is used.

The resulting interpretation is that *ayah* 31 calls on women to draw their "*khimār*" (head covering) over the area of their neck and below (the neck line). The purpose for doing so is that their bosoms are covered in front of all males, with the exception of their *maḥarim* (husband or other close family relatives).

3. Women are prohibited from "stamp[ing] their feet so as to draw attention to any hidden ornaments"<sup>42</sup> —

The verse concerns a woman wearing hidden anklets that make noise when she stamps her feet.<sup>43</sup> The practice aims to entice the sexual curiosity of men as to what is covered beneath the dress of the woman. *Ayah* 31 states women "should" not engage in this practice, though Muslim scholars have interpreted the verb as "shall" — a prohibition.

Many scholars extend this prohibition to other items, such as perfume, because such items are a "hidden ornament" they argue are intended to arouse the sexual curiosity of men. That is, scholars group "hidden ornaments" together and apply *qiyās*, analogizing them to feet-stomping with concealed anklets, and ban all such articles.

<sup>39</sup> See BADAWI, *supra*, at 49-54.

<sup>40</sup> See BADAWI, *supra*, at 49.

<sup>41</sup> See, e.g., the following *surat* and *ayat*: 3:14, 16:8, 17:47, and 37:6.

<sup>42</sup> QUR'AN, *supra*, fn. a to 24:31 at 222.

<sup>43</sup> See NASEEF, *supra*, at 111.

In addition to these three rules, there are two requirements. They do not have the degree of widespread acceptance among the scholars of the Four Schools as do the three rules. Still, they are important and attract considerable support among scholars.

#### 4. Looseness and thickness —

The fourth requirement as to dress appropriate for a Muslim woman is based on a *ḥadīth* narrated by Abū Huraira (quoted above). That *ḥadīth* mentions women who are dressed, but whose dress seduces men, because the wearer appears almost naked, as the garment is tight, thin, or both.<sup>44</sup> The clothing of a Muslim woman must be loose and thick enough so as not to describe the shape of her body or skin, specifically, her bust line, waist, buttocks, and thighs. As for the metaphor of camel humps in the *ḥadīth*, scholars urge they signify hairstyles that are so elaborate and obvious that they reveal to men what lies beneath the *khimār*. Such hairstyles undermine the purpose of the *khimār*. Thus, while *surah* 24, *ayat* 30-31 focus on the extent of covering, the *ḥadīth* narrated by Abū Huraira speaks to the kind of covering permitted: one that is loose, not too thin, and does not explicitly reveal the body shape of the wearer.

According to another *ḥadīth*, related in Musnad Ahmad, the Prophet once received a thick garment as a gift, which he in turn gave to Osama bin Zayd. Osama then gave the garment to his wife. When Osama told Muhammad he had given the garment to his wife, Muhammad said to Osama:

Ask her to use a *gholalah* under it (the garment) for I fear that it may describe the size of her bones.<sup>45</sup>

A "*gholalah*" is an under-garment, worn under clothing, such as a dress, and is akin to a ladies slip under dresses or skirts in modern times.<sup>46</sup> By wearing a *gholalah*, which is made of thick fabric, the body shape of a woman is not delineated by her outer garment. Here, again, is a *ḥadīth* focusing on the looseness of women's clothes: the initial gift was a thick garment, but it was not loose enough to prevent men from capturing the contours of the body of the wife of Osama.

What about outer—rather than under-garments, that is, cloaks of a sort? What rules apply to them? *Surah* 33, *ayah* 59 (quoted earlier) asks all believing women, as well as the wives and daughters of the Prophet, to draw cloaks over their bodies, so that they may be recognized as Muslims and not molested. But, some Muslim scholars, including Dr. Badawi, argue as long as an outer dress satisfies the rules above — it covers everything but the hands and face, and it is loose and thick — then no additional cloak is necessary.<sup>47</sup>

*Surah* 33, *ayah* 59 mentions two purposes for a cloak: not being insulted (e.g., avoiding molestation), and being recognized. The second purpose is about identification as a Muslim woman. Scholars regard a cloak as an indicator of modesty.

<sup>44</sup> See BADAWI, *supra*, at 51-52.

<sup>45</sup> See BADAWI, *supra*, at 51.

<sup>46</sup> See BADAWI, *supra*, at 51.

<sup>47</sup> See BADAWI, *supra*, at 52.

Modest clothing rightly identifies a woman in public as a Muslim. Conversely, scant, thin, tight clothing ought not to be the hallmark of her dress. If attention comes to a Muslim woman because of her clothing, then it should be to ward off harassment and men who look lustfully at her body. Thus, a *ḥijāb* is meant to broadcast that its wearer is a Muslim who does not want to be subject to harassment or concupiscence.

Of course, the same comment offered earlier may be repeated here: insofar as the problem is the weakness and disordered behavior of some men, why attempt to remedy the problem by imposing onerous sartorial requirements on women, instead of educating men in virtue? The answer to this point implicates the Qur'an itself and whether it is interpreted and susceptible to independent reasoning (*ijtihad*). If it is accepted as the literal and invariant word of God (Allāh), then there is little room for maneuver.

#### 5. Alluring Garments —

There is yet a fifth requirement as to dress that is specific to women. The overall appearance of a woman should not be one that attracts the attention of men to her beauty.<sup>48</sup> After all, the purpose of the female dress requirements is to conceal the *zeenah* (beauty, adornments, or charms). The Qur'an asked the Prophet's wives to "bedizen [i.e., ornament] not yourselves with the bedizenment of the Time of Ignorance."<sup>49</sup> Many Muslim women look to the wives of the Prophet as an example in dress. In turn, Muslim scholars agree that women must abstain from dress that is attractive and draws the attention of men who are not their *maharim* (husband or other close family relatives).

Two observations are pertinent. First, scholars ground this rule on aspiration. Based on role models of dress by some Muslim women, some male scholars fashion an obligation for women. The fact these women believe the proper guidance on dress for them is the attire of wives of Muhammad does not, by itself, mean all women must dress like those wives. Yet, some scholars turn an "ought" of some into a "shall" for all.

Second, the entire paradigm as to covering beauty stands in stark contrast to most of the non-Muslim world. Asked directly, query whether in the Islamic paradigm, coverage of beauty is mandated because beauty and sexuality are confused. Is it always the case that to see the outlines of the body of a woman, or certain of her features, is to desire her in a carnal manner? Or, is it possible those contours and features are appreciated as intrinsically beautiful, and admired with humility as evidence of the creative genius of God? Artists throughout the non-Muslim world answer this question in different ways through their depictions of women on canvases, as well as through the dances they choreograph and music they perform. Even in Muslim history, there are periods in which art exalts the beauty of the female form, full stop. One example is the Mogul Empire, specifically, depictions in Rajasthani paintings of Mogul court scenes. Women are routinely depicted in attire that does not satisfy all five rules.

<sup>48</sup> See BADAWI, *supra*, at 54.

<sup>49</sup> See BADAWI, *supra*, at 53.



§ 36.05 DIFFERENCES AMONG FOUR SCHOOLS ON  
‘AWRAH (PRIVATE PARTS), HĪJĀB (VEIL), AND  
NIQĀB (FULL-FACE VEIL)

The five requirements for women are common to all Four *Sunni* Schools. However, among and even within the Schools, there are debates about what women must, or at least should, wear. The starting point for these debates is the Arabic word “*awrah*.” “*Awrah*” refers to the parts of the body to be covered at all times in public — the “private parts” in the language of *surah* 24, *ayah* 30-31. The *Hanafi* and *Mālikis* Schools take the most liberal approach to women’s dress, the *Hanbali* School takes the most conservative path, and the *Shāfi’i* School is split. Table 36-2 summarizes the differences.

[A] *Hanafi* and *Mālikis* Schools

The *Hanafi* and *Mālikis* Schools hold the opinion the “*awrah*” consists of everything except for the face, hands, and sometimes the feet.<sup>50</sup> Thus, these Schools regard the *hijāb* (veil or curtain) — that is, a legitimate *hijāb* that conforms to Islamic dress requirements — as clothing that covers everything except those three areas. The *hijāb* also must adhere to the requirements of looseness, thickness, and overall modesty.

The *Hanafi* School does not require a *niqāb* (or a *burkha*) for believing women other than the wives of the Prophet, with one exception. *Hanafi* scholars encourage a very beautiful woman, or a woman with makeup, to cover her face in front of men to avoid attracting men who may look at her in a lustful manner.<sup>51</sup> This view immediately conjures up the adage “beauty is in the eye of the beholder,” because it begs the question of who is a “very beautiful” woman. Generally, however, *Hanafis* and *Mālikis* explain *surah* 24, *ayah* 31 regarding the *hijāb*, and *niqāb* specifically, as a special *sui generis* command for the wives of Muhammad. It is designed to keep them only visibly, but not intellectually or socially, absent from the eyes of the men at the time. (Ironically, this explanation is an instance of commission by Islamic scholars of the Orientalist Fallacy.)

The *Hanafi* and *Mālikis* Schools rely on three pieces of evidence to support their opinion a woman is not required to cover her face and hands. First, they point to a Qur’anic passage: “[Prophet], tell believing men to lower their gaze. . . .”<sup>52</sup> The scholars remark that if women were to cover completely their entire bodies, including their face, then there would be no need for men to lower their gaze. There would be nothing for men to look at in the first place, as the entirety of the woman would be cloaked.<sup>53</sup>

Table 36-2:  
Summary of Differences on Apparel Requirements for Women among the Four  
*Sunni* Schools

School	Definition of “ <i>Awrah</i> ” (i.e., parts of the body of a woman that must be cov- ered at all times)	Specifications for a <i>Hijāb</i> (Veil)	Is a Face Veil ( <i>Burkha</i> or <i>Niqāb</i> ) Required for Women Other Than the Wives of the Prophet Muhammad?
<i>Hanafi</i>	All parts, except the face, hands, and feet.	Covers all parts, except the face, hands, and feet. Must be loose, thick, and modest.	No, except for a very beauti- ful woman, or a woman who wears make up.
<i>Mālikis</i>	All parts, except the face, hands, and feet.	Covers all parts, except the face, hands, and feet. Must be loose, thick, and modest.	No, except for a very beauti- ful woman, or a woman who wears make up.
<i>Hanbali</i>	The entire body.	Covers the entire body. Must be loose, thick, and modest.	Yes.
<i>Shāfi’i</i>	Majority View: The entire body.  Minority View: All parts, except the face, hands, and feet.	Majority View: Covers the entire body.  Minority View: Covers all parts, except the face, hands, and feet.  Both Majority and Minority Views:  Must be loose, thick, and modest.	Majority View: Yes, except for business transactions, giving testi- mony, medical purposes, and meeting a suitor for marriage.  Minority View: No, except for a very beauti- ful woman, or a woman who wears make up.

Second, the *Hanafi* and *Mālikis* School scholars cite a *ḥadīth* found in *Imām* Malik’s famous book, *Al Muwaṭṭa’*. (This work, which took *Imām* Malik roughly 40 years to complete, not only compiles and discusses the *Sharī’a*, but also collects 1,720 *ḥadīths*.) In that *ḥadīth*, it is recorded that during the *Hajj*, Muslim women used to walk by Asma’a, the sister in law of the Prophet. Asma’a would not order the other women to take off their *niqāb*, even though she herself did not wear the *niqāb* during the *Hajj*.<sup>54</sup> From this account, *Imām* Malik deduces that women were not obligated to cover their faces, even though some chose to wear the *niqāb* independently in emulation of the wives of Muhammad.<sup>55</sup> *Hanafi* and *Mālikis* School

<sup>50</sup> See ABDULRAHMAN AL JAZAIRI, *FIRH OF THE FOUR SCHOOLS* vol. 5 at 1015 (Beirut, Lebanon: Dar Al-Kutub Al-Ilmiyah, 2003). [Hereinafter, AL JAZAIRI.] Sheikh Al Jazairi lived from 1299 to 1360 A.H.

<sup>51</sup> See AL JAZAIRI, *supra*, vol. 5 at 1015.

<sup>52</sup> QUR’AN, *supra*, fl. a to 24:30 at 222.

<sup>53</sup> See AL JAZAIRI, *supra*, vol. 5 at 1015.

<sup>54</sup> See AL JAZAIRI, *supra*, vol. 5 at 1015.

<sup>55</sup> See AL JAZAIRI, *supra*, vol. 5 at 1015.

scholars accept this logic.

Third, there is a *ḥadīth* that *Hanafi* and *Mālikis* School scholars use to support the proposition that women were unidentifiable upon going to the mosque during the time of the Prophet. They were unidentifiable not because they covered their faces, but because of the darkness of the night. 'Ā'isha narrated the relevant *ḥadīth*:

Allah's Apostle . . . used to offer *Fajr* [dawn] prayer and some believing women covered with their veiling sheets used to attend the *Fajr* prayer with him and then they would return to their homes unrecognized.<sup>56</sup>

Some scholars interpret this *ḥadīth* to mean that women were not necessarily fully covered, including their faces, at the *fajr* prayer. Because it was the dawn prayer, it was still too dark to identify anyone, including men versus women.

### [B] *Ḥanbalī* School

The *Ḥanbalī* School regards the entire body of the woman as "*awrah*." They base this holding on the passage in the Qur'ānic that instructs men to speak to the wives of the Prophet only from behind a curtain.<sup>57</sup> Because the wives of Muhammad are highly esteemed in Islamic tradition, this School regards the emulation of their actions as necessary for all believing women.<sup>58</sup> Put differently, *Ḥanbalī* scholars transform this high regard into a mandate: all women must don a *niqāb*.

In addition, *Ḥanbalī* School scholars also cite a *ḥadīth* narrated by 'Ā'isha:

The riders would pass by us while we were with the Messenger of Allah. . . . When they got close to use, we would draw our outer cloak from our heads and cover our faces. When they passed by, we would uncover our faces.<sup>59</sup>

This verse, the *Hanbalis* claim, concerns the *niqāb* and its prevalence among believing women during the time of the Prophet. Yet, read literally, it speaks of coverage only when "riders" passed close to women when they accompanied Muhammad. Evidently, the women otherwise were not covering their faces — a fact the last sentence confirms.

### [C] *Shāfi'i* School

The *Shāfi'i* School does not have a single opinion on special requirements for the personal attire of women. Rather, the scholars in this School are split. The minority of *Shāfi'i* scholars endorses the same opinion held by the *Hanafis* and *Mālikis* as to the meaning of "*awrah*" — it excludes face, hand, and feet — and the applicability of the *niqāb* to women other than the wives of Muhammad. Like the *Hanafi* and *Mālikī* School opinions, the *Shāfi'i* School recommends that a woman wear a *niqāb*

if she is extremely attractive, or is wearing makeup, so as to avoid the covetous looks of men.<sup>60</sup>

However, the majority of *Shāfi'i* scholars agree with the *Ḥanbalī* view that the entire body of a woman is "*awrah*," including the face and hands.<sup>61</sup> The *Shāfi'i* majority allows for a few exceptions, wherein a woman can expose her face and hands. Examples include during business transactions, giving testimony, medical purposes, and when sitting with a suitor a woman is considering marrying.<sup>62</sup>

<sup>56</sup> BUKHARI, *supra*, vol. I, book VIII (The Book of *Ṣalāt* (Prayer)), p. 225, *ḥadīth* no. 368.

<sup>57</sup> See AL-JAZAIRI, *supra*, vol. 5 at 1015.

<sup>58</sup> See AL-JAZAIRI, *supra*, vol. 5 at 1015.

<sup>59</sup> This *ḥadīth* is recounted in IMAM AHMAD, *ABU DAWUD*, and *IBN MAJAH*.

<sup>60</sup> See NASEEF, *supra*, at 114.

<sup>61</sup> See AL-JAZAIRI, *supra*, vol. 5 at 1015.

<sup>62</sup> See AL-JAZAIRI, *supra*, vol. 5 at 1015.



## Chapter 37

### WOMEN AND WORK

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Now, let me be clear: Issues of women's equality are by no means simply an issue for Islam. In Turkey, Pakistan, Bangladesh, Indonesia, we've seen Muslim-majority countries elect a woman to lead. Meanwhile, the struggle for women's equality continues in many aspects of American life, and in countries around the world.

I am convinced that our daughters can contribute just as much to society as our sons. (Applause.) Our common prosperity will be advanced by allowing all humanity — men and women — to reach their full potential. I do not believe that women must make the same choices as men in order to be equal, and I respect those women who choose to live their lives in traditional roles. But it should be their choice. And that is why the United States will partner with any Muslim-majority country to support expanded literacy for girls, and to help young women pursue employment through micro-financing that helps people live their dreams. (Applause.)

President Barack H. Obama,  
*On A New Beginning*, Speech at Cairo University,  
Cairo, Egypt, 4 June 2009

#### SYNOPSIS

##### § 37.01 BASIC EQUALITY

##### § 37.02 TRADITIONAL ROLES

##### § 37.03 EMPLOYMENT OUTSIDE HOME

- [A] Issue At Stake
- [B] No Prohibition
- [C] Three Criteria
- [D] Trend toward Reform

##### § 37.04 WOMEN AS HEADS OF STATE

- [A] Arguments Based on Qur'ān and *Hadith*
- [B] Other Arguments
- [C] Apprehension

##### § 37.05 MUSLIM FEMINISM

- [A] Not Monolithic
- [B] Controversial Thesis of Irshad Manji

### § 37.01 BASIC EQUALITY

Consider the following facts about women, work, pay, and poverty:<sup>1</sup>

- Around the world, one in every four households is headed by a woman.
- In the developing world, women are responsible for between 60 and 80 percent of crop production.
- In most countries, women work approximately twice the unpaid time that men work.
- Of the 1.3 billion poor people in the world, nearly 70 percent are women.

Is religion "to blame" for these stark, depressing facts? Put precisely, among Islamic nations and Muslim communities in non-Muslim countries, is the *Shari'a* to blame?

This question ought not to be, and indeed cannot properly be, answered in the aggregate. Each fact must be assessed in terms of its peculiar causal factors and context. Thus, a broadside attack on Islam, faulting it for the plight of women, would be unfair and erroneous. However, a more focused inquiry, which does bear directly on the status and empowerment of women, may be pursued: does the *Shari'a* permit women to work outside the home, in the public sphere?

The answer is a resounding "yes." There is a general consensus (*ijma'*) among Islamic religious and legal scholars (*ulema* and, respectively, *fukahā'*) that no evidence exists to prohibit a Muslim woman from working outside the home, that is, in the public sphere. Certainly, traditional Islamic teachings place utmost emphasis on the roles of a woman as a mother and a wife.<sup>2</sup> To be a mother and wife is to have a near sacred status, because these roles embrace the femininity of a woman. Accordingly, Muslim scholars tend to view these roles as defining the primary priorities in the life of a woman.

They are not alone in this regard. There are parallels in traditional Catholic Christian culture, and in traditional American society. However, two points are of critical importance across all religions and legal systems. First, a woman ought not be excluded from the labor force (for example, on the excuse that she "must" attend to the home and hearth). Second, the choice of priorities (for example, to focus on her education and career during part of all of her child-bearing years) ultimately ought to be up to her. These points have at times been forgotten, in Muslim and non-Muslim contexts alike.

On what is the consensus (*ijma'*) of Islamic scholars concerning the permissibility of women to work in the public sphere based? The most important source is the Qur'an itself. The Qur'an advocates equality of women and men in *surah* 3, *ayah* 194-195:

<sup>1</sup> See Catholic Relief Services, *A Mother's Love — Letter from CRS President Ken Hackett*, CRS Briefing, May 2010, posted at [http://donate.crs.org/site/MessageViewer?em\\_id=19281.0&printer-friendly=1](http://donate.crs.org/site/MessageViewer?em_id=19281.0&printer-friendly=1). The statistics are as of May 2010.

<sup>2</sup> See JAMAL BADAWI, Ph.D., *GENDER EQUITY IN ISLAMIC BASIC PRINCIPLES* 18 (Soltan Publishing Co. IMC, USA: Egypt, 1995). [Hereinafter, *GENDER EQUITY*.]

<sup>194</sup>Our Lord! Bestow upon us all that You have promised us through Your messengers — do not humiliate us on the Day of Resurrection [*i.e.*, Day of Judgment] — You never break Your promise." <sup>195</sup>Their Lord has answered them: "I will not allow the deeds of any one of you to be lost, *whether you are male or female, each is like the other* [in rewards]."<sup>3</sup>

As to the phrase "each is like the other," Professor Abdel Haleem observes the literal Arabic wording is:

"you come from each other," *i.e.*, you are *equal*.<sup>4</sup>

Another verse, *surah* 16, *ayah* 97, states:

To whoever, *male or female*, does good deeds and has faith, We shall give a good life and reward them according to the best of their actions.<sup>5</sup>

In brief, the Qur'an establishes equality between the sexes, notes the inherent similarities between them, and promises an equal reward for both in return for good works.

From these general passages, the permissibility of Muslim women working in the public sphere follows logically by deduction. Men can and do work outside the home. Men and women enjoy equality with God (Allāh), who sees the deeds of each person and promises to each one a just reward not tethered to gender. Hence, women can work, too.

That is not to say women are equal in all respects in the labor force. True Islamic feminism is not aimed at granting females the identical rights of males. This observation also holds for non-Muslim feminism. In both contexts, women need distinctive rights, such as generous maternity leave with pay, or reasonable accommodations and flexibility for childcare. Rather, Islamic feminism centers on the right of women to engage in society with dignity, honor, and respect, while taking into consideration any differences that may exist between the male and female biological makeup.

Like non-Muslim men and women, Muslim men and women are encouraged to take lawful and respectful jobs. The Qur'an states in *surah* 9, *ayah* 105:

Say [Prophet], "Take action! *God will see your actions* — as will His Messenger and the believers — and then you will be returned to Him who knows what is seen and unseen and He will tell you what you have been doing."<sup>6</sup>

This *ayah* does not exempt women. God (Allāh) is omniscient. He knows whether a person — man or woman — is engaged in illegal activities or disreputable work. The encouragement for Muslims is based on the religious law of Islam, the *Shari'a*, and thereafter reinforced by any additional secular or modernist legislation in the

<sup>3</sup> THE QUR'AN — *A New Translation* by M.A.S. Abdel Haleem 3:194-195 at 49 (Oxford, England: Oxford University Press, 2004) (emphasis added). [Hereinafter, QUR'AN.]

<sup>4</sup> QUR'AN, *supra*, fn. a at 49 (emphasis added).

<sup>5</sup> QUR'AN, *supra*, 16:97 at 172 (emphasis added).

<sup>6</sup> QUR'AN, *supra*, 9:105 at 125 (emphasis added).



jurisdiction in which they reside. For non-Muslims, the encouragement to take up employment that is legal and reputable also has sacred and secular backing. The religious tradition, such as Judaism or Christianity, as well as the relevant legal regime, such as United States federal or state law, would provide that backing. Which justification — the commandment of God, or the requirements of the legal system — are of primary importance to steer a person from illicit, disreputable jobs? The answer, for Muslims and non-Muslims, and men and women, depends on the disposition of the individual toward religion.

In addition to Qur'anic passages, there is a pragmatic justification in favor of women working in the public sphere. Dr. Yusuf Al Qaradawi (1926-), a prominent and controversial Egyptian Islamic scholar, rationalizes that because women comprise 50 percent of a population, one cannot expect 50 percent of a population to abstain from activity and contribution to society.<sup>7</sup> It is unjust for a society to expect a woman to contribute to it by birthing and raising children, but then require her to abstain from intellectual and social benefits society offers, including benefits obtained through work.

### § 37.02 TRADITIONAL ROLES

Across all time and religious tradition, scholars uphold the role of a mother in the upbringing and education of her children. Typically, they place special emphasis on that role during the early years of the life of a child, when the special bonding process between mother and child occurs. But, throughout the life of the child, to use common American expressions, "Mom is Mom," and "there is no substitute for Mom."

In Islam and Catholic Christianity, the role of mother is an esteemed one, and the exemplary role model for motherhood is the Virgin Mary, the Mother of Jesus. Catholic Christians regard Our Lady as the Mother of us all. She is the Mother of the Son of God, who in turn is part of the Trinity with God the Father and God the Holy Spirit, and God the Father is the Father of us all. Muslims do not think of Mary in quite these terms, which is unsurprising as they regard Jesus as a Prophet (albeit the greatest of pre-Muhammadan Prophets). Still, Muslims have great respect for Mary, and like Catholic Christians, not only appreciate her trials and tribulations as a mother, but also accept the Doctrine of the Immaculate Conception (i.e., that Mary was conceived without sin) and the Virginity of Mary (i.e., that Jesus was conceived through supernatural means). Notably, Mary is mentioned more often in the Qur'an than she is in the New Testament.

Accordingly, both Muslims and Catholic Christians agree motherhood is anything but an "idle" activity. Mary herself hardly lived an idle life, and shortly after giving birth to Jesus, fled with him and her husband, Joseph, to escape the sinister plot by King Herod (circa 73-4 B.C.) to eradicate threats he misperceived to his throne from a newborn king. Adherents to both faiths regard motherhood not only as a vital position, in the sense of propagation of the human species, but also a noble

one. As Dr. Al Qaradawi puts it, motherhood "largely shapes the future of nations." Muhammad Hafiz Ibrahim (1872-1932), a famous Egyptian poet known as the Poet of the Nile (*Shā'ir al-Nīl*), writes:

A mother is like a school that if endowed and prepared well, prepares an entire society well.<sup>8</sup>

According to Al Qaradawi, the most sacred responsibility a woman has is to raise her children so as to be positive, contributing members of society. Note that the duty is "sacred," because children are a gift from God (Allāh), and how a mother handles this gift is a key way in which she serves Allāh. Consequently, this duty should not be cast aside for short-term or opportunistic financial or educational concerns. On all these points, Catholic Christianity and Islam are in full accord.

To be sure, no faith, least of all Islam or Catholic Christianity, disregards the importance of the father in child rearing. Joseph, the step-father of Jesus, is a Saint for Catholic Christians, and Muslims have respect for Joseph as a model father and husband. Accordingly, under the *Shari'a*, a husband and wife are to play complementary roles in the household. Both parents ultimately are responsible for instilling in them Islamic teachings and morals, just as Catholic priests are fond of saying that the primary religious educators of children are the parents.

Additionally, the Qur'an codifies the role allocated to men as husbands. *Surah 4, ayah 34* states:

Husbands should take full care of their wives, with [the bounties] God has given to some more than others and with what they spend out of their own money.<sup>9</sup>

This passage indicates men are the protectors and maintainers of women, according to the resources and talents Allāh has given men. Arguably, it further suggests men have this role because have greater strength (in some sense) than women.

Through the ages, most Islamic religious and legal scholars (*ulema* and, respectively, *fukahā'*) hold this passage is the default position on the role of a man: he is normally obligated to financially provide for his family.<sup>10</sup> A woman, in many circumstances, is not obligated to work, nor spend on her family, and any assets she accumulates are hers to invest as she wishes. Some scholars argue that if a woman becomes the primary financial supporter for her family, then she can become "the one entrusted with the burden of guardianship."<sup>11</sup> Similarly, if financial responsibility is shared between both the wife and husband, then they are regarded as the guardians of one another.<sup>12</sup> Significantly, hardly any of the scholars employ the

<sup>8</sup> See AL QARADAWI, *supra*, vol. 2 at 302-306.

<sup>9</sup> See AL QARADAWI, *supra*, vol. 2 at 302-306.

<sup>10</sup> Qur'an, *supra*, 4:34 at 54.

<sup>11</sup> See JAMAL BADAWI, Ph.D., WOMAN UNDER THE SHADE OF ISLAM: A DISCOURSE ON WOMEN'S ISSUES 23 (Cairo, Egypt: El Falah for Translation, Publishing & Distribution, 1997). [Hereinafter, WOMAN UNDER THE SHADE OF ISLAM.]

<sup>12</sup> KHALED ABU EL FADI, SPEAKING IN GOD'S NAME: ISLAMIC LAW, AUTHORITY, AND WOMEN 211 (Oxford, England: One World Publications, 2003). [Hereinafter, EL FADI.]

<sup>13</sup> EL FADI, *supra*, at 211.

<sup>7</sup> See YUSUF AL QARADAWI, Ph.D., 2 CONTEMPORARY FATWAS, vol. 2 at 302-306 (Cairo, Egypt: Dar Al-Wafa'a Publishing, 1994) (Arabic version, Jomana Jihad Qaddour, trans., 2009). [Hereinafter, AL QARADAWI.]

word "guardian" to entail a relationship of superiority or inferiority; rather, wives and husbands are to be compassionate companions of one another.<sup>14</sup>

### § 37.03 EMPLOYMENT OUTSIDE HOME

#### [A] Issue At Stake

In all non-Muslim western societies, and most non-western ones as well, female participation in the labor force *per se* is an issue of diminishing controversy. As *The Economist* reported in January 2010:

[W]ithin the next few months [of 2010], women will cross the 50% threshold and become the majority of the American workforce. Women already make up the majority of university graduates in the OECD [Organization for Economic Cooperation and Development] countries, and the majority of professional workers in several rich countries, including the United States. Women run many of the world's great companies, from PepsiCo [along with Archer Daniels Midland and W.L. Gore] in America to Areva in France.

*Women's economic empowerment is arguably the biggest social change of our times.* Just a generation ago, women were largely confined to repetitive, menial jobs. They were routinely subjected to casual sexism and were expected to abandon their careers when they married and had children. Today they are running some of the organizations that once treated them as second-class citizens. Millions of women have been given more control over their own lives. And millions of brains have been put to more productive use. *Societies that try to resist this trend — most notably, the Arab countries, but also Japan and some southern European countries — will pay a heavy price in the form of wasted talent and frustrated citizens.*<sup>15</sup>

Accordingly, in most of the non-Muslim world, the debate has shifted from "whether women can or even ought to work?" to the conditions under which they work. Those conditions remain far from perfect.<sup>16</sup> Women remain under-represented in senior positions: they account for just 2 percent of the bosses of the Fortune 500 companies in the United States, and 5 percent of the bosses of the FTSE 100 stock market index companies in Britain, and less than 13 percent of the corporate board members in America are women. Women full-time workers average only 80 percent of the earnings of their male counterparts. And, women routinely and rightly complain they are forced into a Hobson's choice between career and child-rearing, because (aside from Scandinavian nations), few countries provide generous, paid maternity leave, and few companies are willing to re-engineer their high-pressure, "up or out" promotion systems.

<sup>14</sup> *EL FAH*, *supra*, at 211.

<sup>15</sup> *We Did It*, *THE ECONOMIST*, 2 January 2010, at 7 (emphasis added). [Hereinafter, *We Did It*].

<sup>16</sup> *See We Did It*, *supra*, at 49. The statistics presented are as of January 2010.

In contrast, if judged by the relatively low female participation rates in the labor force, then it appears the debate in most of the Islamic World, especially Arab Muslim countries, is stuck on the first issue: can and ought women to work outside the home? Put differently, does the emphasis in Islamic Law on the roles of a woman as a mother and wife mean that women are not to work outside the home? The resolute answer, which comes as a surprise to some Muslims and non-Muslims alike, is "no."

#### [B] No Prohibition

The *Shari'a* neither discourages nor prohibits women from active participation in the labor force. Indeed, the Qur'an consistently stresses "ordaining the good and forbidding the evil"<sup>17</sup> in a way that captures the strengths of each individual, whether male or female. More specifically, there exists no single passage in the Qur'an forbidding women from engaging in any type of employment outside of the home, with the possible exception of the position of head of state (a controversial topic discussed below).<sup>18</sup>

Across many generations and countries, including modern-day America, meeting the expenses of a family can require paid employment by a Muslim wife and mother. This need is even more compelling if a woman is divorced, widowed, or supporting extended family or elderly parents. There are three broad pieces of evidence supporting the proposition that Muslim women are permitted to be employed outside the home:

- (1) The Qur'an condones, albeit implicitly, work by women outside the home. One supporting passage lies in *Surah* 28, which is a Meccan *surah* focusing on the life of Moses. This *Surah* recounts a story of two daughters, who used to take care of the sheep owned by their family.<sup>19</sup> The fact that they work is not commented on in either positive or negative terms, but simply seems to be taken as normal.
- (2) The example of Asma'a bint Abū Bakr, the sister in law of Muhammad, who Muhammad does not rebuke for working. Asma'a used to work in the fields with her husband, raising horses, planting and harvesting crops, and carrying the crops in the traditional manner in containers on her head. On one occasion, Muhammad happened to meet her while she was working. He did not discourage Asma'a from continuing her work.
- (3) Muslim women are encouraged to seek out other women to address female specific needs. Indeed, Muslim women are required to seek out female doctors and nurses to address their needs unless a female doctor is unavailable. Obviously, it would be impossible for Muslim women in Muslim countries to consult female health care professionals if women were not allowed to work.

<sup>17</sup> *See GENDER EQUITY, supra*, at 18.

<sup>18</sup> *See GENDER EQUITY, supra*, at 18.

<sup>19</sup> *See QUR'AN, supra*, 28:23 at 246.



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## § 37.03

### [A]

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<sup>14</sup> *Id.* *See*

<sup>15</sup> *We Did*

<sup>16</sup> *See* *We*

Thus, the issue under the *Shari'a* is not whether women can work outside the home, but rather what parameters exist for them to do so.

### [C] Three Criteria

Dr. Al Qaradawi articulates three criteria to which Muslim women must adhere when they choose outside employment. First, the work must not involve forbidden (*haram*) actions. Second, a woman must follow Islamic precepts on modesty. Third, she cannot abandon her responsibilities at home if she is the main caretaker of the family.<sup>20</sup>

The first criterion prohibits both men and women from engaging in any activity that ordinarily would be forbidden (*haram*).<sup>21</sup> Examples of *haram* jobs that specifically pertain to women include being a dancer and performing for the enjoyment of men, serving as a personal maid for an unmarried man whereby they are often left alone in the house, or working as a personal secretary to a man where it is inevitable the two of them would spend extended hours together alone. Other examples are working as a waitress or bartender, if that job requires frequent service and delivery of alcoholic beverages, or working as a flight attendant, if doing so obligates her to serve alcohol, and travel frequently for long periods of time, thus leaving her children and husband alone.<sup>22</sup> Without doubt, some Muslim men are cited for hypocrisy in that they employ non-Muslim women in these jobs — and, worse yet, sexually abuse such women. To this sad reality, which exists in some Gulf countries, it may be added that hypocrisy of this sort exists in many, non-Muslim countries. That is, women are exploited, and even trafficked for that very purpose, by men of a different religion, race, or ethnicity, and put into jobs by them for which they would not dare hire women of their own kind.

The second criterion also is universal, in that it applies to both Muslim men and women. Adhering to Islamic dress, behavior, and mannerisms is incumbent upon all Muslims, whether they work or not.<sup>23</sup> Consequently, for a woman, she must guard her modesty as commanded in the Qur'an in all aspects of her life, including during her interaction between colleagues. Note that Islamic dress requirements are not incumbent on non-Muslim women in the workplace. Yet, in Malaysia, some government offices have required non-Muslim Chinese and Indian women to wear a *hijab* (veil), and to cover their arms down to their wrists and legs down to their ankles. (Such a practice is an unwarranted extension of the *Shari'a* to these women.

The third criterion is that family consensus is required.<sup>24</sup> For a single woman with no obligations to a husband or children, the decision to work is left to her and perhaps her immediate family. But, if a woman is married, then her employment is a familial issue, and the family must be consulted. This criterion sounds like a potentially serious constraint on the freedom of Muslim women to work.

<sup>20</sup> *See* AL QARADAWI, *supra*, vol. 2 at 302-306.

<sup>21</sup> *See* AL QARADAWI, *supra*, vol. 2 at 302-306.

<sup>22</sup> *See* AL QARADAWI, *supra*, vol. 2 at 302-306.

<sup>23</sup> *See* AL QARADAWI, *supra*, vol. 2 at 302-306.

<sup>24</sup> *See* AL QARADAWI, *supra*, vol. 2 at 302-306.

Depending on the nature of her family, that indeed may be true. Some husbands and children may unreasonably demand that a woman stay at home. They may fear she will neglect their wants. They may be insecure about their own labor market value, and fret she will be highly-regarded by her colleagues and peers. Such dysfunctions are not unique to Muslim families. And, they may arise not because of religion, but because of male ego. (However, in an October 2009 Rockefeller Foundation/*Time* magazine poll, 9 out of 10 American men said they were comfortable with women earning a greater sum than them.<sup>25</sup>)

Such problems aside, however, the idea that a mother — as well as a father — ought to discuss her employment is common to many non-Muslim cultures. That is because, in non-Muslim as well as Muslim societies, the roles of a woman as a wife and mother are of utmost importance, regardless of whether she is the primary caregiver in her family. She is not to abandon these roles merely for employment that is not essential to the upkeep of her family. Conversely, so long as she is able to meet her obligations towards her husband and children, there is no prohibition in the *Shari'a* on her employment.<sup>26</sup> Manifestly, the challenge facing women cuts across religious boundaries: how can they best balance their roles as wives and mothers with their human need for creativity, self-expression, intellectual challenge, and contribution to society through jobs and careers?

### [D] Trend toward Reform

Progress in respect of the employment of women has been slow in the Muslim World, particularly the Arab Muslim World. The Kingdom of Saudi Arabia, which is among the most socially conservative Muslim countries in the world, is a case in point.<sup>27</sup> It is the only country with a ban on female driving. Yet even in the Kingdom, there are hopeful signs. In 2009, King Abdullah appointed the first female minister in the history of the Kingdom, Norah al-Fayez, who serves as Deputy Education Minister.<sup>28</sup> Ms. Al-Fayez is a veteran educational professional, and has worked closely with many of the elite females in the Kingdom promoting human and educational rights. The leading force in Saudi education reform is Prince Faisal, the Minister of Education, who is married to Princess Adila, a well-known human rights advocate.<sup>29</sup> Princess Adila is a leading force for women's rights and opportunities in Saudi, and also presses for modern education and health services, and the protection of children.<sup>30</sup>

Significantly, oil wealth may be one impediment to accelerating reforms concerning female participation in labor markets. A country not in possession of vast natural resources cannot afford to confine half of its labor force to the home. Labor, along with land, physical capital, human capital, and technology, is a key

<sup>25</sup> *See* Female Power, *THE ECONOMIST*, 2 January 2010, at 49-50.

<sup>26</sup> *See* AL QARADAWI, *supra*, vol. 2 at 302-306.

<sup>27</sup> *See* Saudi Monarch Credited with "Radical, Fundamental Changes, AGENCY FRANCE PRESSE, 18 February 2009.

<sup>28</sup> *See* AL QARADAWI, *supra*, vol. 2 at 302-306.

<sup>29</sup> *See* AL QARADAWI, *supra*, vol. 2 at 302-306.

<sup>30</sup> *See* AL QARADAWI, *supra*, vol. 2 at 302-306.

factor of production. Its efficient employment is an essential source for economic growth. As long as a country can live off natural resource endowments, it does not face the same degree of pressure to maximize the productive use of its labor pool as do resource-poor countries. (Of course, in some resource-rich non-Muslim countries, such as Canada and Russia, women play a major role in the labor force.) Leaders in Gulf countries are well aware their supply of oil is not infinite, and know oil-consuming countries seek to curtail demand for fossil fuel energy sources. In turn, these leaders appreciate the prospective role women can — and, indeed, will need to — play in the long-term economic growth of their countries.

## § 37.04 WOMEN AS HEADS OF STATE

### [A] Arguments Based on Qur'ān and Ḥadīth

Can a Muslim woman serve as leader of a country? Table 37-1 reveals many women — including Muslim women — around the world have served as heads of state. Similarly, women occupy a range of political offices below the level of head of state. For example (as of January 2010), roughly 40 percent of legislators in Norway are women.<sup>31</sup> In November 2008, the New Hampshire State Senate became the first legislative body in America to have a majority of women (13 out of 24 State Senators).<sup>32</sup> There appears to be no pattern of religious discrimination against women holding the senior-most political office. Rather, differences reflect cultural and social mores across countries.

The first and most important point in addressing the issue is that no Qur'ānic passage or ḥadīth text prohibits a woman from any position of leadership, except as a leader of mixed, congregational prayer.<sup>33</sup> Even in respect of serving as an *imām*, that is, as a leader of prayer, women have on occasion played this role, albeit in cosmopolitan venues like New York, and to the horror of some traditionally-minded adherents to Islam.

As to leading a country, religious and legal scholars (*ulema* and *fukahā'*, respectively) who argue women cannot serve in this capacity typically cite *surah* 4, *ayah* 34 of the Qur'ān, specifically the passage to the effect that “men are protectors and maintainers of women.” They argue that this passage prohibits women from leading a country. After all, if men protect and maintain women, then surely the top governmental post to execute this role is the chief of a country.

This argument is unpersuasive. First, the inference drawn from it is overly broad. Even if the text is taken at face value (and not in the vein Dr. Laleh Bakhtiar advocates in her translation, *The Sublime Qur'ān*), it does not preclude women from playing a complementary role. They, too, can protect and maintain men. The reality is they do so, everyday, all around the world, in a variety of ways. Moreover, many *ulema* and *fukahā'* find the analogical reasoning (*qiyās*) on which

the prohibition is based to be inconclusive.

In particular, Muslim scholars who argue against any prohibition on women serving as heads of state examine the reasoning for the revelation of *surah* 4, *ayah* 34.<sup>34</sup> They focus on the Arabic word “*qiwamah*,” which the Qur'ān uses and means “protector” or “maintainer.” That is, “*qiwamah*” refers to responsibility for being the overall head or leader of a household. Traditionally, this superior position is assigned to a man (*e.g.*, the husband and father). Scholars contend “*qiwamah*” concerns the particulars of family life and role differentiation between females and males such that a husband and wife have complimentary roles in maintaining their family.<sup>35</sup> The question is whether some differences in roles can be translated beyond the household? Some scholars say “yes.” But, how far beyond the household is it reasonable to draw an analogy? Some scholars argue role differentiation based on “*qiwamah*” extends from the household to a country. On this basis, they leap to the conclusion women are not to serve as heads of state.

This analogical reasoning (*qiyās*) is parlous at best. Indeed, the further from the household an analogy is drawn, the more parlous it is. Even if the analogy is accepted, the fact remains there is no Qur'ānic text specifically speaking to the question of, and excluding women from, headship of state.<sup>36</sup> With no sound textual basis, what other sources of the *Sharī'a* exist for a ban on women from the top governmental post?

There is one *ḥadīth* from which some *ulema* and *fukahā'* deduce a prohibition on Muslim women leading a country. As compiled by *Imām* Bukhari, Abū Bakra narrates:

During the battle of Al-Jamal, Allāh benefitted me with a Word (I heard from the Prophet . . .): When the Prophet . . . heard the news that the people of Persia had made the daughter of Khosrau their Queen (ruler), he said, “*Never will succeed such a nation as makes a woman their ruler.*”<sup>37</sup>

The final quotation from Muhammad is the specific basis some scholars use for the exclusion. However, the infirmity of that argument is readily apparent.

First, consider the literal meaning of the statement. The Prophet is not forbidding a woman from being a ruler. To view the statement otherwise is to over-generalize its plain meaning. Rather, he is making a prognostication. He is asserting that a country that does make a woman a leader will not succeed. Moreover, the context of his prediction is battle. Thus, he may well mean to exclude only success in battle, but not success in other realms, such as economic growth or cultural development.

Second, looking at the nuances of the key passage, there are scholars who disagree with the common interpretation of this *ḥadīth*. They argue the specificity

<sup>34</sup> See GENDER EQUITY, *supra*, at 38.

<sup>35</sup> See GENDER EQUITY, *supra*, at 38.

<sup>36</sup> See GENDER EQUITY, *supra*, at 38.

<sup>37</sup> THE TRANSLATION OF THE MEANINGS OF SAHIH AL-BUKHARI, ARABIC-ENGLISH by Dr. Muhammad Muhsin Khan, vol. IX, book LXXXVIII (The Book of Afflictions), pp. 170-171, *ḥadīth* no. 219 (Islamic University, Medina, Kingdom of Saudi Arabia: Dar Ahya Us-Sunnah, Al Nabawiya, March 1978) (emphasis added).

<sup>31</sup> See *We Did It!*, *supra*, at 7.

<sup>32</sup> See Renee Loth, *The Matriarchy Up North*, BOSTON GLOBE, 30 April 2009, posted at [www.boston.com/bostonglobe/editorial\\_opinion/oped/articles/](http://www.boston.com/bostonglobe/editorial_opinion/oped/articles/).

<sup>33</sup> See GENDER EQUITY, *supra*, at 38.



of the occasion is the motivating factor behind the statement of Muhammad.<sup>38</sup> At the time this *hadith* was spoken, the Persian rulers were enemies of the Prophet. Accordingly, some scholars regard this statement as recognition of the "impending doom of [the] unjust empire,"<sup>39</sup> not a generic utterance on the permissibility of women to serve as heads of state. Even if this *hadith* were to be taken generally, it would not invoke automatically a ban on women as leaders in every instance. Again, the context is battle. Thus, as with the Qur'ān, there exists no *hadith* that provides conclusive evidence to support an exclusion of women from the position of head of state.

### [B] Other Arguments

What, then, is the next line of support for a prohibition from headship of state? Some scholars respond by justifying it on the basis that women cannot lead a mixed congregational prayer.<sup>40</sup> That is, some scholars hold that because of the

format of the Muslim prayer and its nature, it is not suitable for women to lead a mixed congregation.<sup>41</sup>

However, for three reasons, this argument lacks cogency.

First, leading prayer is a purely religious act. Leading the state is political act. There is no obvious analogy between the two tasks.<sup>42</sup> Even if women are excluded from leading prayer, it does not simultaneously exclude them from engaging in leading a country. Moreover, women are excluded from prayer during their menstrual periods. Does that mean a woman head of state would be forbidden from leading a mixed congregation approximately one week every month? In other words, is the underlying concern of some scholars an old-fashioned male stereotype that the monthly cycle of a woman renders her at least temporarily incapable of responsibilities? If so, then surely the positive evidence everyday in the public sphere around the globe puts paid that concern.

Second, the general rule as to whether a woman may lead prayer is not a prophylactic ban. In a one *hadith*, it was related that the Prophet asked a woman, Um Waraqah, to lead her household in prayer.<sup>43</sup> Her household consisted of a young girl, a young boy, and a *muezzin* (caller to prayer, who is always a male).<sup>44</sup>

Third, looking to Islamic history, there are two prominent examples of women in high positions in a Muslim state. Um Salamah, one of the wives of the Prophet, served as the equivalent of "Chief Advisor" to the head of state.<sup>45</sup> Under the Caliphate of 'Umar (634-644 A.D.), the second of the *Rashidun*, Um Al-Shifaa' bint

<sup>38</sup> See GENDER EQUITY, *supra*, at 38.

<sup>39</sup> See GENDER EQUITY, *supra*, at 38.

<sup>40</sup> See GENDER EQUITY, *supra*, at 39-40.

<sup>41</sup> See GENDER EQUITY, *supra*, at 40.

<sup>42</sup> See GENDER EQUITY, *supra*, at 40.

<sup>43</sup> See GENDER EQUITY, *supra*, at 40.

<sup>44</sup> See GENDER EQUITY, *supra*, at 40.

<sup>45</sup> See GENDER EQUITY, *supra*, at 40.

Abdullah served as the marketplace advisor, or what would be called in modern times the Director for Consumer Protection. Moreover, without hesitation, *Imām* Abū Hanifa and Al-Tabarī derived from Islamic texts that a woman may be appointed to the position of *qāḍī* (Islamic judge).<sup>46</sup>

To be sure, these examples are of positions below that of head of state. Yet, consider Abū Ya'la' ibn Al-Farrā' (990-1065/1066), a prominent Islamic jurist and *qāḍī*, and a *Ḥanbalite* scholar from Baghdad who authored an authoritative work on forbidding wrong in Islamic thought.<sup>47</sup> He compiled a list of qualifications for head of state based on the *Sunnah* of the Prophet, specifically, the *ḥadīths*. Being male was not on his list.<sup>48</sup>

### [C] Apprehension

Despite the dubious justifications for claiming the *Shar'ia* forbids women from serving as head of state, the claim still is made. Why? The short answer seems to be "apprehension." In Islamic tradition, the office of head of state is not simply a ceremonial post.<sup>49</sup> The head of state sometimes leads public prayers, including the Friday (*Jum'a*) prayer, and travels to negotiate with officials of other states, most of whom are men.<sup>50</sup> Women cannot lead public mixed congregational prayers. And, foreign diplomacy entails confidential meetings, which means a female head of state could be alone with another man for an extended period of time.<sup>51</sup> There is apprehension, then, that traditional Islamic guidelines on interaction between the genders may be compromised.

Insofar as apprehension on this matter is a concern, surely it is a paternalistic and patriarchal one. It amounts to little more than saying "an adult woman who is the leader of a country cannot be trusted to be in a room alone with a man from another country." The statement is not even specious, in the sense of being superficially plausible but actually erroneous. It is flat wrong. Moreover, were the statement true, then the slippery slope would be obvious: the "justification" could be used to keep women entirely out of the public sphere when men are or could be present. Finally, it may well be that retaining a male monopoly on political power is the real, underlying apprehension concerning women serving as heads of state. Certainly, there are *bona fide* considerations of Islamic culture to respect if and when a Muslim female head of state meets with her male counterparts. But, none of them justifies barring women from appointment to the top political office. As long as a Muslim woman can perform her head-of-state functions in accordance with the *Sunnah*, and not compromise her familial responsibilities, there appears to be no credible reason to prevent her from doing so.

<sup>46</sup> See WOMAN UNDER THE SHADE OF ISLAM, *supra*, at 22.

<sup>47</sup> See MICHAEL COLE, COMMANDING RIGHT AND FORBIDDING WRONG IN ISLAMIC THOUGHT 129 (Cambridge, England: Cambridge University Press, 2000).

<sup>48</sup> See GENDER EQUITY, *supra*, at 38.

<sup>49</sup> See GENDER EQUITY, *supra*, at 38.

<sup>50</sup> See GENDER EQUITY, *supra*, at 38.

<sup>51</sup> See GENDER EQUITY, *supra*, at 38.

Table 37-1:  
Women Heads of State by Country and Religion  
(1940-2011, listed chronologically)

Name	Country	Name of Office Held	Dates in Office	Religion <sup>52</sup> (Muslim in Bold)
Khertek Anchimaa-Toka	Tannu Tuva (currently part of the Russian Federation)	Chair of the Presidium of the Little Khural	4/6/1940-10/11/1944	Buddhist
Sükhbaataryn Yanjmaa	Mongolia	Acting Chair of the Presidium of the State of Great Khural	9/23/1953-7/7/1954	Not available, although majority religion of country is Buddhist.
Sirimavo Bandaranaike	Sri Lanka	Prime Minister	7/21/1960-3/27/1965; 5/29/1970-7/23/1977; 11/14/1994-7/10/2000	Buddhist
Indira Gandhi	India	Prime Minister	1/25/1966-4/24/1977; 1/15/1980-10/31/1984	Hindu
Soong Chingling	People's Republic of China (PRC)	Acting Co-Chair	10/31/1968-4/24/1972;	Hakka Chinese Methodist
			5/16/1981-5/28/1981	
Golda Meir	Israel	Prime Minister	3/17/1969-6/3/1974	Jewish
Isabel Martínez de Perón	Argentina	President	7/1/1974-3/24/1976	Catholic
Elisabeth Domitien	Central African Republic	Prime Minister	1/2/1975-4/07/1976	Not available, although majority religion of country is indigenous beliefs.
Margaret Thatcher	United Kingdom	Prime Minister	5/4/1979-11/28/1990	Protestant (Methodist)

<sup>52</sup> Some of the information in this Table, particularly on the predominant religion of a country, is from Central Intelligence Agency, *The World Factbook*, posted at <https://www.cia.gov/library/publications/the-world-factbook/index.html>.

Name	Country	Name of Office Held	Dates in Office	Religion <sup>52</sup> (Muslim in Bold)
Lidia Gueiler Tejada	Bolivia	Acting President	11/16/1979-7/17/1980	Not available, although majority religion of country is Roman Catholic.
Maria de Lourdes Pintasilgo	Portugal	Prime Minister	7/1/1979-1/3/1980	Roman Catholic
Eugenia Charles	Dominica	Prime Minister	7/21/1980-6/14/1995	Christian
Vigdís Finnbogadóttir	Iceland	President	8/1/1980-8/1/1996	Not available, although majority religion of country is Lutheran Church of Iceland.
Gro Harlem Brundtland	Norway	Prime Minister	2/4/1981-10/14/1981; 5/9/1986-10/16/1989; 11/3/1990-10/25/1996;	Humanist
Maria Lea Pedini Angelini	San Marino	Captain Regent	4/1/1981-10/1/1981	Not available, although majority religion of country is Roman Catholic.
Agatha Barbara	Malta	President	2/15/1981-2/15/1987	Not available, although majority religion of country is Roman Catholic.
Milka Planinc	Yugoslavia	Prime Minister	5/16/1982-5/15/1986	Atheist
Gloriana Ranocchini	San Marino	Captain Regent	4/1/1984-10/1/1984; 10/1/1989-4/1/1990	Not available, although majority religion of country is Roman Catholic.
Carmen Pereira	Guinea-Bissau	President of the National People's Assembly	5/14/1984-5/16/1984	Not available, although majority religion of country is <b>Muslim</b> .
Elisabeth Kopp	Switzerland	Member of the Federal Council	10/20/1984-1/12/1989	Not available, although majority religion of country is Roman Catholic.
Corazon Aquino	Philippines	President	2/25/1986-6/30/1992	Roman Catholic



<i>Name</i>	<i>Country</i>	<i>Name of Office Held</i>	<i>Dates in Office</i>	<i>Religion</i> <i><sup>52</sup> (Muslim in Bold)</i>
Stella Sigcau	Transkei (currently part of South Africa)	Prime Minister	10/5/1987-12/30/1987	Not available, although majority religion of country is Zion Christian
Benazir Bhutto	Pakistan	Prime Minister	12/2/1988-8/6/1990; 10/19/1993-11/5/1996	<b>Muslim</b>
Ertha Pascal-Trouillot	Haiti	Acting President	3/13/1990-2/7/1991	Not available, although majority religion of country is Roman Catholic.
Kazimira Prunskiene	Lithuania	Prime Minister	3/17/1990-1/10/1991	Not available, although majority religion of country is Roman Catholic.
Sabine Bergmann-Pohl	East Germany	President of the People's Chamber	4/5/1990-10/2/1990	Protestant
Violeta Chamorro	Nicaragua	President	4/25/1990-1/10/1997	Roman Catholic
Mary Robinson	Ireland	President	12/3/1990-9/12/1997	Protestant
Khaleda Zia	Bangladesh	Prime Minister	3/20/1991-3/20/1996	<b>Muslim</b>
Edith Cresson	France	Prime Minister	5/15/1991-4/2/1992	Roman Catholic
Edda Ceccoli	San Marino	Captain Regent	10/1/1990-4/1/1992	Not available, although majority religion of country is Roman Catholic.
Hanna Suchocka	Poland	Prime Minister	7/11/1992-10/25/1993	Roman Catholic
Ruth Dreifuss	Switzerland	Member of the Federal Council and President	4/1/1993-12/31/2002	Jewish
Patricia Busignani	San Marino	Captain Regent	4/1/1993-10/1/1993	Not available, although majority religion of country is Roman Catholic.
Kim Campbell	Canada	Prime Minister	6/25/1993-11/4/1993	Anglican
Tansu Çiller	Turkey	Prime Minister	6/13/1993-3/6/1996	<b>Muslim</b>

<i>Name</i>	<i>Country</i>	<i>Name of Office Held</i>	<i>Dates in Office</i>	<i>Religion</i> <i><sup>52</sup> (Muslim in Bold)</i>
Agathe Uwilingiyimana	Rwanda	Prime Minister	7/18/1993-4/7/1994	Not available, although majority religion of country is Roman Catholic.
Sylvie Kinigi	Burundi	Prime Minister	10/27/1993-2/5/1994	Not available, although majority religion of country is Roman Catholic.
Chandrika Kumara-tunga	Sri Lanka	President	11/12/1994-11/19/2005	Not available, although majority religion of country is Buddhist.
Reneta Indzhova	Bulgaria	Acting Prime Minister	11/14/1994-7/10/2000	Not available, although majority religion of country is Bulgarian Orthodox.
Claudette Werleigh	Haiti	Prime Minister	11/7/1995-2/27/1996	Christian
Hasina Wazed	Bangladesh	Prime Minister	6/23/1996-7/15/2001	<b>Muslim</b>
Ruth Perry	Liberia	Chair of the Council of State	9/3/1996-8/2/1997	<b>Muslim</b>
Rosalía Arteaga Serrano	Ecuador	Acting President	2/9/1997-2/11/1997	Not available, although majority religion of country is Roman Catholic.
Janet Jagan	Guyana	Prime Minister	3/6/1997-12/19/1997; 12/19/1997-8/11/1999	Jewish
Mary McAleese	Ireland	President	11/11/1997 - Incumbent	Roman Catholic
Jenny Shipley	New Zealand	Prime Minister	12/5/1997-12/5/1999	Presbyterian
Ruth Metzler	Switzerland	Member of the Federal Council	3/11/1999-12/10/2003	Christian
Rosa Zafferani	San Marino	Captain Regent	4/1/1999-10/1/1999; 4/1/2008-10/1/2008	Not available, although majority religion of country is Roman Catholic.

<i>Name</i>	<i>Country</i>	<i>Name of Office Held</i>	<i>Dates in Office</i>	<i>Religion</i> <i><sup>52</sup> (Muslim in Bold)</i>
Irena Degutien	Lithuania	Acting Prime Minister	5/4/1999–5/18/1999; 10/27/1999–11/3/1999	Not available, although majority religion of country is Roman Catholic.
Vaira Vīķe-Freiberga	Latvia	President	7/8/1999–7/7/2007	Not available, although majority religion of country is Lutheran.
Mireya Moscoso	Panama	President	9/1/1999–9/1/2004	Roman Catholic
Helen Clark	New Zealand	Prime Minister	12/5/1999–11/19/2008	Agnostic
Tarja Halonen	Finland	President	3/1/2000 — Incumbent	Not available, although majority religion of country is Lutheran Church of Finland.
Maria Domenica Michelotti	San Marino	Captain Regent	4/1/2000–10/1/2000	Not available, although majority religion of country is Roman Catholic.
Gloria Macapagal-Arroyo	Philippines	President	1/20/2001 — Incumbent	Roman Catholic
Megawati Sukarnoputri	Indonesia	President	7/23/2001–10/20/2004	<b>Muslim</b>
Mame Madior Boye	Senegal	Prime Minister	3/3/2001–11/4/2002	Not available, although majority religion of country is <b>Muslim</b> .
Khaleda Zia	Bangladesh	Prime Minister	10/10/2001–10/29/2006	<b>Muslim</b>
Chang Sang	South Korea	Acting Prime Minister	7/11/2002–7/31/2002	Not available, although majority religion of country is Christian.
Maria das Neves	São Tomé and Príncipe	Prime Minister	10/3/2002–9/18/2004	Not available, although majority religion of country is Catholic.
Micheline Calmy-Rey	Switzerland	Member of the Swiss Federal Council	1/1/2003 — Incumbent	Not available, although majority religion of country is Roman Catholic.

<i>Name</i>	<i>Country</i>	<i>Name of Office Held</i>	<i>Dates in Office</i>	<i>Religion</i> <i><sup>52</sup> (Muslim in Bold)</i>
Beatriz Merino	Peru	Prime Minister	6/28/2003–12/15/2003	Not available, although majority religion of country is Roman Catholic.
Anneli Jaatteenmaki	Finland	Prime Minister	4/17/2003–6/24/2003	Not available, although majority religion of country is Lutheran Church of Finland.
Valeria Ciavatta	San Marino	Captain Regent	10/2003–3/2004	Not available, although majority religion of country is Roman Catholic.
Nino Burjanadze	Georgia	Speaker of the Parliament of Georgia; Acting President	4/22/2004–6/7/2008;	Not available, although majority religion of country is Orthodox Christian.
			11/25/2007–1/20/2008	
Luisa Diogo	Mozambique	Prime Minister	2/17/2004 — Incumbent	Roman Catholic
Radmila Sekerinska	Macedonia	Acting Prime Minister	5/12/2004–6/12/2004;	Not available, although majority religion of country is Macedonia Orthodox.
			11/3/2004–12/15/2004	
Yulia Tymoshenko	Ukraine	Prime Minister	1/24/2005–9/8/2005;	Ukrainian Orthodox
			12/18/2007 — Incumbent	
Fausta Morganti	San Marino	Captain Regent	4/1/2005–10/1/2005	Not available, although majority religion of country is Roman Catholic.
Maria do Carmo Silveira	Sao Tome and Principe	Prime Minister	6/8/2005–4/21/2006	Not available, although majority religion of country is Catholic.
Angela Merkel	Germany	Chancellor	11/22/2005 — Incumbent	Protestant (Lutheran)
Portia Simpson-Miller	Jamaica	Prime Minister	3/30/2006–9/11/2007	Not available, although majority religion of country is Protestant.



Name	Country	Name of Office Held	Dates in Office	Religion <sup>52</sup> (Muslim in Bold)
Michelle Bachelet	Chile	President	4/11/2006–3/11/2010	Agnostic
Han Myung Sook	South Korea	Prime Minister	4/19/2006–3/7/2007	Not available, although majority religion of country is Christian.
Doris Leuthard	Switzerland	Member of the Swiss Federal Council	8/1/2006 — Incumbent	Not available, although majority religion of country is Roman Catholic.
Ellen Johnson-Sirleaf	Liberia	President	1/16/2007 — Incumbent	Methodist
Dalia Itzik	Israel	Acting President	1/25/2007–7/15/2007	Jewish
Pratibha Patil	India	President	7/25/2007 — Incumbent	Hindu
Cristina Fernandez de Kirchner	Argentina	President	12/10/2007 — Incumbent	Roman Catholic
Eveline Widmer-Schlumpf	Switzerland	Member of the Federal Council	1/1/2008 — Incumbent	Not available, although majority religion of country is Roman Catholic.
Zinaida Greceanii	Moldova	Prime Minister	3/31/2008 — Incumbent	Not available, although majority religion of country is Eastern Orthodox.
Michele Pierre-Louis	Haiti	Prime Minister	9/5/2008 — Incumbent	Not available, although majority religion of country is Roman Catholic.
Assunta Meloni	San Marino	Captain Regent	10/1/2008 — Incumbent	Not available, although majority religion of country is Roman Catholic.
Hasina Wazed	Bangladesh	Prime Minister	1/6/2009 — Incumbent	<b>Muslim</b>
Johanna Sigurdardottir (first openly gay head of state)	Iceland	Prime Minister	2/1/2009 — incumbent	Not available, although majority religion of country is Lutheran Church of Iceland.
Laura Chinchilla	Costa Rica	President	2/7/2010 — incumbent	Roman Catholic

Name	Country	Name of Office Held	Dates in Office	Religion <sup>52</sup> (Muslim in Bold)
Mari Kiviniemi	Finland	Prime Minister	6/22/2010 — incumbent	Not available, although majority religion of country is Lutheran Church of Finland.
Julia Gillard	Australia	Prime Minister	6/24/2010 — incumbent	Baptist.
Dilma Rousseff	Brazil	President	1/1/2011 — incumbent	Roman Catholic (former Atheist)

## § 37.05 MUSLIM FEMINISM

### [A] Not Monolithic

There are feminists in the Muslim world. Indeed, there is not one feminist movement, but several, among Muslims. Indeed, the feminist movement in the non-Muslim world hardly is monolithic. Many Muslim feminists understandably are not content to let western, non-Muslim feminists speak for them, and they do not all define feminism in the same way as their non-Islamic counterparts.

For example, some of them take traditional views on the rights of women in the private and public spheres, and seek a good accommodation between women and men. Pointing to *surah* 33, *ayah* 5 of the Qur'an, they emphasize that equality between men and women is inherent in Islam as a religion and the *Shari'a* as a legal system. In that verse, God (Allāh) addresses both women and men, and makes clear that when they are judged upon their death, they are judged equally, by the same criteria. Women do not stand in a diminished position vis-à-vis men, in this life or the next one.

Certainly, Muslim feminists acknowledge there are passages in the Qur'an that outline different obligations and spheres of responsibility here on earth for men and women, ones that generally suggest men are to care for the public sphere and support the household, and women are to be supported and care for the household. Even still, Muslim feminists say that these differences in spheres of responsibility do not mean they are unequal in the eyes of Allāh or under the *Shari'a*. Moreover, they argue that the differences in spheres do not restrict their freedoms. The various passages simply mean their responsibilities, as women, are different. Non-Muslim feminists might not agree with this interpretation, but it is prudent to bear in mind Muslim feminists are annoyed, even insulted, if a non-Muslim feminist asserts Islam is an innately chauvinistic faith.

### [B] Controversial Thesis of Irshad Manji

One Muslim feminist — Irshad Manji — has provoked considerable controversy. Hers is a strong, contrasting example to more traditional strains of feminism. Her key work, published in 2003, is *The Trouble with Islam Today: A Muslim's Call for*

*Reform in Her Faith*.<sup>53</sup> Ms. Manji is both openly lesbian and devoutly Muslim, and takes her personal relationship with God (Allāh) seriously.

She migrated as a 4 year old from Uganda, and grew up in Vancouver, Canada. Her childhood was shaped by a strict, abusive father and his "commitment" to Islam. While her family was Muslim, initially they put her in the babysitting program at a local Baptist church, because it was free. In that program, her teachers encouraged her to ask questions and explore stories. She did so, and the program gave her the award of "Most Promising Christian of the Year." The award angered her father, who snatched her out of that environment and plunked her in a *madrasa* (Islamic religious school) as a pre-teen. The new school mandated head-coverings for girls and screens to separate them from boys, and conceded little space for questions. Gone were the colorful books and creative environment. She was rewarded for reciting from memory the Qur'ān, not discussing it. Eventually, she left the *madrasa*, becoming a journalist in Canada for Queer Television.

While Ms. Manji addresses many issues in her book, the most provocative questions she asks of her fellow Muslims, and of non-Muslims, are:

- (1) Why has mainstream Islamic doctrine stagnated in medieval, tribal interpretations of the faith?
- (2) Why has this stagnation been accepted, or deemed acceptable?

To Ms. Manji, the problem with Islam today is it has become ossified, and this rigid, unprogressive *status quo* actually is revered to the point that questioning any precept is tantamount to religious betrayal and political treason. She asks these questions in three contexts: People of the Book (*ahl al kitāb*), women and homosexuals, and *ijtihād*. Manifestly, these two questions and three contexts are controversial. They have provoked both support and opprobrium from Muslim and non-Muslims alike.

#### • The People of the Book

The Qur'ān says there can be no inconsistencies in it (*surah 4, ayat 82*). Hence, it must supersede other — inconsistent, errant — religious texts. Ms. Manji argues there are contradictions in the Qur'ān. One contradiction, she says, is between

- (1) The assertion of Islam as the only one, true faith (*surah 3, ayah 19*), and
- (2) The declaration that People of the Book can be saved (*surah 2, ayah 62*, and *surah 5, ayah 69*), and that there should be more than one religion so that human beings feel an incentive to compete in good works.<sup>54</sup>

Significantly, the "Pact of 'Umar" which dealt with non-Muslim conquered peoples, was not part of advanced, Islamic Golden Age thought whereby Muslims and Jews interacted well, or even tolerantly. 'Umar was the second of the *Rashidun* Caliphs, and the Arab-Islamic Empire expanded greatly under his Caliphate to include a large number of *dhimmis* — non-Muslims.

<sup>53</sup> See IRSHAD MANJI, *THE TROUBLE WITH ISLAM TODAY: A MUSLIM'S CALL FOR REFORM IN HER FAITH* (New York, New York: St. Martin's Griffin, 2003). [Hereinafter, MANJI.]

<sup>54</sup> MANJI, *supra*, at 39.

The terms of the Pact of 'Umar, included:

- (1) A duty to differentiate yourself.
- (2) A duty to wear a girdle over your garments
- (3) Your headgear had to be specifically marked.

Thus, Ms. Manji entitles the Chapter in which she describes the Pact of Umar, "When Did We Stop Thinking?"<sup>55</sup> She does so because it was at this time in Islamic history that it became dangerous, from a political standpoint, to disagree with the leadership.

#### • Women and Homosexuals

Ms. Manji reminds readers that Khadija, the wife of the Prophet, was a businesswoman who employed Muhammad, then proposed to him and married him, and then became the first convert to Islam. Ms. Manji also points out that Israel is the only place in the Middle East in which there is an annual gay pride parade. Yet, she argues, the Pact of Umar still is in effect in Muslim areas of Israel, like around the Dome of the Rock. When she tried to go to visit the Dome of the Rock without a male escort, she argued with a fellow Muslim about getting in. She needed an Israeli police officer escort, and had to wear a girdle over her clothing, to get in.

#### • Operation *Ijtihād*

Because the Qur'ān is the latest and greatest revelation from Allāh, and because Muhammad is his most important Prophet, Islam from within is seen as the perfected religion. This superiority has translated into the calcification of interpretation. Anything that may potentially conflict with the Qur'ān or *hadith*, even on matters subject to historical verification or proof by the scientific method, is viewed as heretical by an established religious authority. This kind of reasoning has deleterious consequences. Notably, it has led to poor educational standards and achievement levels, which in turn contribute to egregious human rights abuses in most of the Muslim world.

Ms. Manji argues it is time for Muslims and non-Muslims everywhere to challenge this *status quo*. By indulging power structures that condone violence against women and institutionalize discrimination (with leading examples being Northern Nigeria, Saudi Arabia, and Sudan), the non-Muslim western world accepts these practices as legitimate exercises of faith. The acceptance may not be overt, and indeed be covered with condemnatory rhetoric. But, it is at least a *de facto* acquiescence. Ms. Manji cites several cases in which positive steps have been made, including an outpouring of support for Muslims in North America after the 11 September 2001 terrorist attacks, and micro-loan initiatives like the Grameen Bank. Regrettably, they do not address the policies that injure the people within Muslim countries.

In respect of all three contexts, it may be asked whether Ms. Manji ultimately is writing to reconcile her faith with the atrocities committed in its name in the

<sup>55</sup> See MANJI, *supra*, at 48-70.



modern era. Is Islam the reason women are treated as perpetual minors or chattel in Muslim societies? "Yes and no," she concludes. The Fundamentalist approach to the *Shari'a*, which she contends is based on tribal traditions of the Arabian desert where Islam was born, is the seed for saying "yes." But, Fundamentalism is not the only alternative. Muslims can invoke Islam, if they choose to do so, to demand human rights, because God says so, in that He is the source of those rights. Moreover, non-Muslims have the responsibility to support and hold recalcitrant Islamic leaders accountable for their human rights violations, whether or not they are done in the name of faith.

The long-term solution is a simple one: get people in the Muslim world to think, to question, and to debate. Better education, coupled with the will to break out of the tribal-leader-is-always-right mentality, is essential. This solution requires a re-opening of the Gate to *Ijtihad*, a move Ms. Manji strongly advocates. Manji would agree with scholars like Professor Wael B. Hallaq (1955-), who argue the Gate to *Ijtihad* never was closed, or if it was, then it should be reopened. That is because *ijtihad* is needed to deal with subjects like the empowerment of women, free speech and free media, and liberalizing rules on the *Hajj*. More generally, she asks, without *ijtihad*, how can common people and intellectuals alike be liberated from the endless imitation of the past?

The establishment Ms. Manji challenges will not cede religious or secular power easily. The June 2009 response of the Iranian government to elections — in effect, a *coup d'état* — is a case in point. The reality is that like the *madrasa* of Ms. Manji's childhood, most Muslim societies are closed, segregated, and allow little room for dissent.

## PART TEN

### FAMILY LAW AND CHILDREN

## Chapter 38

### REARING CHILDREN

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Peace will come when the Arabs will love their children more than they hate us.

Golda Meir (1898-1978),  
4th Prime Minister of Israel (1969-1974),  
Statement at National Press Club, Washington, D.C., 1957

#### SYNOPSIS

§ 38.01 ACKNOWLEDGEMENT OF PARENTHOOD

§ 38.02 FATHER'S DUTY TO PROVIDE MAINTENANCE

§ 38.03 MOTHER'S RIGHT TO CARE (ḤAḌĀ NA)

§ 38.04 FOUNDLING (LAḲĪṬ) AND ADOPTION

#### § 38.01 ACKNOWLEDGEMENT OF PARENTHOOD

In respect of children, Islamic Family Law contains the doctrine that "the child belongs to the marriage bed."<sup>1</sup> In Arabic, this doctrine is known as "*al-walad lil-firāsh*." Professor Schacht explains this doctrine corresponds to, and entered the *Shar'ā* from, the same Roman Law maxim: *pater est quem nuptiae demonstrant*. This expression means "*the father is who the marriage shows*."<sup>2</sup> Here, then, is an illustration of transmission into Islamic Law of a Roman Legal concept through educated non-Arab converts to Islam who were schooled in the liberal Hellenistic tradition, which including training in law and oratory. Essentially, the doctrine creates a presumption that a child is legitimately born to a properly married couple.

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<sup>1</sup> See JOSEPH SCHACHT, AN INTRODUCTION TO ISLAMIC LAW 21 (Oxford, England: Oxford University Press (Clarendon Paperbacks) 1982). [Hereinafter, SCHACHT.]

<sup>2</sup> Literally, "*pater*" is the masculine, singular, nominative (subject) case, and means "father." "*Est*" is the third person, singular, present tense verb for "to be" (i.e., he/she/it is). "*Quem*" is the masculine or feminine, singular, accusative (direct object) case, and means "which," "who," or "whereby." "*Nuptiae*" is the feminine, plural, nominative (subject) case, and translates as "marriage," "wedding," or "nuptials." "*Demonstrant*" is the third person, plural, present verb for "indicate" or "show."

The complete phrase is: "*Mater semper certa; pater est nuptiae demonstrant*," which means "*The mother is always certain; the father is who the marriage vows indicate*." The phrase embodied an important principle in Roman Law. Children, specifically sons, were entitled to inherit the wealth of their father. Medically speaking, the mother was seen as a vessel for the seed of the father. The father was viewed as the necessary or important actor in engendering children. Conversely, women in the Roman Empire often were confined to the shadows of society, not allowed out for fear another man might seduce them, and they subsequently might bear the children of an imposter.



Related to this doctrine is a rule about acknowledgement of paternity. According to the *Shari'a*, the duration of pregnancy is said to be from six months to two years.<sup>3</sup> Obviously, the duration does not refer narrowly to the time a child grows and develops in the womb of the mother. Rather, the duration is relevant to the acknowledgment of paternity. In turn, paternity, or more generally, the question of whether a child is legitimate or not, has implications for inheritance. Professor Hussain explains:

[C]hildren have a right to know their parents and to be cared for and maintained during infancy and to inherit from parents after their death. Only the natural mother and father of a child can be acknowledged as his or her parents, since adoption is recognized [as explained below]. The status of legitimate children is different from that of illegitimate children, who have no claim upon their natural father. As illegitimacy has severe consequences in the Islamic world, some latitude has been allowed by the jurists in calculating the term of pregnancy. *The minimum term of pregnancy, according to most of the scholars, is six months, and the maximum term allowed by them has varied from nine lunar months according to some of the Shias to five years according to others. Some count the term of pregnancy from the time of the marriage contract rather than the date of consummation of the marriage.*<sup>4</sup>

This account indicates the range for duration of a pregnancy is wider than Professor Schaacht reports.

In the event his marriage is dissolved, a husband must acknowledge as his own child a son or daughter born to his ex-wife within two years from that dissolution. Suppose the husband refuses to recognize as his own a child born to his ex-wife during the six months-to-two year period. He might be guilty of *kadhif* (falsely accusing his wife of unchastity). Thus, the period functions not only as a paternity recognition rule, but also protects the mother, and by extension, the child.

### § 38.02 FATHER'S DUTY TO PROVIDE MAINTENANCE

As Professor Hussain states:

[i]t is the parents' duty to care for children and to bring them up to be responsible and God-fearing.<sup>5</sup>

This statement illustrates a universal point: upbringing of a child, including religious education, is a responsibility of the mother and father. In no family, Muslim or non-Muslim, is it shared exactly equally. Each parent contributes unique strengths to child-rearing. As a child grows, the nature of the respective contributions changes.

<sup>3</sup> See SCHAACHT, *supra*, at 166.

<sup>4</sup> JAMILA HUSSAIN, *ISLAMIC LAW AND SOCIETY — AN INTRODUCTION* 81 (Annandale, New South Wales, Australia: The Federation Press, 1999) (emphasis added). [Hereinafter, HUSSAIN.]

<sup>5</sup> HUSSAIN, *supra*, at 79.

According to Islamic Family Law, it is the father who has a general duty to provide for the maintenance of his child.<sup>6</sup> He must do so until the child becomes an adult, or in the case of a daughter, until she is married. The paternal grandfather must step in and assume this duty of maintenance if the father is unable to fulfill the duty. Only if the child has no male relatives does the duty of maintenance switch to the mother.

What does "maintenance" entail? The answer is not limited to food (*i.e.*, adequate nutrition), clothing (*i.e.*, appropriate garments), and shelter (*i.e.*, a dwelling place). It includes education, kind treatment, and love. The parents, particularly the father, must provide maintenance to the best of his ability. In Muslim and non-Muslim cultures alike, truly engaged fathers sacrifice personal goals and desires to advance the interests of their child. For such fathers, the existence of an independent legal obligation to maintain their child is superfluous. They would think it unthinkable not to do so.

Of critical importance is that the duty of maintenance is owed equally to all children. Professor Hussain observes:

Children should be treated equally by their parents. According to [a] *hadith*, a man of the Ansar proposed to accede to his wife's request to give a garden or a slave to one of his sons and asked the Prophet to be a witness to the transfer. The Prophet inquired whether such gifts were being made to the other sons, and on being informed that they were not, refused to be a witness saying that he would not be a witness to injustice.<sup>7</sup>

Equal treatment as to maintenance applies to daughters as well as sons. A father is not to discriminate between or among multiple daughters, nor is he to prefer a son to a daughter.

For example, it would be incongruous with his duty to provide maintenance to his children to allocate high-protein foods to his son, but not his daughter, and to sponsor the son, but not the daughter, for a tertiary education, when he has the means to provide excellent nutrition and schooling for both kids. The excuse, then, sometimes heard in the Muslim world that providing a daughter with an advanced education makes little sense because she will get married is nothing more than old-fashioned male chauvinism, which constrains the progress of women, but which has no basis in the *Shari'a*.

Is there any exception by which a child may be favored in respect of maintenance? Other than differences owing directly to gender (*e.g.*, different clothes for boys and girls, or enlisting services of different health care specialists for boys versus girls), there is one exception. It concerns disability.<sup>8</sup> *Imām* Hanbal argued a child with a handicap or other unique circumstance may be afforded special treatment.

<sup>6</sup> See HUSSAIN, *supra*, at 79-80.

<sup>7</sup> See HUSSAIN, *supra*, at 79-80.

<sup>8</sup> HUSSAIN, *supra*, at 79 (citing Yusuf Al-Qaradawi, *The Lawful and Prohibited in Islam* 230-231 (1989)).

<sup>9</sup> See HUSSAIN, *supra*, at 80.

Is the right of a child to maintenance absolute or conditional? A child has a claim to maintenance only if he or she is poor, and such a claim would be against the father.<sup>10</sup> Thus, the right is contingent. It would seem, then, that an impoverished child could bring a legal action against his or her father for maintenance, and the action would be brought by the mother. Conversely, neither parent has any right of ownership or usufruct (i.e., use or enjoyment short of destruction) in the property of their child. Thus, for example, even though a father (or grandfather) can act on behalf of his child, he cannot enter on the child's behalf into a transaction that is disadvantageous to the child. Lending the property of the child, or abandoning a legal claim held by the child, would be illustrations of disadvantageous transactions. However, a son or daughter who is of the age of majority, and who is not poor, is obliged to provide for the maintenance of his or her parents.<sup>11</sup> This obligation lies equally on sons and daughters.

From the perspective of a child, then, the child has a right to maintenance. It is the correlative of the duty of the father to provide that maintenance. What is the correlative right of the father, given that it is his duty to provide maintenance? The answer is he is entitled to respect, as Table 38-1 indicates.

Table 38-1:  
Correlative Rights and Duties of Father and Child

Duty—Right Set	Duty to Provide Maintenance	Right to Respect (Obedience)
Party	Duty of Father	Duty of Child
	Correlative right of Child	Correlative right of Father

"Respect" entails obedience of children to parents. Of course, the breadth and depth of this obedience varies from family to family, and culture to culture. Traditionally among families in Saudi Arabia, parents guide the selection of, and even arrange, partners for the marriage of their children, and make decisions about the educational and professional specialties of them.<sup>12</sup> However, in other Muslim countries, and among Muslim communities in non-Muslim countries, obedience to that degree would be regarded as overly officious parental behavior. Indeed, the trend may well be turning even in the Kingdom. That said, the father (and mother) is entitled to expect help in their old age from their child. In other words, part of the right of respect owed to the father in return for maintaining his child is to receive assistance later in life. That is true, also, of the mother in return for the care she provides to her child in her old age.

Can a father (or, for that matter, mother) force respect by violence? Put directly, is it permissible under the *Shari'a* for a parent to beat his child? Professor Hussain answers:

There is a *hadith* to the effect that children should not be struck with a cane before they have reached the age of 10, but reason and guidance are

<sup>10</sup> See SCHACHT, *supra*, at 168.

<sup>11</sup> See SCHACHT, *supra*, at 168.

<sup>12</sup> See SORAYA AL-UTHAYBI, *WOMEN IN SAUDI ARABIA: IDEOLOGY AND BEHAVIOR AMONG THE ELITE* 72 (New York, New York: Columbia University Press, 1986).

preferable means of discipline.<sup>13</sup>

The first clause gives little protection against child abuse. It implicitly authorizes corporal punishment, and regulates only the means in relation to age. The second clause is heartening, and reflects the approach of most Muslim and non-Muslim families alike.

### § 38.03 MOTHER'S RIGHT TO CARE (HADĀNA)

Distinct from the duty of a father to maintain his children until they are adults (or until a daughter is married) is the right of a mother to care for her children in their early years. Professor Schacht reports that, as a general principle in the *Shari'a*, parental rights of the mother of a young child are stronger than those of the father.<sup>14</sup> He further observes this principle holds until a boy is 7 years old, or in some instances, 9 years old, and until a girl comes of age (i.e., has her first menstrual period).<sup>15</sup> There is less uniformity as to the cut-off ages than Professor Schacht implies. Professor Hussain states:

There is a presumption in Islamic Law that it is for the benefit of a small child to remain with its mother. This is called *hadhanah*. The age at which *hadhanah* ceases varies between [sic] the [Four Sunnite] Schools, and also with the sex of the child, but the very minimum age is two years, and according to the Maliki School the right of *hadhanah* in relation to a daughter lasts until she is married. Once a child has reached the age of discretion, he or she may choose which parent he or she wishes to live with.<sup>16</sup>

In practice, then, the mother holds the right to care for a child, which in Arabic is known as "*hadāna*." Observe that "*hadāna*" actually entails two specific rights: the right of custody of a child, and the right to rear (in the sense of actual care of) a child.

Note, too, the *hadāna* right of the mother does not affect the guardianship of the father.<sup>17</sup> Guardianship (*wilāyah*) and custody (under *hadāna*) are distinct legal concepts and rights.<sup>18</sup> Throughout the childhood period, the father remains the legal guardian of the child. (If there are no prospective legal guardians available, then a *qādi* (Islamic judge) will appoint one to protect both the child and his or her property.<sup>19</sup>) That is true regardless of which parent, in fact, has custody of the child. Consequently, the father has control over the property of the child. He can enter

<sup>13</sup> HUSSAIN, *supra*, at 80.

<sup>14</sup> See SCHACHT, *supra*, at 167.

<sup>15</sup> See SCHACHT, *supra*, at 167.

<sup>16</sup> HUSSAIN, *supra*, at 81 (emphasis added).

<sup>17</sup> See HUSSAIN, *supra*, at 81.

<sup>18</sup> See 'ABD AL-RAHMAN I. DOI, *SHAR'AH ISLAMIC LAW* 331 (London, England: Ta-Ha Publishers Ltd., 2nd rev'd ed., 2008). [Hereinafter, DOI.] (The author's name is commonly transliterated as in the text above, and used on the copyright page and back of the treatise. But, the transliteration in this citation is more precise, and set out on the cover and title page of the treatise).

<sup>19</sup> See DOI, *supra*, at 333.



into contractual transactions involving that property of the child, and even incur debts, on behalf of that child.

As to rearing a child, what does "care" entail? Muslim religious and legal scholars (*ulema* and *fukahā*, respectively) have focused their attention on breast-feeding. Professor Hussain explains:

According to the scholars, it is the mother's *religious duty* to suckle her baby in accordance with the Quranic rule that "the mothers shall suckle their offspring for two whole years . . . [quoting *surah* 2, *ayah* 233]." The *Hanafis* and *Malikis* agree that a woman can be compelled to feed her baby, unless of course, she is physically unable to do so, and the *Shia* also agree with this position, with the exception that a woman may hire a wet nurse as a substitute if she wishes. The *Hanbalis* say that it is the duty of the father alone to provide for feeding the baby.<sup>20</sup>

Of course, as part of his duty of maintenance of his children, the father must provide the necessary support for his wife to breast-feed, or the funds to hire a wet nurse. Beyond nursing a child, "care" would entail all of the support, within the ability of the mother, necessary for the child to be healthy in the broad sense of the term.

Viewing breast-feeding as a religious obligation is an example of a general theme in the *Shari'a*, namely, the inseparability of law and religion. Children are a gift from God (Allāh). It is only logical a mother would take care of this precious gift by nursing if she is physically able to do so. Many non-Muslims, including Catholic Christians, would accept this logic. But, they would not write that logic into law. That is, a duty to breastfeed is not part of Family Law in the United States, because that law is secular in its basis. Grounded on Islam itself, Islamic Law contains that duty.

What happens to the right of *hadāna* if, tragically, the mother dies before the relevant cut-off age of her child, or otherwise is unable to care for the child before that age because of a physical or mental infirmity? Then, *hadāna* would not pass to the father. Rather, that right would pass to the nearest female relative of the mother, and if none, then the nearest female relative of the father. The specific hierarchy of custodians following the mother, as set out by *Imām* Ibn Juzayy Al Kalbi (1321-1357 A.D.), is:<sup>21</sup>

- Maternal grandmother
- Maternal aunt
- Paternal grandmother

<sup>20</sup> HUSSAIN, *supra*, at 80 (emphasis added).

<sup>21</sup> See Doi, *supra*, at 331-332 (quoting Juzayy Al Kalbi).

Juzayy Al Kalbi (1321-1357 A.D.), whose full name was "Abū 'Abdallāh Muḥammad ibn Muḥammad ibn Ahmad ibn Juzayy Al Kalbi," was a scholar of law and history, and a poet. He is renowned for his book on the comparative jurisprudence of the Sunni Schools, *Qawānīn al-Fiqhiyyah* (The Laws of Jurisprudence), his *tafsir* (interpretation) of the Qur'ān, his book on Islamic legal theory, *Aqrab al-Wasool 'ilā 'Ilm al-Usool* (The Nearest of Paths to the Knowledge of the Fundamentals of Islamic Jurisprudence), plus a treatise on Sufism called *The Refinement of the Hearts*. See [http://en.wikipedia.org/wiki/Ibn\\_Juzayy](http://en.wikipedia.org/wiki/Ibn_Juzayy).

- Great grandmother (however remote she is)
- Sister
- Paternal aunt
- Brother's daughter
- The best of the relatives of the parents on either side.

Any person in this order may be skipped if they are unfit for custody. Custodial rights remain with the relative in question until the child passed the requisite age. After the cut-off age, the *hadāna* right switches to the father of the child.

However, at anytime before these cut-off points, there are four grounds on which the mother loses her *hadāna* right. First, abjuring Islam, that is, apostasy, is one basis. Juzayy Al Kalbi describes this ground as a "paucity of *dīn*. . . ."<sup>22</sup> Obviously, this basis is a significant infringement on the freedom of religion of the mother.

Second, if the mother enters into a marriage with another man, other than a *mahram* of the child, i.e., a close relative of the child who is within the forbidden degrees of marriage with respect to that child, then she forfeits her *hadāna* right. Juzayy Al Kalbi further explains that if the mother re-marries, but then divorces, she does not regain her *hadāna* right in respect of her child from the prior marriage.<sup>23</sup> Professor Hussain articulates why marrying someone who is not related to the child causes forfeiture, and how Malaysian courts handle such cases:

This . . . reason appears to have been based on fears that a step-father might abuse the child, but the approach of the courts, in Malaysia at least, is to decide whether the welfare of the child is best served by leaving him or her with the mother regardless of her remarriage.<sup>24</sup>

Nonetheless, the possibility of forfeiture is a strong incentive against divorce and re-marriage. Yet, it can have the regrettable consequence of imposing on a woman a dilemma between staying in an abusive marriage yet retaining her right to care for a child she loves, or extricating herself from the abuse by losing that right.

Suppose, however, that divorce is initiated by the husband, who irrevocably divorces her (through a three-fold pronouncement of *talāk*). The wife retains custody over and the duty to care of the child.<sup>25</sup> If she is unable to fulfill her responsibilities, then custody moves to other female relatives. Moreover, the wife has a right to payment from him for breastfeeding her child for a period of up to two years.<sup>26</sup>

The other two grounds for forfeiting the *hadāna* right are clearly aimed at protecting the best interests of the child. The third basis is ill treatment by the mother of the child. If she is abusive, then it is proper to deprive her of her custodial

<sup>22</sup> See Doi, *supra*, at 332 (quoting Juzayy Al Kalbi).

<sup>23</sup> See Doi, *supra*, at 332 (quoting Juzayy al-Kalbi).

<sup>24</sup> HUSSAIN, *supra*, at 81.

<sup>25</sup> See Doi, *supra*, at 331.

<sup>26</sup> HUSSAIN, *supra*, at 80.

and care rights. The fourth basis is absconding with the child. That is, if the mother moves far away from the father without his permission, so that the father cannot contact the child, then she loses her right to care for that child. The exact distance considered "too far" is uncertain. Juzayy Al Kalbi identifies three possibilities: one postal stage (*i.e.*, about 12 miles), six postal stages (*i.e.*, 72 miles), or one day's journey.<sup>27</sup> But, as he wrote in the 14th century, these benchmarks may be inappropriate in today's world.

Suppose the father moves away, perhaps for a better job than he currently has, but the mother prefers to stay put? Juzayy Al Kalbi also sets out the following ruling:

If the father or another of the guardians of the child takes up residence in a city which is not the mother's city, then he has the custody of his children and not her, and he will move them with him *if he is trusted with them*, unless he is contented with the person who has custody to take them with him [or her] wherever he goes.<sup>28</sup>

At first glance, this ruling is puzzling. It seems to create a presumption that if the father moves and mother seeks to stay put, the presumption of custody switches to the father. However, the key phrase (*italicized*), suggests that custody stays with the mother.

What about an illegitimate child, one born out of wedlock, *i.e.*, to parents not married to each other? Likewise, what happens to a child whose paternity is contested by the purported father (the lawful husband of the mother), who claims *li'ān* (unchastity) by the mother as a ground for dissolution of the marriage? Do such occurrences provide yet another ground for forfeiture? The answer is "no." The mother retains her right to provide care (*ḥaḍāna*). That is, maintenance of the child remains the responsibility of the mother.

Given that a mother potentially could forfeit her right to give care (*ḥaḍāna*) were she to enter into a subsequent marriage with a *mahram* (nearby relative) of the child, Professor Schacht observes that this right is not also a duty.<sup>29</sup> His observation reflects a point made by Juzayy Al Kalbi, namely:

There is a difference of opinion as to whether custody is a right of the custodian, which is the well known position, or those being cared for, and on the basis of that whether if the one whose right it is drops it then it is dropped.<sup>30</sup>

As a legal matter, classification of *ḥaḍāna* as a forfeitable right may be accurate. But, as a practical matter there is a correlative right — duty set. That is, there is a duty that is correlative with the right of the mother to give care. She has a duty to give that care.

<sup>27</sup> See Doi, *supra*, at 332 (quoting Juzayy Al Kalbi).

<sup>28</sup> See Doi, *supra*, at 332 (quoting Juzayy al-Kalbi) (emphasis added).

<sup>29</sup> See Schacht, *supra*, at 167.

<sup>30</sup> See Doi, *supra*, at 332 (quoting Juzayy Al Kalbi).

## § 38.04 FOUNDLING (LAḲĪṬ) AND ADOPTION

How does Islamic Family Law treat a tragic, all-too-common occurrence, namely, a foundling (*laḳīṭ*), that is, a child who has been abandoned and whose parentage is unknown? The *Sharī'a* does not recognize adoption as such. Professor Hussain explains:

adoption was common in pre-Islamic Arabia, and Muhammad himself, before the time of his Prophethood, had adopted a child named Zaid, who had been captured in a tribal raid and presented to him as a slave. Muhammad freed him and adopted him and he was known as Zaid ibn Muhammad. Later he married the Prophet's cousin Zainab, but when that marriage failed, the Prophet married her after the divorce in accordance with the now revealed Islamic rule that adoption created no family relationship.<sup>31</sup>

The Qur'ān is the origin of the rule that Islamic Family law does not recognize adoption. *Surah* 33, *ayah* 4 states:

God does not put two hearts within a man's breast. He does not turn the wives you reject and compare to your mothers' backs into your real mothers; *nor does He make your adopted sons into real sons.*<sup>32</sup>

Read literally, this passage is not an express rejection of taking care of the child of another. It states merely that a son who is adopted does not become the biological child of the adopting parents by virtue of the adoption.

Not surprisingly, then, adoption exists in a *de facto*, but not *de jure*, sense. Professor Hussain notes:

The prohibition of adoption does not mean that there is any objection to a person bringing up someone else's child and caring for it if the child is an orphan or other circumstances exist which justify this happening.<sup>33</sup>

Consequently, a man may claim a foundling by acknowledging the child as his offspring.

Indeed, any man may make such a claim, and becomes a foster parent. Until that claim is made and proven false, the child is regarded as both free and a Muslim, unless the child was found in a non-Muslim area. Thus, a man may adopt a child by claiming him as his own, and unless contested, a father — child relationship is established. Suppose no one claims the child? Then, the person who found the child

<sup>31</sup> HUSSAIN, *supra*, at 81.

<sup>32</sup> THE QUR'AN — A New Translation by M.A.S. Abdel Haleem 33:4 at 266 (Oxford, England: Oxford University Press, 2004) (emphasis added).

The reference to "your mothers' backs" is explained by Professor Abdel Haleem as follows:

In pre-Islamic Arabia the husband sometimes said to his wife, "From now on, you are to me like my mother's back," by which he meant that he refused to have further conjugal relations with her, yet he did not divorce her and so give her the freedom to remarry (see 58:1-4).

*Id.*, fn. a to 33:4.

<sup>33</sup> HUSSAIN, *supra*, at 82.



has limited parental authority over the child. The child may be placed in an orphanage, with maintenance being the responsibility of the government or a charitable organization (*waqf*).

Significantly, a child raised by a foster parent does not have the same inheritance rights as a biological child of that parent.<sup>34</sup> Only the blood-related son or daughter inherits as an heir of the parent. To take care of the foster child upon the death of the foster parent, that parent may exercise either or both of two options. First, the foster parent may make gifts to the foster child during the life of the parent. Second, the foster parent may make a bequest in a will. However, as per the rule in Islamic Inheritance Law, that bequest is restricted to no more than one-third of the estate of the testator.

<sup>34</sup> See HUSSEIN, *supra*, at 82.

## Chapter 39

### CONTRACEPTION

Life is the sum of all your choices.

Albert Camus (1913-1960),  
French Novelist, Essayist, and Playwright, and winner of the 1957 Nobel  
Prize for Literature

#### SYNOPSIS

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## § 39.01 BASIC RULES

[A] Irreversible Methods Forbidden (*Ḥarām*)

Few if any issues concerning interactions between men and women are as sensitive or controversial as contraception. (Abortion is the obvious competitor.) For all couples, Muslim and non-Muslim alike, contraception is about one question: is the couple open to the creation of new life? The issue hardly is a simple one. Whether to take recourse to contraception, and if so, what contraceptive method to use, are religious matters. But, they also involve a complex admixture of economic, psychological, and scientific concerns. In making these decisions, each couple, and indeed each man and woman, and their circumstances, are unique and deserving of careful, personal attention. The issue is rendered more confusing in certain parts of the Muslim World, where it is not discussed or debated openly.<sup>1</sup> In that vacuum, some conservative *mullahs* (religiously educated men) simply, and simple minded, intone against contraception.

The *Sharī'a* does provide Muslim couples with considerable guidance as to their choices about contraception. This guidance, while of course grounded in religion, implicates the economic, psychological, and medical factors at stake. This guidance is not from the Qur'ān itself. Like the New Testament of the Bible, and the United States Constitution, the Qur'ān is silent on contraception.<sup>2</sup> None of these documents expressly and unequivocally permits or forbids either permanent or temporary contraception. (To be sure, there are passages in these Sacred Texts to which some observers point for indirect support of a particular position.) Instead, then, under Islamic jurisprudence (*fiqh*), guidance to married couples is based on the other three sources of Islamic Law: *hadith*, analogical reasoning (*qiyās*), and consensus (*ijma*).

To begin, Islamic jurisprudence (*fiqh*) does not treat all methods of contraception equally. Hence, it is necessary to distinguish among methods. The key distinction in Islamic *fiqh* is between irreversible and reversible methods of contraception.

The *Sharī'a* regards castration as forbidden (*ḥarām*). That is because it destroys the power of reproduction. The ability to reproduce is a precious gift from God (Allāh). Destroying it is a kind of sacrilegious self-mutilation. Abdullah 'ibn Mas'ud, a Companion of the Prophet (*Sahābiy*), relates a *hadith* on the topic of castration:

We used to be engaged in *jihād* with the Messenger of Allāh and we had no one (with whom we could fulfill our desires). So we asked if we could get ourselves castrated. The Messenger of Allāh forbade us from doing so.<sup>3</sup>

<sup>1</sup> See JAMILA HUSSAIN, *ISLAMIC LAW AND SOCIETY — AN INTRODUCTION* 122. [Hereinafter, HUSSAIN.]

<sup>2</sup> See HUSSAIN, *supra*, at 117.

<sup>3</sup> This *hadith* appears in MUHAMMAD IBN ADAM AL-KAWTHARI, *BIRTH CONTROL AND ABORTION IN ISLAM* 23 (Santa Barbara, California: White Thread Press, 2006) [Hereinafter, AL KAWTHARI.] T his source states that the *hadith* is recounted in SAHIH BUKHARI, as *hadith* number 4787, in the Book of *Tafsīr*. Indeed, this *hadith* does appear in one or more Arabic-language versions of the compilation of *hadiths* by Imām Bukhari. Oddly, it is missing from the Book of *Tafsīr* in the English translation of the compilation by

Imām Badr Al Din Al Ayni comments on this *hadith*, concluding that:

Castration is to cut the organs of the body that are the basis for offspring . . . It is considered *ḥarām* by the consensus of all of the scholars.<sup>4</sup>

Modern *Sharī'a* scholars draw an analogy (*qiyās*) between castration and sterilization, conclude that the *fiqh* on each issue is the same: both are prohibited.<sup>5</sup>

That is, by recourse to *qiyās*, specifically, analogical reasoning based on the above-quoted *hadith*, male sterilization (vasectomy) and female sterilization (tubal ligation or tubectomy) are *ḥarām*. Like castration, these surgical procedures permanently inhibit a couple from reproduction.<sup>6</sup> The modern medical possibility that certain vasectomies or tubal ligations may be reversed by subsequent surgical procedures does not alter the stance of the Islamic *fiqh*. However, it may be anticipated that a male or female, having undergone sterilization, would be encouraged by some religious or legal scholars (*ulema* and *fukahā*), respectively) to make best efforts to obtain medical help to reverse that sterilization.

In this regard, some Muslim scholars do not liken a tubal ligation or vasectomy to castration, categorizing only the latter as unequivocally irreversible.<sup>7</sup> Such scholars, who appear to be a minority, thus do not forbid tubal ligation or vasectomy. Rather, they treat these procedures like a reversible method of contraception.

There is a clear parallel with Catholic Christianity: it contains the same precepts. Sterilization is regarded as sinful, as it rejects a God-given ability to reproduce. However, there is an unambiguous difference with American law, under which a person is free to choose to be sterilized, and to seek a reversal of a prior procedure.

As with many situations, however, the *Sharī'a* is flexible and provides exceptions. In a situation in which the life of a mother is in danger, as attested to by an unbiased medical opinion, it is permissible for her to undergo a tubal ligation.<sup>8</sup> Typically, this situation arises where a mother cannot have a natural birth. Having several children through Caesarean birth could endanger greatly the life of the mother.<sup>9</sup>

## [B] Historical Practice of 'Azl (Withdrawal)

"Azl" occurs during sexual intercourse when a "man withdraws his sexual organ from his spouse's genitals just before ejaculation."<sup>10</sup> It is a temporary contraceptive method, and (as explained below) for this reason often provides the standard of permissibility for other reversible contraceptive methods. Of course, medically, in

Imām Bukhari, and does not seem to appear elsewhere in that translation. Ms. Jomana Qaddour tracked down an Arabic version of the *hadith*, translated it, and checked the English translation of the Imām Bukhari compilation.

<sup>4</sup> See AL KAWTHARI, *supra*, at 23 (quoting 'UMAYYAT AL-QARI' 14:14).

<sup>5</sup> See AL KAWTHARI, *supra*, at 24.

<sup>6</sup> See AL KAWTHARI, *supra*, at 22.

<sup>7</sup> See HUSSAIN, *supra*, at 121-122.

<sup>8</sup> See AL KAWTHARI, *supra*, at 22.

<sup>9</sup> See AL KAWTHARI, *supra*, at 25.

<sup>10</sup> See AL KAWTHARI, *supra*, at 25.



terms of efficacy, 'azl is highly uncertain.

The *sirah* (way of life) of Muslims during the time of the Prophet Muhammad reveals that Muslims practiced *coitus interruptus* ('azl). Jābir, one of the Companions of the Prophet (*ṣaḥābah*), narrates unambiguously:

We used to practice *coitus interruptus* during the lifetime of Allāh's Apostle. . . .<sup>11</sup>

Another *ḥadīth*, narrated by Abū Sa'īd Al-Khudri, concerns an instance in which he was asked about the views of Muhammad on 'azl:

Yes, (I heard) Allāh's Apostle . . . saying: There is no harm if you do not practice it, for it (the birth of the child) is fate.<sup>12</sup>

Al-Khudri also testifies:

[T]he Jews say that 'azl is minor infanticide, so the Prophet . . . said, "The Jews are wrong: for if Allāh wanted to create something, no one can divert Him."<sup>13</sup>

From these *ḥadīths*, three inferences may be drawn: that 'azl was practiced in the era of the Prophet, that the Prophet neither required nor forbade its practice, and that the Prophet believed that a child is a gift from God (Allāh).

By no means was 'azl the only method of temporary contraception employed by Muslims. Professor Hussain writes:

Nawal El Saadawi mentions [in *The Hidden Face of Eve: Women in the Arab World* 67 (London, England: Zed Books, 1980)] that contraception was practiced in the Muslim world in the Middle Ages. A famous physician, Abou Bakr al Razi, in the 9th century, described various methods of contraception, other than *coitus interruptus*. Some of these were the placing of medicaments at the opening of the uterus before sexual intercourse. These were intended either to close up the opening or expel the semen. Some substances used were tablets of cabbage, wax secreted by

<sup>11</sup> THE TRANSLATION OF THE MEANINGS OF SAHIH AL-BUKHARI, ARABIC-ENGLISH BY DR. MUHAMMAD MUHSIN KHAN, vol. VII, book LXII (The Book of Nikāh (Wedlock)), p. 102, *ḥadīth* no. 135 (Dar Ahyā Us-Sunnah, Al Nabawiya, March 1978). See also *id.*, *ḥadīth* no. 136 ("We used to practice *coitus interruptus* while the Qur'ān was being revealed"); HUSSAIN, *supra*, at 118 (quoting this *ḥadīth*).

Regarding this *ḥadīth*, Professor Hussein observes:

There is also a *ḥadīth* in which the Prophet is reported to have himself likened 'azl to minor infanticide. This is considered by some scholars to be a weak *ḥadīth*, but Imām al Ghazālī explained the apparent contradiction as being that the "minor" infanticide lies in the intention not to produce a child and as such it may be likened to the Prophet's remarks about "minor disbelief" as being something *undesirable but not forbidden*.

*Id.* at 119 (emphasis added).

<sup>12</sup> SAHIH MUSLIM — BEING TRADITIONS OF THE SAYINGS AND DOINGS OF THE PROPHET MUHAMMAD AS NARRATED BY HIS COMPANIONS AND COMPILED UNDER THE TITLE AL-JAM' US-SAHIH BY IMAM MUSLIM, RENDERED INTO ENGLISH BY ABDEL HAMID SIDDIQI, WITH EXPLANATORY NOTES AND BRIEF BIOGRAPHICAL SKETCHES OF MAJOR NARRATORS, CORRECTED AND REVISED BY DR. HASSAN VOL. II, B, book 16 (Book of Marriage), p. 373, *ḥadīth* no. 1458R3 (Lahore, Pakistan: Sh. Muhammad Ashraf Booksellers and Exporters, 1990). (Hereinafter, MUSLIM.)

<sup>13</sup> Quoted in HUSSAIN, *supra*, at 118.

animal's ears, the droppings of elephants, and calcium water. It is not stated how effective these methods were or whether there were any side effects!

Another famous Muslim physician was Ibn Sina, known in Europe as Avicenna, who died in A.D. 1037. He wrote *Al Kanoun fil Tib* (*The Laws of Medicine*) in which he described 20 different methods of contraception in a way which Nawal El Saadawi describes as "remarkably accurate and detailed considering the relatively early stage of scientific development at which he was writing." Imām al Ghazali, writing in the 11th century, mentioned the use of a condom made out of gut as a means of contraception.<sup>14</sup>

Of course, methods of temporary contraception have evolved since the early days of Islam. Nevertheless, the religious and moral debate about such methods continues.

### [C] Most Reversible Methods Generally Permitted (*Ḥalal*)

Since the 9th century A.D., a variety of reversible contraceptive techniques have been recognized and commented on by Islamic scholars.<sup>15</sup> Ibn Sinā (*circa* 980-1037, known in the West as Avicenna) in his *Qanun*, listed 20 birth control substances, while Abū Bakr al-Razi, in *Hawi*, listed 176 birth control substances.<sup>16</sup> Both contributed to the Islamic medical legacy, and both recognized the use of the variety of contraceptive methods available in their time.

Contemporary *ulema* and *fukahā'* recognize the existence and widespread use of a variety of reversible contraceptive means. Listed alphabetically, these contraceptive methods include the following:

- 'Azl, or *coitus interruptus*, which in English is commonly known as withdrawal.
- Condoms, for males or females.
- Diaphragms and caps.
- Injections, particularly of progesterone.
- Intra-Uterine Devices (IUD), which is often described as the "loop," "coil," or "curl" because of its shape.
- Locally acting spermicidal jellies.
- Oral contraceptive pills, commonly known as "the pill."<sup>17</sup>

<sup>14</sup> HUSSAIN, *supra*, at 120-121.

<sup>15</sup> See AL KAWTEARI, *supra*, at 33.

<sup>16</sup> See SA'DIYYA SHAHID, SACRED RIGHTS: THE CASE FOR CONTRACEPTION AND ABORTION IN WORLD RELIGIONS 105, 115 (New York, New York: Oxford University Press, Daniel C. Maguire ed., 2003).

<sup>17</sup> Early versions of the Pill contained a large amount of estrogen, the primary effect of which was to block ovulation. Thus, these versions operated as a contraceptive. However, such high doses of estrogen posed serious health risks to women. Consequently, the pharmaceutical companies that made the Pill altered the ingredients by reducing the levels of estrogen, and added another hormone, progestin. Progestin changes the lining of the uterus, which makes it difficult for a new embryo to implant in that lining during the second week of a pregnancy. The newer versions of the Pill, therefore, have more of an

- Rhythm method, that is, the practice of abstinence during the fertile periods in the normal menstrual cycle of a woman.

Muslim scholars have not dwelled extensively on each of these individual methods. Rather, they have ruled the first of the eight methods, 'azl, is permissible (*halal*). In turn, by use of analogical reasoning (*qiyās*), the scholars generally consider the latter seven methods to be equivalent to 'azl. Their logic essentially is that withdrawal is acceptable, the other methods are functionally akin to withdrawal, so they, too, are acceptable. That is, they analogize the range of modern methods to the ancient method of 'azl.<sup>18</sup>

Thus, the general rule in the *Shari'a* is most, indeed nearly all, of the methods of reversible contraception are permissible (*halal*). However, this view is not unanimous. There are differences (discussed below) among the Four Sunni Schools on the particulars of permissibility, namely, the prerequisites for use of reversible contraception. Moreover, the *Māliki* School holds a slightly different opinion on oral contraceptive pills, and do not regard them as subject to the same ruling as 'azl.

Significantly, there are two reversible contraception methods that are not regularly put into the category of "permissible." They are birth control patches and the morning-after pill. Both are debated amongst the scholars as to whether they are *halal*.<sup>19</sup>

Why do some Muslim scholars regard the birth control patch as offensive? They argue the patch conflicts with Islamic requirements of purification, or *ghusl*.<sup>20</sup> Uninterrupted attachment of the patch to the body of a woman is necessary for the patch to be effective. Yet, continuous attachment hinders the ability of a woman to wash every part of her body. She cannot, therefore, become ritually clean in preparation for prayers. Some scholars, then, opine the birth control patch is permissible (*halal*) only if no other contraceptive means are available, and only if a woman using the patch wipes over it with water so that she can still meet the requirements of *ghusl*.<sup>21</sup>

As for the morning-after pill, the debate among Muslim scholars concerns its operation. Does this pill destroy an already fertilized egg? Or, does this pill prevent attachment of an embryo to the lining of the womb?<sup>22</sup> If the pill operates in the first manner, then certain scholars categorize it as an abortifacient drug (i.e., one that induces an abortion), and subject it to the Islamic rulings on abortion.<sup>23</sup> These scholars permit use of the pill only in extreme medical circumstances. However, other Muslim scholars regard the morning-after pill as yet another permissible

abortifacient than a contraceptive effect. See Joe Bollig, "The Pill" Leaves a Legacy of Pain, THE LEAVEN (Newspaper of the Archdiocese of Kansas City, Kansas), 30 July 2010, at 5. [Hereinafter, Bollig.]

<sup>18</sup> See Al Kawthari, *supra*, at 28.

<sup>19</sup> See Al Kawthari, *supra*, at 43-45.

<sup>20</sup> See Al Kawthari, *supra*, at 45.

<sup>21</sup> See Al Kawthari, *supra*, at 45.

<sup>22</sup> See Al Kawthari, *supra*, at 43-44.

<sup>23</sup> See Al Kawthari, *supra*, at 43-44.

method of reversible contraception.<sup>24</sup> Note that the distinction between destruction of a fertilized egg and prevention of attachment of an embryo to the lining of the womb is one without a difference. Both result in the end of life, which (according to Catholic Christian, and indeed most if not all other religious teachings) began at conception.

The general permissibility of reversible contraceptive methods under the *Shari'a* is analogous to the *status quo* in American law. Once approved by Federal authorities, specifically the Food and Drug Administration (FDA), a reversible method is produced and sold en masse. It is up to the individual consumer to decide whether to use the method, and if so, which method to use. Most methods are marketed over-the-counter (OTC), though considerable controversy exists as to whether and how abortifacient drugs ought to be distributed. The *Shari'a* rules contrast with Catholic Christian teaching, which holds that artificial contraceptive methods other than Natural Family Planning (NFP) are objectively morally wrong.

## § 39.02 DIVERSITY OF ISLAMIC OPINIONS

### [A] Overview and Three Themes

Professor Hussain provides the following characterization of the opinions of Muslim religious and legal scholars (*ulema* and *fukahā'*, respectively) on and other methods of reversible (temporary) contraception:

There is general agreement among the scholars of all the major schools of Islamic jurisprudence that contraception is acceptable, providing that the wife consents. Some consider it within the category of actions classed as *makrah* (undesirable) since it deprives women of sexual fulfillment and the benefit of having children. However, if there is some genuine need, as may result from a threat to the life or health of the mother or genuine financial difficulties, there is no objection to it.

...

... It is generally agreed that the reversible methods are permissible, though some consider them undesirable. ...<sup>25</sup>

This summary is accurate. Indeed, in the opinion of some scholars, a threat to the mother indubitably is the soundest basis for the use of contraception.<sup>26</sup> Yet, the summary also is incomplete. For example, is a threat defined narrowly, to include only the possible bearing and delivery of one child, or one more child? Or, is "threat" defined broadly to include frequent childbearing and delivery, and caring for a large family? The scholars do not offer a uniform consensus (*ijma'*) on these questions.

<sup>24</sup> See Al Kawthari, *supra*, at 44.

<sup>25</sup> Hussain, *supra*, at 119, 121.

<sup>26</sup> See Hussain, *supra*, at 119 (Annandale, New South Wales, Australia: The Federation Press, 1999) (discussing the argument of Abul Fadl Mohsin Ibrahim in *Abortion, Birth Control, and Surrogate Parenting* 27 (Burr Ridge, Illinois: American Trust Publications, 1991)).



Such questions call for a survey of Islamic *fiqh* on contraception. Three overarching themes emerge. First, the overwhelming majority of *ulema* and *fukahā* in all Four Schools regard 'azl (withdrawal) as permissible (*halal*).<sup>27</sup> Second, except for some *Hanafi* School opinions, the Four Schools regard the express consent of the wife as a necessary pre-condition for the permissibility of 'azl. That is, a husband is not to interrupt sexual intercourse unilaterally without clear, prior agreement from his wife.

Third, despite the general permissibility in respect of reversible methods, there is a degree of dislike or reprehensibility (*makrāh*) attached to the practice of contraception.<sup>28</sup> This degree of dislike is lowered if 'azl is practiced for a legitimate religious reason. Aside from coping with a threat to the life or health of the mother, which all *ulema* and *fukahā* agree is a "legitimate" reason from a religious perspective, what other justifications pass muster? There is some debate on this question. One scholar, Dr. 'Abdur Rahman i Doi in his 1992 book, *Women in Shari'ah*, says contraception is permissible in only the following instances:

- if there is any fear of special financial, educational, or other problems in respect of children which would stop a man from fulfilling his religious duties;
- if it forces a man to accept unlawful things or unlawful food just for the sake of his children;
- if there is a problem of ruining the health of the children. If the father or mother is suffering from a contagious disease which can be transmitted to the children, but this does not apply to hereditary diseases like diabetes and such other diseases;
- if there is a danger that the parents would not be in a position to give proper training (*tarbiyyah*) to the children as required by Islam.<sup>29</sup>

In all other instances, Professor Doi says, the use of contraception is tantamount to a loss of trust in God (Allāh). The above list, however, is by no means universally accepted by Muslim scholars. Generally, there is agreement among the *ulema* and *fukahā* that religiously "legitimate" reasons include the following circumstances in which a married couple may find itself:<sup>30</sup>

- The couple lives in the land of the enemy (*dār al-ḥarb*).
- The couple plans on divorcing.
- The couple fears their child will be raised in an environment of moral and religious decline.

<sup>27</sup> See Al Kawthari, *supra*, at 38.

<sup>28</sup> See Al Kawthari, *supra*, at 38.

<sup>29</sup> HUSSAIN, *supra*, at 129 (Annandale, New South Wales, Australia: The Federation Press, 1999) (summarizing Dr. 'Abdur Rahman i Doi, *Women in Shari'ah* 129-130 (London, England: Ta-Ha Publishers, Ltd., 1992)).

<sup>30</sup> See Al Kawthari, *supra*, at 38.

The key point, then, is that even if they do not agree on every item on the list of reasons, most scholars are less than enthusiastic about the use of even reversible birth control methods. By articulating legitimate religious reasons for their use, it may be surmised that scholars at least encourage a couple to consider its motives for contraception.

'Azl is the only contraceptive means mentioned in any of the reliable *hadiths*. As per the intrinsic nature of 'azl, its practice depends on an affirmative act by the husband. For this reason, the *hadiths* are generally silent on the permission of the husband to practice 'azl, i.e., they presume consent of the husband. Instead, they focus on the permission of the wife as a necessary prerequisite for this practice. In light of modern medical advancements, contemporary Muslim scholars are aware of the availability of several temporary contraceptive methods, many of which (such as insertion of a diaphragm or taking of birth control pills) depend on an affirmative act of the wife. Therefore, the majority of scholars in all Four Schools now regard previously endorsed opinions that emphasize express consent of the wife as interchangeably requiring express consent of the husband.<sup>31</sup>

That is, all Four *Sunni* Schools recognize that explicit spousal consent is necessary from the spouse who is not undertaking the affirmative act of reducing the chances of reproduction. This "prior consent" requirement — affirmative temporary contraceptive action by one spouse should be agreed upon by the other spouse — is a product of analogical reasoning (*qiyās*): because the *hadiths* required prior consent of the non-acting spouse (the wife) with respect to 'azl, by extension the prior consent of the non-acting spouse (the husband or wife) is needed with respect to a modern temporary contraceptive method. The specific nuances among the Schools are set out as follows.

## [B] *Hanafi* School

The *Hanafi* School permits 'azl and other temporary contraceptive methods, although this School stresses that all such practice is disliked and discouraged. The School identifies two distinct issues:

- (1) Under what circumstances is the use of reversible contraception acceptable, in the sense of not being reprehensible (*makrāh*)?
- (2) Under what circumstances is prior consent by a spouse to the use of reversible contraception not required?

On the first issue, most recently, Imām Muhammad Shafī 'Uthmani of Deoband, India, summarized the grounds for religiously legitimate use of temporary contraception:

it is acceptable to practice reversible contraception in cases where: (1) a woman is too weak or ill to sustain pregnancy; (2) when she is in an area where there is no stability or security; (3) when the couple is on a prolonged

<sup>31</sup> See Al Kawthari, *supra*, at 38.

and difficult journey, in which pregnancy may cause difficulty; (4) when the wife's relationship with the husband is strained and divorce is likely.<sup>32</sup>

Other contemporary *Hanafi* scholars have added another religious justification for reversible contraception: spacing. They state it is permissible to practice reversible methods of contraception if a couple wishes to space out children. Spacing allows the couple to provide more adequately for the family. It also accommodates the reality of distressed circumstances in which a woman may be compelled to work to earn income for her family, and therefore is not in a position to give birth to more children and provide adequately for them.<sup>33</sup>

On the second issue, the general consensus (*ijma*) of the *Hanafi* School is that to practice 'azl, consent of both spouses, husband and wife, is necessary. In respect of express consent of the wife, the majority of *Hanafi* scholars emphasize the importance of her agreement. That is because 'azl simultaneously affects both her right to have children and her level of sexual pleasure.<sup>34</sup> In contrast, it is that right, but less so the level of physical satisfaction, which is implicated.

The *Hanafi* School *ijma* holds that explicit spousal consent may be overlooked in particular circumstances. These circumstances amount to compelling religious reasons.<sup>35</sup> One such reason is the couple lives in the land of the enemy (*dār al-ḥarb*). In effect, this means they are in a non-Muslim country with which there is no peace agreement. The underlying logic appears to be that having a child in such circumstances could prove treacherous, although certainly the birth of children during wartime has occurred throughout human history. A second reason is that one or both spouses are planning on divorce. This reason is odd, in that conjugal relations would not be expected in this case.

Religious corruption is a third justification for waiving the prerequisite of spousal consent before 'azl. In particular, a husband maybe concerned that any child would be born into an environment of moral and spiritual decay. Some *Hanafi* School scholars explain that having a child is conditional on being able to raise that child as a practicing, God-fearing Muslim. If that condition cannot be met owing to an adverse milieu, then contraception by means of withdrawal without prior consent of the wife is permissible (*halal*). For example, the classical *Hanafi* jurist, Imām Haskafi states in his book, *Al-Durr al-Mukhtar*, which is a major reference of *Hanafi* School *fiqh*:

[I]t is permissible to practice 'azl with a woman with her consent, although . . . it is permissible even without the wife's consent in our times due to religious decline.<sup>36</sup>

<sup>32</sup> See AL KAWTHARI, *supra*, at 35 (quoting Mufti Muhammad Shafi 'Uthmani, *Dab-e Wiladat* at 19). Mufti 'Uthmani died in 1976.

<sup>33</sup> See AL KAWTHARI, *supra*, at 35.

<sup>34</sup> See AL KAWTHARI, *supra*, at 33-35.

<sup>35</sup> See AL KAWTHARI, *supra*, at 34.

<sup>36</sup> See AL KAWTHARI, *supra*, at 33 (emphasis added).

Imām Haskafi wrote *Al-Durr al-Mukhtar* in 1070 A.D., and died in 1077 A.D.

Imām ibn 'Abidin, a later *Hanafi* authority, states in his commentary on the above quotation from Imām Haskafi, that:

If there is fear of begetting delinquent and mischievous children, it will be permitted to practice 'azl with a woman even without her consent.<sup>37</sup>

Imām Kasani, another prominent *Hanafi* jurist, states that:

It is prohibitively disliked (*makrah*) to practice 'azl without one's wife without her consent [*sic*], for sexual intercourse with ejaculation is [the] cause of begetting children, and she has a right to have children. . . . However, if 'azl is practiced with her consent, it will not be disliked, for she has agreed to relinquish her right.<sup>38</sup>

A careful examination of the above-mentioned religious grounds for (1) the use of 'azl or other temporary contraceptive methods, and (2) waiving the requirement of prior spousal consent, indicates that the justifications are not widely different. They seem to be nearly co-extensive as to residing in enemy territory and contemplating divorce, and possibly the concern about religious corruption. Consequently, the potential to conflate the issue of the permissibility of contraception with the issue of prior consent exists, with the follow-on possibility that one spouse (quite likely the wife) will not be fully respected.

### [C] *Mālikī* School

The *Mālikī* School permits the practice of 'azl, on the condition that the husband has the express permission of his wife to practice it.<sup>39</sup> Imām Ibn Juzayy, a prominent *Mālikī* authority who followed Imām Mālik, states clearly that:

*Coitus interruptus* will not be permissible with one's wife except with her consent.<sup>40</sup>

Notably, the *Mālikī* School consensus (*ijma*) traditionally departs from the other Four Schools on medicinal means of contraception. This School has issued rulings against such means. For example, Shaykh Muhammad 'Illish in *Fath al-'Aliyy al-Malik* writes:

It is not permissible to use medicine to prevent pregnancy. . . . Once the semen has entered the womb, it is prohibited to take any measure to remove it.<sup>41</sup>

<sup>37</sup> See AL KAWTHARI, *supra*, at 33 (quoting RAḌD AL-MUḤTAR 'ALA 'L-DURR AL-MUKHTAR 3:175-176).

The full name of Imām ibn 'Abidin was Muhammad Amin ibn 'Abidin, and on the Indian Subcontinent he is known as Imām Shami. He was born in Damascus, and lived between 1198-1252 A.H.

<sup>38</sup> See AL KAWTHARI, *supra*, at 34 (quoting BADA' AL-SANA' 2:334).

<sup>39</sup> See AL KAWTHARI, *supra*, at 35.

<sup>40</sup> See AL KAWTHARI, *supra*, at 35 (quoting AL-QAWANIN AL-FIḤḤA 160).

The full name of Imām Ibn Juzayy was Abū 'Abdallāh Muhammad ibn Muhammad ibn Ahmad ibn Juzayy al-Kalbi. He lived between 1321-1357 A.D., and died in Fez, Morocco. He dictated the travels of Ibn Batutta (1304-1368/1369), a Moroccan Berber Muslim scholar and traveler.

<sup>41</sup> See AL KAWTHARI, *supra*, at 44 (quoting 'ILLISH IN FATH AL-'ALIYY 'L-MALIK FI'Y-FATAWA 'ALA MADHḤAB AL-IMAM MALIK 1:399).



Thus, under traditional *Māliki* opinion, the modern-day pill and injections are prohibited.<sup>42</sup> Condoms and other such reversible methods appear to be permissible.

Possibly, this opinion is based on the rationale that acceptance of suffering, in the sense of "dealing with God's Will," is a more respected gesture than turning to medicine or doctors when one is sick or in need of help. (Such a rationale implicitly categorizes child-bearing and child-rearing as suffering, a categorization that is both true and false.) However, the *Sunnah* of the Prophet does not support this rationale. Muhammad encouraged Muslims to do what they could to protect the body God (Allāh) gave them, because the body is an *amanah*, or trust, from Him. Thus, recent *Māliki* jurists, such as Shaykh 'Abd al-Rahman al-Ghiryani, permit the use of medicines to prevent pregnancy.<sup>43</sup>

### [D] *Shāfi'i* School

The *Shāfi'i* School follows reasoning similar to that of the *Hanafi* School. Consequently, the consensus (*ijma*) of the *Shāfi'i* School permits 'azl, while simultaneously maintaining that it is reprehensible (*makrūh*). The majority of *Shāfi'i* scholars also regard advance permission of a wife as a necessary condition for the permissibility of 'azl.<sup>44</sup>

Several prominent *Shāfi'i* scholars have commented on temporary contraception, specifically 'azl, and its permissibility. *Imām* Nawawi studied the distinction of the practice of 'azl with a free versus a slave woman, because of the *ḥadīth* narrated by the Caliph 'Umar. This *ḥadīth* states:

The Messenger of Allāh forbade the practice of 'azl with a free woman except with her permission.<sup>45</sup>

*Imām* Nawawi concluded the practice of 'azl is *makrūh* in both instances. That is because it eventually "leads to a reduction in reproduction" in both circumstances.<sup>46</sup> In his commentary on the *ḥadīths* compiled by *Imām* Saḥīḥ Muslim, *Imām* Nawawi asserts:

'Azl . . . is a practice that is *makrūh* according to *Shāfi'i*s at all times, and with all types of women, irrespective of whether she is willing or otherwise, for it leads to a reduction in reproduction. . . . The narrations in this regard have been reconciled with one another, such that the narration

signifying the impermissibility of this practice is interpreted to indicate that it is *makrūh tanẓīhan* and the narrations indicating its permissibility show that it is not *ḥarām*.<sup>47</sup>

*Imām* Abū Ḥamid Al Ghāzālī agreed with the opinions of the *Shāfi'i* jurists, also finding its practice to be permissible, yet *makrūh*.<sup>48</sup>

There were *Shāfi'i* scholars who disputed the degree of religious offensiveness of the act. Consequently, Al Ghazālī delved into the reasoning why *Shāfi'i* scholars ruled 'azl as *makrūh*. Al Ghazālī concluded:

As for offensiveness, or *karaha*, it is a term applied to things that are closer to the unlawful and *ḥarām* acts than things that are somewhat disliked (and closer to the lawful), and things that merely entail leaving out the superior. 'Azl is considered *makrūh* in the third sense in that it entails leaving out a meritorious act. The meaning of offensiveness, or *karaha*, here is merely foregoing a commendable act — that is, to have a child.<sup>49</sup>

Al Ghazālī was a proponent of contraception for a variety of purposes, including:

- Protecting the life of the wife.
- The need for the wife to preserve her beauty for the enjoyment of the marriage.
- Limiting family size if a large number of dependents would impose a great financial and psychological hardship on the family.<sup>50</sup>

These reasons appear to be fairly widely appreciated in the *Shāfi'i* School.

### [E] *Ḥanbali* School

The *Ḥanbali* School follows the reasoning and conclusions of the majorities of the other three Schools. Thus, under the *Ḥanbali* School consensus (*ijma*), the practice of 'azl, and by analogical extension modern reversible contraceptive methods, is reprehensible (*makrūh*). The majority of *Ḥanbali* scholars allow the use of 'azl as long as the husband has express prior consent from his wife. Again by extension, it appears the majority of *Ḥanbali* scholars agree permission from the

<sup>47</sup> See AL KAWTHARI, *supra*, at 36 (quoting AL-MINHAJ SHARH SAḤĪḤ MUSLIM *ḥadīth* no. 1085).

<sup>48</sup> See AL KAWTHARI, *supra*, at 36.

The full name of *Imām* Al Ghāzālī was Abū Ḥamid Muḥammad ibn Muḥammad Al Ghazālī. A Persian jurist, philosopher, and theologian, he lived from 1058-1111 A.D., dying in Tus, which is in the Khorasan province in the north-east of modern-day Iran. He is one of the most important figures in the history of Islamic thought. Among his achievements are his use of doubt and skepticism, and his book, *The Incoherence of the Philosophers*, which moved Islamic metaphysics away from ancient Greek philosophy, putting it on an Islamic foundation in which God (Allāh), sometimes through angels, determines cause-and-effect. This foundation is known as "Occasionalism," meaning that God causes all events.

<sup>49</sup> See AL KAWTHARI, *supra*, at 37 (quoting IRYA 'ULUM AL-DIN 2:45).

<sup>50</sup> See Marion Holmes Katz, *The Problem of Abortion in Classical Sunni Fiqh*, in ISLAMIC ETHICS OF LIFE: ABORTION, WAR, AND EUTHANASIA 24, 43 (Columbia, South Carolina: University of South Carolina Press, Jonathan E. Brockopp ed., 2003).

This Shaykh lived from 1802-1881 A.D. (1196-1275 A.H.).

<sup>42</sup> See AL KAWTHARI, *supra*, at 44.

<sup>43</sup> See AL KAWTHARI, *supra*, at 44.

<sup>44</sup> See AL KAWTHARI, *supra*, at 36.

<sup>45</sup> See AL KAWTHARI, *supra*, at 36 (quoting IRN MAJA *ḥadīth* no. 2003).

The full name of *Imām* Nawawi was Yahya ibn Sharaf Al Nawā. He was born in Nawa, a village in Southern Syria, and spent most of his life in Damascus. He died in 1277 A.D. (676 A.H.). He is highly regarded as an intellectual heir to *Imām* Shāfi'i, and known for his works on the *ḥadīth*. See also JAMILA HUSSAIN, ISLAMIC LAW AND SOCIETY — AN INTRODUCTION 118 (Annandale, New South Wales, Australia: The Federation Press, 1999) (quoting this *ḥadīth*).

<sup>46</sup> See AL KAWTHARI, *supra*, at 36.

appropriate (non-acting) spouse is needed for the other (acting) spouse to employ an alternative temporary method.

As for the reason express, prior permission of the wife is needed before her husband practices *ʿazl*, the *Ḥanbali* authority *Imām* Ibn Qudamah provides two.<sup>51</sup> First, contraception interferes with the right of the wife to have children.<sup>52</sup> Second, reversible contraception methods may physically harm the wife, and it would be wrong to impose such harm on her. Accordingly, Ibn Qudamah reasons in a fashion similar to *Imām* Nawawi, and bases his opinion on the *ḥadīth* narrated by Caliph 'Umar (quoted earlier) with an emphasis on the rights of women. Indeed, for Ibn Qudamah, the rights of women are the central concern, because *'azl* subsequently results in

reducing offspring and . . . lessen[ing] the pleasure [of sex] for a woman.<sup>53</sup>

Analogous to the reasoning of the *Ḥanafi* School, Ibn Qudamah condones practicing *'azl* in times of need, such as living in the *dār al-ḥarb* or fighting in enemy lands.<sup>54</sup>

Finally, it may be asked whether any one of the Four Schools permit contraception to avoid birth defects? The answer to this question is not clear. Professor Hussain writes that a:

modern scholar, Shaykh Ahmad al Sharabassi from Egypt, has approved the use of contraception to prevent the transmission of genetic defects which can now be established by genetic screening.<sup>55</sup>

Thus, it seems to be the case that Islamic scholars, like their counterparts in some other faiths, are considering the matter, but have not adopted a uniform position.

### [F] Three Instances in which Contraception (Including 'Azl) is Impermissible

While the Four Schools accept *'azl* as permissible (*ḥalāl*) so long as certain requirements are satisfied, they acknowledge that *'azl* is impermissible if practiced in certain situations. By extension, the same view applies to reversible contraceptive methods that otherwise would be permissible. Specifically, the Four Schools agree that temporary contraception is impermissible if practiced: (1) out of fear of poverty; (2) out of shame of conceiving a girl; or (3) to impose population control measures.<sup>56</sup>

<sup>51</sup> Ibn Qudamah was born in 1147 A.D. (541 A.H.) in Palestine, memorized the Qur'an while young, undertook a military expedition with the legendary Saladin in 1187 A.D. (573 A.H.) including the recapture of Jerusalem, and died 1223 A.D. (620 A.H.). His full name was Muwaffaq ad-Deen Abu Muhammad 'Abd Allaah Ibn Ahmad Ibn Muhammad Ibn Qudamah Ibn Muqdaam Ibn Naasr Ibn 'Abdillaah al-Maqdisi. He is the author of *Al-Mughni* (sometimes transliterated as "Al-Mughnee" or "Al-Mughani"), which is the most widely known treatise on *Ḥanbali* School *fiqh*.

<sup>52</sup> See AL KANTHARI, *supra*, at 37 (quoting *IMAM IBN QUDAMA, AL-MUGHNI* 7:23).

<sup>53</sup> See AL KANTHARI, *supra*, at 37.

<sup>54</sup> See AL KANTHARI, *supra*, at 37.

<sup>55</sup> HUSSAIN, *supra*, at 119 (quoting ABEL FAIZ, MORRIS EBERHART, ABORTION, BIRTH CONTROL AND SUBROGATE PARENTING 26 (Burr Ridge, Illinois: American Trust Publications 1991)).

<sup>56</sup> See AL KANTHARI, *supra*, at 38-41.

First, concerning fear of poverty, the Qur'an states in *surah* 11, *ayah* 6:

There is not a creature that moves on earth whose provision is not His concern. He knows where it lives and its [final] resting place: it is all [there] in a clear record.<sup>57</sup>

*Surah* 6, *ayah* 151 proclaims:

Say [Prophet], "Come! I will tell you what your Lord has really forbidden you! . . . [D]o not kill your children in fear of poverty" — We will provide for you and for them. . . .<sup>58</sup>

Similarly, *surah* 17, *ayah* 31 says:

Do not kill your children for fear of poverty — We shall provide for them and for you — killing them is a great sin.<sup>59</sup>

Additionally, the Caliph 'Umar narrates the following *ḥadīth*:

I heard the Messenger of Allāh say, "If you were to trust Allāh as he ought to be trusted, you would be given sustenance as birds are given it. They go out hungry in the morning and return full in the evening."<sup>60</sup>

Based on these Qur'anic passages and the *ḥadīth*, traditional scholars from all Four Schools find it unacceptable to practice contraception out of fear of poverty.

After all, the *Shari'a* teaches one to depend on God (Allāh) for sustenance. While an individual has free will, no one is ultimately in control of his or her own life. Practicing contraception out of fear of poverty shows a lack of faith in the Almighty. Trust in Allāh is supposed to be an article of faith, and not doing so may lead an individual to trust him or herself more than Allāh, a kind of narcissistic self-reliance. Thus, Muslim scholars argued that reducing one's chances of reproduction because of fear of poverty, in spite of specific reassurance from Allāh that He will provide in those circumstances, is viewed as directly conflicting with the *Shari'a*.<sup>61</sup>

In theory, the state treasury (*bayt al māl*) of an Islamic country ought to contain funds to assist families that are poor. This government assistance should be available for large families to meet their educational, health, housing, and nutritional needs. However, in practice, funding typically is tight, if it even exists. Where the *bayt al māl* does contain the requisite monies, there is no guarantee that distributions are made in an efficient, uncorrupt manner. Thus, Professor Hussain argues that in certain Muslim countries, including Bangladesh and Egypt, with a large number of poor people and serious environmental pressures, some effort to limit population size is needed.<sup>62</sup>

<sup>57</sup> THE QUR'AN — A New Translation by M.A.S. Abdel Haleem 11:6 at 136 (Oxford, England: Oxford University Press, 2004). [Hereinafter, QUR'AN.]

<sup>58</sup> QUR'AN, *supra*, 6:151 at 92.

<sup>59</sup> QUR'AN, *supra*, 17:31 at 136.

<sup>60</sup> See AL KANTHARI, *supra*, at 39 (quoting *TERMINIḤ ḥadīth* no. 2344, *IBN MAJA ḥadīth* no. 4164).

<sup>61</sup> See AL KANTHARI, *supra*, at 39.

<sup>62</sup> See HUSSAIN, *supra*, at 119.



Moreover, this position is not always as pious as it appears. International relations are at play. More often than not, Muslim scholars regard family planning as a western conspiracy, aimed at limiting the growth of the Muslim community (*ummah*). The thrust of the conspiracy assertion is that non-Muslim nations, particularly the United States and in the European Union (EU), prefer to retain their dominant global economic, political, and military positions. They are challenged enough by the rise of China and India. An ever-growing *ummah* is a threat to the *status quo* they seek to preserve. A related assertion is that Islam competes with other faiths, particularly Christianity, and family planning as practiced by Muslims, but not by Christians, is adverse to Islamic interests.

Both versions of the conspiracy theory are erroneous. There is no need to "push" artificial contraceptive techniques on Muslim countries. That is because fertility rates fall in any country, Muslim, or non-Muslim, as the country develops, and particularly as women become better educated, participate in the labor market, and marry at later ages. (Indeed, the availability of contraceptive technologies *per se* is not the sole determinant of fertility rates.) In other words, the development process itself is a natural and uncontroversial contraceptive. Moreover, like all conspiracy theories, the ones concerning family planning tend to over-estimate the competence and secrecy of the conspirators. It is scarcely imaginable that the United States, EU, or both, acting with sinister motives, could sustain a credible family planning program without any "leaks."

Not surprisingly, therefore, modern opinions tend to reject conspiracy theories about family planning.<sup>63</sup> They point out that most Muslim countries are growing at a rate unequal to that of non-Muslim ones. Whereas traditional scholars regard family planning as way to weaken the strength of Islam, modern scholars blame the lack of family planning for the weakness of Muslim society. Better growth performance might result from more prudent choices about family size, they suggest. Further, they appreciate that multiple strains on parents directly affect the quality of life of all the family members in many ways, including spiritually, emotionally, psychologically, and financially.

Accordingly, many Muslim countries not only permit contraception, but also have family planning programs. Egypt was among the first to have such a program, following a 1937 ruling by the *Mufti* of that country approving of contraception for medical or social reasons.<sup>64</sup> Malaysia, Indonesia, Pakistan, Tunisia, and Turkey also have such programs.<sup>65</sup> In respect of Malaysia, a 1965 *fatwā* from the state of Kelantan stated that while government family planning schemes were attempts to restrict freedom in Islamic family life, and contrary to Natural Law, contraception was permissible if the health of the mother was in danger, either or both parents suffered from an infectious disease, or the family was in extreme poverty. Also from

individual Malaysian states, in 1976 a *fatwā* from Trengganu, and a 1979 *fatwā* from Selangor, permitted contraception for health reasons, though they forbid both sterilization and abortion (with the 1979 *fatwā* forbidding abortion absolutely after 4 months). The National Council for Religious Affairs in Malaysia issued a decree along the same lines as the 1978 and 1979 *fatwās*.

The second circumstance under which practice of 'azl or other reversible contraceptive methods is unacceptable concerns shame about conceiving a girl. Before the advent of Islam, the practice killing of newborn girls (female infanticide) was widespread on the Arabian Peninsula and beyond.<sup>66</sup> (Tragically, it still is in some parts of the world.) Often times, a new born girl would be buried alive in the sand immediately after birth. Couples resorted to contraceptive methods to avoid conceiving female infants.<sup>67</sup> Pagan Arabs feared their daughters would dishonor the family if the daughter was raped during war, or if she chose to engage in sexual activities that were not authorized by her family. Why not use contraception to avoid these negative possibilities, and further avoid the temptation to commit female infanticide? That was the logic, at any rate, behind the pre-Islamic custom of endeavoring to prevent female births all together.

With Islam, thankfully, the rules changed. In *Surah* 16, the Qur'an speaks of the inhumanity of female infanticide, and prohibits it:

<sup>67</sup>They [the pagan Arabs] assign daughters to God — may He be exalted! — and prefer [sons] for themselves. <sup>68</sup>When one of them is given news of the birth of a baby girl, his face darkens, and he is filled with gloom. <sup>69</sup>In his shame he hides himself away from his people because of the bad news he has been given. Should he keep her and suffer contempt, or bury her in the dust? *How ill they judge!*<sup>70</sup>

This prohibition is absolute and without exception. Based on it, all Muslim scholars agree any hesitancy to have a child because of the gender of that child is forbidden (*haram*).

Observe that the reasoning is somewhat by analogy (*qiyās*): because it is forbidden to kill a female child after birth, it must also be forbidden to preclude the conception of a child for fear the child will be a girl. That is, the post-birth child is analogized to the embryonic child, and the theme linking the two is fear by either or both parents. Yet, not all scholars accept this reasoning. Professor Hussain writes:

Some scholars, such as Maulana Maududi, in India, have drawn an analogy between the prohibition of killing children for fear of want mentioned in these [Qur'anic] verses [6:151 and 17:31, quoted earlier], and limiting the birth of children through contraception for economic reasons. *There does*

<sup>63</sup> See Donna Lee Bowen, *Contemporary Muslim Ethics of Abortion*, in ISLAMIC ETHICS OF LIFE: ABORTION, WAR, AND EUTHANASIA 51, 69 (Columbia, South Carolina: University of South Carolina Press, Jonathan E. Brockopp ed., 2003).

<sup>64</sup> See HUSSAIN, *supra*, at 120-121. In this ruling, the *Mufti* also approved of abortions conducted before 16 weeks, which is by no means universally agreed.

<sup>65</sup> The summary of the Malaysian rulings is drawn from Hussain, *supra*, at 121, who in turn cites M.B. Hooker, *Fatwa in Malaysia 1960-1985*, 8 ARAB LAW QUARTERLY 93 (June 1993).

<sup>66</sup> See HUSSAIN, *supra*, at 117.

<sup>67</sup> See AL-KAWTHARI at 39.

<sup>68</sup> Qur'an, *supra*, 16:57-59 at 169 (emphasis added). As Professor Haleem explains, the pagan Arabs committed a double blasphemy. First, they called angels the daughters of God, thus likening angels to God. Second, they held daughters in contempt because of their warrior culture. See *id.*, fn. b and c to 16:57, 60, respectively, at 169.

*not seem to be a sound basis for this reasoning since contraception does not involve any killing, and at the time contraception is used, no child has yet come into existence.*<sup>69</sup>

In this respect, Professor Hussain observes that *surah* 2, *ayah* 233, encourages breastfeeding for up to two years, and Muhammad did not forbid a husband from having sexual intercourse with his wife during her breastfeeding period, because there was no such prohibition among other communities with whom Muslims interacted, nor any damage to a child being breastfed. Breastfeeding typically reduces the likelihood of conception. Therefore, Professor Hussain argues, spacing births via breastfeeding is a kind of contraception that always has been permissible.

The third circumstance in which 'azl or other temporary contraceptive methods are not permissible is if they are used as population control devices. That is, while reversible contraception generally is permissible for individuals based on their circumstances, it is impermissible for a government to impose contraceptive means, whether reversible or permanent, on the population as a whole.<sup>70</sup> The overwhelming number of Islamic scholars, past and present, reject population control as a national policy, because procreation is to be encouraged as a natural result of an Islamic marriage. Here, too, fear of poverty cannot be used as a justification for mandating national population control policies.

#### [G] Unacceptability of "One Child Policy" of Chinese Communist Party

As regards population control, the infamous "One Child Policy" of the Chinese Communist Party (CCP) is completely unacceptable from the vantage point of Islamic Law (and, indeed, on many other grounds).<sup>71</sup> From the perspective of the *Shari'a*, there are five main goals for which any legitimate Islamic government is responsible for preserving, protecting, and defending:

- Faith
- Life
- Intellect
- Posterity
- Wealth

Traditionally, Islamic religious and legal scholars have understood the fourth goal — posterity — as meaning that no government has a right to control the size of a Muslim family. Sadly, the CCP is hardly the first governmental regime in human

<sup>69</sup> HUSSAIN, *supra*, at 117-118 (Annandale, New South Wales, Australia: The Federation Press, 1999) (quoting ABUL FADL MOHSEN ENBAH, *ABORTION, BIRTH CONTROL AND SURROGATE PARENTING* 21 (Burr Ridge, Illinois: American Trust Publications 1991)) (emphasis added).

<sup>70</sup> See AL-KAWTHARI, *supra*, at 40.

<sup>71</sup> See generally Sarah J. Conroy, *Birth Control and the Citizen-Catholic in One-Child China*, 25 *CONNECTICUT JOURNAL OF INTERNATIONAL LAW* 431-458 (2010) (discussing the conflict between the one-child policy and Catholic precepts on artificial contraception, and its ramifications for the loyalties of Chinese Catholics and Sino-Vatican relations).

history to attempt to manage demography. In the 20th century, other infamous attempts at eugenics of one sort or another, using one means or another, occurred in Germany under Adolf Hitler and Singapore under Lee Kuan Yew.

Unsurprisingly, given the aforementioned Islamic legal perspective, the CCP was unable to enforce its One Child Policy on the large Uyghur Muslim population in Xinjiang. The CCP also could not impose it on the Tibetan Buddhist population of the Tibet Autonomous Region (TAR). For these groups, respectively, the *Shari'a* and Buddhism exert a far stronger appeal to hearts, minds, and souls than the crass economic materialism of CCP ideology ever will.

Consequently, the CCP resorted to inflicting its One Child Policy predominantly on the majority Han Chinese in urban areas, and with ill effects. Not only have widespread female infanticide and forced abortions occurred, but also the CCP miscalculated and manufactured a shortage of young people. With couples reproducing the natural replacement rate of 2.1, and with fewer girls to marry, a long-term deficit of people resulted. China faces a future with an insufficient number of young workers to support its aging population, and as China transforms itself into a more market-oriented economy, many people lack guaranteed, state-sponsored pensions and health care.<sup>72</sup> Pope Paul VI warned of the dangers of government family planning programs in his 1968 Encyclical Letter, *Humane Vitae* (*Of Human Life*):

[C]areful consideration should be given to the danger of this power [over artificial methods of contraception] passing into the hands of those public authorities who care little for the precepts of the moral law. Who will blame a government which in its attempt to resolve the problems affecting an entire country resorts to the same measures as are regarded as lawful by married people in the solution of a particular family difficulty? [The Encyclical argues against the lawfulness of artificial measures.] Who will prevent public authorities from favoring those contraceptive methods which they consider more effective? Should they regard this as necessary, they may even impose their use on everyone. It could well happen, therefore, that when people, either individually or in family or social life, experience the inherent difficulties of the Divine law and are determined to avoid them, they may give into the hands of public authorities the power to intervene in the most personal and intimate responsibility of husband and wife.

Consequently, unless we are willing that the responsibility of procreating life should be left to the arbitrary decision of men, we must accept that there are certain limits, beyond which it is wrong to go, to the power of man over his own body and its natural functions — limits, let it be said, which no one, whether as a private individual or as a public authority, can lawfully

<sup>72</sup> See generally Tom Mitchell, *China's "Workshop of the World" Suffers Acute Labour Shortages*, *FINANCIAL TIMES*, 26 February 2010, at 1 (discussing manpower constraints on Chinese exports, particularly in Guangdong Province and the manufacturing heartland of the Pearl River Delta).



exceed. These limits are expressly imposed because of the reverence due to the whole human organism and its natural functions. . . .<sup>73</sup>

To be sure, Muslims and Catholic Christians agree that a government is within its right to engage in certain kinds of demographic activities. As the *Catechism of the Catholic Church* explains:

The state has a responsibility for its citizens' well-being. In this capacity it is legitimate for it to intervene to orient the demography of the population. This can be done by means of objective and respectful information, but certainly not by authoritarian, coercive measures. The state may not legitimately usurp the initiative of spouses, who have the primary responsibility for the procreation and education of their children. In this area, it is not authorized to employ means contrary to the moral law.<sup>74</sup>

However, the One Child Policy of the CCP far exceeded the line between objective, respectful information and authoritarian, coercive measures. In so doing, the Policy condemned itself as a morally hideous and practically disastrous effort at social engineering.

### § 39.03 BALANCING RELIGIOUS FACTORS

Notwithstanding stereotypes to the contrary, Islam is not a sexually puritanical religion (nor, for that matter, is Catholic Christianity). In his commentary on the compilation of the *hadith* by *Imām* Muslim, Dr. Hasan writes:

Islam does not believe in the absolute suppression of the sensual side of human nature. The conception of the saintly life in Islam is not, therefore, the extermination of all carnal impulses, but to control them and keep them within proper limits. Islam does not make the life of an individual completely dark and dreary, devoid of all enjoyments of life. Islam encourages healthy enjoyments and one out of these is the satisfaction of the sexual desire. Islam does not associate the idea of sexual pleasure with that of sin and vice. Pleasure gives strength to the moral side of a man provided one does not transgress the limits of ethical codes.<sup>75</sup>

As for contraception, the issue for a Muslim couple involves more than economic, psychological, and scientific concerns. Indeed, from an Islamic perspective, such concerns are less significant than a careful, reverential contemplation of religious factors.

The religious factors include procreation and fulfilling the purpose of an Islamic marriage. The combination of these two factors yields a third one: procreating children that are pious and righteous, who become a source of reward for their

parents after their parents pass away.<sup>76</sup> Professor Hussain suggests there is a balancing among factors:

[I]n Islam, while procreation of children is one of the purposes of the marriage relationship, it is not the sole or dominant purpose, mutual love and support between the parties and prevention of illicit sex also being of importance.<sup>77</sup>

The Prophet emphasized the importance of marriage in its various dimensions. Marriage is not only meant to create permissible (*halal*) companionships. It also is the foundational structure for the development of the family and, through the growth of the Muslim community (*ummah*), a method of evangelization. 'Ā'isha, the favorite wife of Muhammad after Khadyja, related this *hadith*:

Marriage is from my way (*Sunnah*), thus whosoever does not practice my way [out of rejection] is not from me. And marry [and procreate], for indeed I will outnumber the other nations by you.<sup>78</sup>

In sum, through a lawful, loving marriage, normal conjugal relations, procreation, and rearing pious children, Muhammad encouraged Muslims to lead fulfilling religious lives and expand the *ummah*.

The ability to have children is looked upon extremely favorably in Islam — again, a gift from God (Allāh).<sup>79</sup> The Qur'an acknowledges that some couples are granted the ability to have children, while others are left barren. However, infertility is not to be regarded as a punishment. Rather, it is solely due to the will of Allāh and His Knowledge, as *Surah* 42 indicates.

<sup>49</sup>God has control of the heavens and the earth; He creates whatever He will — He grants female offspring to whoever He will, <sup>50</sup>male to whoever He will, or both male and female, and He makes whoever He will barren; He is all knowing and all powerful.<sup>80</sup>

Couples who are able to conceive children are thereby handed a tremendous responsibility, namely, to rear them as responsible citizens and devout Muslims. But, they also are promised an incredible reward as a result of raising upright Muslim children.

Death halts the actions of an individual. However, if that individual was a parent, and taught his or her children appropriate Islamic behavior, then that parent, after death, receives a good deed each time the child behaves well.<sup>81</sup> For example, if the parent taught the child to pray, then the parent receives a good deed each time the son or daughter supplicates and asks Allāh to have mercy on his or her parent. One of the Companions of the Prophet (*Ṣaḥābah*), Abū Hurayra, affirms the point through this *hadith*:

<sup>76</sup> See AL KANTHARI, *supra*, at 13.

<sup>77</sup> HUSSAIN, *supra*, at 119.

<sup>78</sup> AL KANTHARI, *supra*, at 13 (quoting Ibn Maja *hadith* no. 1846).

<sup>79</sup> See AL KANTHARI, *supra*, at 13.

<sup>80</sup> QUR'AN, *supra*, 42:49-50 at 314.

<sup>81</sup> See AL KANTHARI at 17.

<sup>73</sup> Encyclical Letter, *Humanae Vitae*, of the Supreme Pontiff Paul VI, ¶ 17, 25 July 1968, posted at [www.vatican.va](http://www.vatican.va). [Hereinafter, *Humanae Vitae*.]

<sup>74</sup> CATECHISM OF THE CATHOLIC CHURCH ¶ 2372 at 570 (United States Catholic Conference, Inc., Washington, D.C.: Libreria Editrice Vaticana, 2nd ed. 1997) (emphasis added). [Hereinafter, CATECHISM.]

<sup>75</sup> MUSLIM, *supra*, vol. II.B, book 16 (Book of Marriage), p. 339, fn. 2 to *hadith* no. 1400.

When a man dies, his acts come to an end, but [for] three, recurring charity, or knowledge (by which people) benefit, or a pious son, who prays for him (for the deceased).<sup>82</sup>

In effect, raising children properly is tantamount to storing one's treasure in Heaven.

In making choices about contraception, many Muslim couples rely on Qur'anic verses emphasizing trust in Allāh. In doing so, they do not (or should not) discount the notion of responsibility and moral agency in planning their life and employing methods of family planning. Additionally, they can and do look to the story of a man who was told by the Prophet to tie up his camel and then trust in God, or to the account of the Caliph 'Umar, who advised that one should plant the seeds and then trust in God for a good harvest. Indeed, Islam does not require one to glide passively through life. Rather, the religion and law require that each individual employ active means to bring about positive results and exercise his or her full human capacity.

Dr. Yusuf Al Qaradawi, a prominent contemporary Sunni scholar, identifies three main reasons Muslim couples typically acknowledge for employing reversible contraceptive methods.<sup>83</sup> The first is the fear that the pregnancy or delivery might endanger the life or health of the mother. In this respect, the Qur'an says:

- In *surah 2, ayah 195*:  
Spend in God's cause: do not contribute to your destruction with your own hands, but do good for God loves those who do good.<sup>84</sup>
- And, in *surah 4, ayah 29*:  
... Do not kill each other, for God is merciful to you.<sup>85</sup>

Dr. Al Qaradawi points out that the criterion to determining the gravity of this possibility is experience or the opinion of a reliable physician. This reason is consistent with the precepts of the *Shari'a*.

The second reason is the burden of children may hamper the circumstances of the family. The Qur'an states:

- In *surah 2, ayah 185*:  
... God wants ease for you, not hardship.<sup>86</sup>
- And, in *surah 5, ayah 6*:  
... God does not wish to place any burden on you: He only wishes to cleanse

<sup>82</sup> MUSLIM, *supra*, vol. IIIA, book 25 (Book of Will), p. 83, *hadith* no. 1631.

<sup>83</sup> See YUSUF AL-QARADAWI, *THE LAWFUL AND PROHIBITED IN ISLAM* 263-265 (Cairo, Egypt: El Falaḥ for Translation, Publishing & Distribution, 1997). (Hereinafter, AL QARADAWI.)

<sup>84</sup> QUR'AN, *supra*, 2:195 at 22 (emphasis added).

<sup>85</sup> QUR'AN, *supra*, 4:29 at 53 (emphasis added).

<sup>86</sup> QUR'AN, *supra*, 2:185 at 20 (emphasis added).

you and perfect His blessing on you, so that you may be thankful. . . .<sup>87</sup>

Yet, this reason is not consistent with the precepts of the *Shari'a*. Couples should not choose contraception out of fear of poverty. They are called to trust in God that He will not impose hardship on them by blessing them with multiple children that will impoverish them. That is, these Qur'anic passages are to be read consistently with the *surah 11, ayah 6, surah 17, ayah 31*, and the *hadith* narrated by the Caliph 'Umar. *Surah 2, ayah 185* and *surah 5, ayah 6* are redolent of Biblical passages to the effect that God plans for our welfare, not our woe. In Catholic Christian terms, all of the aforementioned passages might be said they sum up to the oft-repeated exhortation from Christ: *Noli Timere* (Fear Not, i.e., Do Not Be Afraid).

The third reason Muslim couples typically cite for use of contraception, is a medical one, as Dr. Al Qaradawi highlights. A new pregnancy, or a new baby, might harm a suckling infant by polluting breast milk and thereby causing harm to the baby.<sup>88</sup> Muhammad did not prohibit sexual intercourse with a suckling woman. However, he did demonstrate concern for a suckling child. For this reason, the Prophet discouraged — but did not prohibit — intercourse leading to pregnancy while a mother is nursing.

#### § 39.04 CONTRASTING OPINIONS: AMERICAN LAW AND 1965 SUPREME COURT DECISION IN *GRISWOLD v. CONNECTICUT*

Muslim societies are increasingly embracing scientific advancements in the area of contraception. While there is evidence of a particular method of contraception that stretches back to the time of the Prophet Muhammad, namely 'azl (withdrawal), modern Muslim couples tend to accept a variety of new methods to limit family size or space children apart. As a practical matter, the primary reasons for their acceptance of contraception methods vary from fear of poverty, to physical weakness of the mother, to health concerns of future children, and to the inadequacy of the parents to providing quality of life for subsequent children. As explained earlier, some — but not all — of these motivations are regarded as religiously acceptable bases for contraception.

The majority of modern day scholars do not discount the importance of family planning in Muslim societies. Islamic scholars do not discuss contraception in terms "marital privacy." But, they do all agree that contraception, if used, should be within the confines of marriage:

... Muslim scholars have pointed out that contraception should be practiced *only within marriage*, and they strongly disapprove of making contraceptives freely available, especially to minors and unmarried persons as is the practice in Western countries. Contraception when practiced for the purpose of enjoying illicit sex without risk is clearly *ḥarām*

<sup>87</sup> QUR'AN, *supra*, 5:6 at 68.

<sup>88</sup> See AL QARADAWI, *supra*, at 263-265.



(prohibited) [and gives rise to the possibility of criminal liability].<sup>89</sup>

In contrast, "privacy," and not necessarily "marital privacy," is the paradigm for contraception in American law, following the landmark 1965 United States Supreme Court decision in *Griswold v. Connecticut*.<sup>90</sup> Indeed, the widespread availability of artificial contraceptive devices in the United States is traceable directly to this case.

In *Griswold*, the Supreme Court held state prohibition of contraception contradictory to the "concept of liberty,"<sup>91</sup> and to inherent rights of privacy, found in the 14th Amendment to the United States Constitution. Section 1 of this Amendment states:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.<sup>92</sup>

The Supreme Court decided that contraception was protected from "all invasions on the part of the government . . . of the sanctity of a man's home and privacies of life."<sup>93</sup> Of course, the decision to use contraception remains with an individual American couple — the key point is that from a legal perspective, neither the Federal nor any State government can abridge that right to decide.

As under American law, under the *Shari'a* contraception is a matter left to the family unit.<sup>94</sup> But, Islamic scholars do not accord contraception legal status or protection in the American sense: it is not a right of privacy. Moreover, whereas the Supreme Court does not opine on the religious or other merits (or lack thereof) of contraception, nor should it, Islamic scholars do. This difference is to be expected when contrasting a secular with a sacred legal system. The *ulema* and *fukahā'* incline toward the same "bottom line" conclusion. Temporary contraception, while permissible (*halal*), should not be encouraged. It is even is reprehensible (*makrāh*), and becomes forbidden (*harām*) under certain circumstances. But, it is a decision left to believing couples to make after they consider their circumstances.

<sup>89</sup> HUSSAIN, *supra*, at 122 (emphasis added).

<sup>90</sup> See 381 U.S. 479 (1965), 85 S.Ct. 1678, 14 L.Ed. 2d 510. [Hereinafter, *Griswold*.]

<sup>91</sup> *Id.* at 486 (Goldberg, J., concurring).

<sup>92</sup> The Constitution of the United States, Amendment XIV, Section 1. This Amendment was ratified in 1868, following the American Civil War (1861-1865).

<sup>93</sup> *Griswold*, *supra*, 381 U.S. at 485.

<sup>94</sup> *Griswold*, *supra*, 381 U.S. at 485.

## § 39.05 CONTRASTING OPINIONS: CATHOLIC CHRISTIAN TEACHING AND 1968 ENCYCLICAL *HUMANAE VITAE*

### [A] Choice of Family Size

Juxtaposing Islamic Family Law precepts on contraception with the teaching of the Catholic Christianity on the topic is not easy for a number of reasons, due in part to misconceptions about the position of the Church. Moreover, in recent decades, few if any issues have generated greater controversy — other than possibly abortion — among Catholic and non-Catholic communities alike. Thus, to find parallels and distinctions between Catholic Christian and Islamic approaches to contraception, it is necessary to explain the basic points the Church does and does not make.

There are at least four misunderstandings about the teaching of the Catholic Church on contraception. They are fairly widespread, in both Catholic and non-Catholic circles. The reasons for them are varied, but certainly bad faith or willful blindness is not to be ascribed to any individual, community, or group. The teachings are profound, and not susceptible to a short "sound bite" in a mainstream news media program. Rather, they require careful study and meditation to appreciate.

The first misunderstanding is that the Catholic Church exhorts the faithful to have large families, or even that large family sizes are in some way religiously required. That is patently false, and is based in part on a narrow view of the passage in the Old Testament *Book of Genesis*, chapter 1, verse 28, concerning being fruitful and multiplying. To be sure, both Sacred Scripture (i.e., the Bible) and Sacred Tradition (i.e., the two millennia of Christian practice) indicate that a large family is a sign of the blessing of God and the generosity of parents, while sterile couples endure great suffering from not having a child or children (though by no means is sterility an evil).<sup>95</sup> After all, as Pope Paul VI stated in his 1968 Encyclical, *Humanae Vitae* (Of Human Life), married love is marked by three features:

- (1) Totality, meaning that husband and wife in their special friendship "generously share everything,"
- (2) Fidelity, meaning that husband and wife are faithfully exclusive to each other, and
- (3) Fecundity, meaning that husband and wife do not confine their loving interchange to each other, but also transcend themselves "to bring new life into being."<sup>96</sup>

<sup>95</sup> See Catechism, *supra*, §§ 2373-2374, 2379 at 571-572. As the *Catechism* indicates, the examples of such suffering include Abraham, in *Genesis* 15:2, and Rachel and Jacob, in *Genesis* 30:1. See *id.* § 2374. On the question of fertility treatment, such as in vitro fertilization (IVF), see *id.*, §§ 2375-2378 at 571-572.

<sup>96</sup> *Humanae Vitae*, *supra*, § 9. See also Catechism, *supra*, §§ 2390-2392 at 567-570 (discussing the love of a husband and wife, conjugal fidelity, and fecundity).

Nevertheless, Catholic Christianity, like Islam, leaves the decision of family size entirely up to a married couple.

Thus, like Muslim couples, Catholic Christian couples must evaluate their circumstances, not the least of which are economic and medical, in considering whether they can and should have a child, or more children. In both faiths, parenthood is a major responsibility, and not all couples are in a position at every point in their marriage to provide the necessary loving environment and educational support needed to raise productive citizens and pious persons. Father Leo J. Trese (1902-1970) writes:

In recent times there has been discussion on the topic of "responsible parenthood." This discussion has been inspired by two factors. One is the presumed danger, exaggerated out of all proportion to reality by some demographers, of overpopulating the earth to the point where there is not enough food for all. Another factor is the spiraling cost of providing children with all the medical, educational, and cultural advantages which they need for a normally successful and happy life in today's world.

Responsible parenthood would mean, then, that parents exercise Christian prudence in begetting children. Unselfishly but realistically they would appraise their present and probable resources, and would space their children accordingly.

There is nothing essentially unchristian about such a procedure. God has endowed us with intelligence and He expects us to use that intelligence as we cooperate with him in continuing his work of creation.<sup>97</sup>

Accordingly, Catholic Christian teaching encourages couples to consider their unique circumstances. If they have a serious reason not to have a child, or additional reasons, then they may choose not to do so. Simply put, neither the Church nor the Mosque regulates family size. Both faiths call upon their adherents to give careful consideration to a decision not to have children.

Should a couple make that choice, then the issue under either the *Shar'ia* or Catholic Christian teaching is one of contraceptive method. As Father Trese explains:

The crucial question which arises with respect to responsible parenthood concerns the means which are used to achieve it. To abstain from marital intercourse by mutual and free consent, whether periodically or for an extended period, is certainly the legitimate right of spouses.<sup>98</sup>

In other words, a couple may practice periodic continence to regulate whether they have children, the number of children they have, and the spacing between children. If they do so, then not only must they agree, but also they must act based on weighty reasons — in the language of various Church documents, "serious and

proportionate motives," or "serious personal reasons."<sup>99</sup> Such reasons would include the financial ability of a couple to raise a child properly, and medical concerns about the ability of the mother to bear a child. In this respect, Catholic Christianity, like Islam, teaches that having children is a natural purpose and end of marriage, hence an upright intention and moral motives should exist for electing to regulate births.<sup>100</sup>

## [B] Distinctions among Methods

The second misunderstanding is that the Catholic Church holds against all forms of contraception. That is an over-statement. Like Islamic religious and legal scholars (the *ulema* and *fukahā'*, respectively), Catholic theologians distinguish among methods of contraception. Like their Muslim counterparts, Catholic thinkers agree that certain methods are gravely sinful. In 1968, Pope Paul VI issued an Encyclical entitled *Humanae Vitae* (*Of Human Life*).<sup>101</sup> Paragraphs 13 and 14 state:

13. Men rightly observe that a conjugal act imposed on one's partner without regard to his or her condition or personal and reasonable wishes in the matter, is no true act of love, and therefore offends the moral order in its particular application to the intimate relationship of husband and wife. If they further reflect, they must also recognize that an act of mutual love which impairs the capacity to transmit life which God the Creator, through specific laws, has built into it, frustrates His design which constitutes the norm of marriage, and contradicts the will of the Author of life. Hence to use this Divine gift while depriving it, even if only partially, of its meaning and purpose, is equally repugnant to the nature of man and of woman, and is consequently in opposition to the plan of God and His holy will. But to experience the gift of married love while respecting the laws of conception is to acknowledge that one is not the master of the sources of life but rather the minister of the design established by the Creator. Just as man does not have unlimited dominion over his body in general, so also, and with more particular reason, he has no such dominion over his specifically sexual faculties, for these are concerned by their very nature with the generation of life, of which God is the source. "Human life is sacred — all men must recognize this fact," Our predecessor Pope John XXIII recalled. "From its very inception it reveals the creating hand of God." [Quoting *Mater et Magistra*, Encyclical Letter of Pope John XXIII on Christianity and Social Progress, ¶ 194, 15 May 1961, posted at [www.vatican.va](http://www.vatican.va).]

14. Therefore We base Our words on the first principles of a human and Christian doctrine of marriage when We are obliged once more to declare that the direct interruption of the generative process already begun and, above all, all direct abortion, even for therapeutic reasons, are to be

<sup>97</sup> LEO J. TRESE, *THE FAITH EXPLAINED* 433 (Manda, Philippines: Sinag-Tala Publishers, Inc. 1965, 6th Philippine printing, 1991, updated by Father Robert Bucciarelli). [Hereinafter, TRESE.] See also *Humanae Vitae*, *supra*, ¶ 10 (defining "responsible parenthood").

<sup>98</sup> TRESE, *supra*, at 433.

<sup>99</sup> Quoted in TRESE, *supra*, at 433.

<sup>100</sup> See Pope Pius XII, *Address to Obstetricians*, 29 October 1961, quoted in TRESE, *supra*, at 433. See also CATECHISM, *supra*, ¶¶ 2366-2367 at 569.

<sup>101</sup> See *Humanae Vitae*, *supra*.



*absolutely excluded as lawful means of regulating the number of children. Equally to be condemned, as the Magisterium of the Church has affirmed on many occasions, is direct sterilization, whether of the man or of the woman, whether permanent or temporary.* . . .<sup>102</sup>

Accordingly, abortion (including abortifacient medicines) and sterilization are morally unacceptable means of birth control. Note that *Humanae Vitae* explicitly mentions permanent and temporary means of sterilization. Thus, it does not matter whether a vasectomy, castration, tubal ligation, or other surgical procedures is or might be temporary: all are forbidden. At the same time, a therapeutic measure that is necessary to cure a bodily disease, which may pose a foreseeable impediment to procreation, is permitted, as that impediment is not the motive for using that measure.<sup>103</sup> In other words, a husband or wife can and should get a necessary medical treatment to remedy an ailment even if there is a risk the treatment will adversely affect their fertility.

As the Paragraph 13 of *Humanae Vitae* suggests, the basis for Catholic Christian teaching resembles that underlying the *Shari'a* rules on contraception. In both paradigms, the foundational point is that ability to procreate is a gift from God, as are children. To have a child is to share in the creative power of God, cooperate with the love of God, and interpret that love in raising the child.<sup>104</sup> The following statement from *Gaudium et Spes* (*Joy and Hope*), a document of the Second Vatican Council (1962-1965), is one with which Muslims would agree:

All should be persuaded that human life and the task of transmitting it are not realities bound up with this world alone. Hence, they cannot be measured or perceived only in terms of it, but always have a bearing on the eternal destiny of men.<sup>105</sup>

Consequently, deliberately destroying this ability is a rejection of this gift. It is a sin under the 5th of the 10 Commandments that proscribes killing, because sterilization is a kind of self-mutilation that kills the ability to reproduce.

Unlike the rules of Islamic Family Law, Catholic teaching does not regard all forms of reversible (temporary) contraception as permissible. Rather, this teaching accepts natural methods, specifically, NFP or other techniques that respect the fertility cycles of a woman. But, it rejects artificial methods. Paragraph 16 of *Humanae Vitae* addresses recourse to infertile periods:

. . . [S]ome people today raise the objection against this particular doctrine of the Church concerning the moral laws governing marriage, that human intelligence has both the right and responsibility to control those forces of irrational nature which come within its ambit and to direct them toward ends beneficial to man. Others ask on the same point whether it is

<sup>102</sup> *Humanae Vitae*, *supra*, ¶¶ 13-14 (emphasis added).

<sup>103</sup> See *Humanae Vitae*, *supra*, ¶ 15, 25.

<sup>104</sup> See *Catechism*, *supra*, ¶ 2367 at 569.

<sup>105</sup> Pastoral Constitution on the Church in the Modern World, *Gaudium et Spes* (*Joy and Hope*), Pt. II, Ch. I, ¶ 51, 7 December 1965, posted at [www.vatican.va](http://www.vatican.va) (emphasis added). See also *Catechism*, *supra*, ¶ 2371 at 570 (quoting *Gaudium et Spes*).

not reasonable in so many cases to use artificial birth control if by so doing the harmony and peace of a family are better served and more suitable conditions are provided for the education of children already born. To this question We must give a clear reply. *The Church is the first to praise and commend the application of human intelligence to an activity in which a rational creature such as man is so closely associated with his Creator. But she affirms that this must be done within the limits of the order of reality established by God.*

*If therefore there are well-grounded reasons for spacing births, arising from the physical or psychological condition of a husband or wife, or from external circumstances, the Church teaches that married people may then take advantage of the natural cycles immanent in the reproductive system and engage in marital intercourse only during those times that are infertile, thus controlling birth in a way which does not in the least offend the moral principles which We have just explained.*

*Neither the Church nor her doctrine is inconsistent when she considers it lawful for married people to take advantage of the infertile period but condemns as always unlawful the use of means which directly prevent conception, even when the reasons given for the later practice may appear to be upright and serious. In reality, these two cases are completely different. In the former the married couple rightly use a faculty provided them by nature. In the later they obstruct the natural development of the generative process. It cannot be denied that in each case the married couple, for acceptable reasons, are both perfectly clear in their intention to avoid children and wish to make sure that none will result. But it is equally true that it is exclusively in the former case that husband and wife are ready to abstain from intercourse during the fertile period as often as for reasonable motives the birth of another child is not desirable. And when the infertile period recurs, they use their married intimacy to express their mutual love and safeguard their fidelity toward one another. In doing this they certainly give proof of a true and authentic love.*<sup>106</sup>

In brief, natural methods are licit, as they rely on monitoring fertility cycles of a woman.

Considerable medical advancements have been made in recent decades so that such monitoring is far more accurate than the old-fashioned rhythm (or calendar) method.<sup>107</sup> That method presumed the time of the next ovulation could be forecast

<sup>106</sup> *Humanae Vitae*, *supra*, ¶ 16 (emphasis added).

<sup>107</sup> Indeed, such advancements were encouraged by Paul VI in *Humanae Vitae*. See *Humanae Vitae*, *supra*, ¶ 24.

It is worth underscoring the point that NFP is distinct from the rhythm method, despite occasional media and even medical references that conflate the two. See DAVID BOHR, CATHOLIC MORAL TRADITION 260 (Huntington, Indiana: Our Sunday Visitor, rev'd ed., 1999). [Hereinafter, BOHR.] Monsignor Bohr is Rector of Pius X Seminary in Dalton, Pennsylvania.

It also is worth noting that no less than the World Health Organization (WHO) has declared that: Because it requires constant motivation, NFP is more difficult for many people to utilize than

by monitoring previous menstrual cycles. It proved inaccurate, particularly if the cycles did not follow a regular pattern. In contrast, "NFP" is an umbrella term for various methods to space or limit pregnancy by observing the signs and symptoms that naturally occur with the fertile and infertile phases of the menstrual cycle.<sup>108</sup> Because a couple focuses on those signs and symptoms of a particular cycle, the regularity of the pattern of cycles is irrelevant. Accordingly, couples can and do use NFP both to get pregnant, and to avoid an unplanned pregnancy. They engage in conjugal relations during the days of a month when the wife is fertile, if they seek a child, or abstain from those relations on such days, if they seek to space or limit births. On all other days of the month, the wife is not fertile, hence the couple can engage in sexual intercourse knowing pregnancy is not possible. Applied properly, NFP methods are up to 99 percent successful.<sup>109</sup> They are inexpensive, pose no health risks to women, and engender respect for women as a total person. They hold out the prospects of enriching marriage, helping couples accept moral responsibility for their intimate relations, and encouraging greater appreciation for children.

### [C] Rationale

Why does Catholic teaching distinguish among temporary contraceptive methods not found in the *Shari'a*, namely, between natural methods like NFP, on the one hand, and artificial methods like condoms, diaphragms, and "the pill," on the other hand?<sup>110</sup> The answer relates to the third misunderstanding about

contraceptive pills. However, NFP remains the most problem-free method of family limitation from a medical perspective.

*Id.* at 260 (quoting Kevin O'Rourke, O.P., *Humanae Vitae, A 25-Year Retrospective*, 60 *LINACRE QUARTERLY* 77 (November 1993), in turn quoting the WHO).

<sup>108</sup> See *Natural Family Planning*, THE LEAVEN (Newspaper of the Archdiocese of Kansas City, Kansas), 30 July 2010, at 5. (Hereinafter, *Natural Family Planning*.) On NFP generally, see, e.g., United States Conference of Catholic Bishops, [www.usccb.org](http://www.usccb.org) ("Life Issues") and NFP Outreach, [www.nfpoutreach.org](http://www.nfpoutreach.org). Concerning a specific methodology, see, e.g., the Creighton Model FertilityCare System, [www.creightonmodel.com](http://www.creightonmodel.com), and the scientific peer reviews of this System referenced at [www.creightonmodel.com/references.htm](http://www.creightonmodel.com/references.htm).

<sup>109</sup> *Natural Family Planning*, *supra*.

<sup>110</sup> A related and hotly debated issue is whether the convenient availability of temporary contraceptives causally contributes to an increase in promiscuous sexual behavior. The question, which was posed by *Time* magazine in a 1967 cover story on the pill, is of concern not only to Catholics and Muslims, but also to persons regardless of their faith. The *Time* story stated:

Does the convenient contraceptive promote promiscuity? In some cases, no doubt it does—as did the automobile, the drive-in movie, and the motel. But the consensus among both physicians and sociologists is that a girl who is promiscuous on the pill would have been promiscuous without it.

Quoted in Rita Rubin, *The Pill Turns 50*, USA TODAY, 7-9 May 2010, at 1A-2A.

The *Time* answer is a poor one. First, the automobile, drive-in movie, and motel do not exist with the specific purpose of sexual intercourse among unmarried (or, for that matter, married) couples. In considering causal factors, there are important distinctions to be made between directly contributing independent variables, and indirect factors that may facilitate an outcome without existing to do so. Second, whether the "consensus" still holds (if, indeed, it ever held), particularly given what is now known about the risks from promiscuous behavior (including sexually transmitted diseases (STDs)), is dubious. Third, there is a general concern about whether widespread access to temporary contraceptives contributes to sexual objectification of women, a disordered attitude toward intimacy among women and men, and a general decline in moral standards.

Catholic precepts, which is that they are based on little else than the thinking of some male clergy who do not have the interests of women in mind. In truth, the rationale has deep historical roots, reflects a sincere concern to empower women in an authentic manner and to objectify them as sexual instruments, and has profound moral and theological foundations.

Until 1930, all Christian denominations — Protestant and Catholic — agreed artificial methods of contraception were morally unacceptable. That position was not based on the New Testament of the Bible, which is silent on contraception. Rather, it was based in part on Natural Law (discussed below), and in part on the story of Onan in the Old Testament. This story, which appears in the first book of the Bible, *The Book of Genesis*, chapter 38, verses 6-10:

<sup>6</sup>Judah got a wife named Tamar for his first-born [son], Er. <sup>7</sup>But Er, Judah's first-born, greatly offended the Lord; so the Lord took his life. <sup>8</sup>Then Judah said to Onan [who was the second son of Judah and the daughter of a Canaanite named Shua, Er being the first of their sons], "Unite with your brother's widow [Tamar], in fulfillment of your duty as brother in law, and thus preserve your brother's line."<sup>9</sup>Onan, however, knew that the descendants would not be counted as his; so whenever he had relations with his brother's widow, he wasted his seed on the ground, to avoid contributing offspring for his brother. <sup>10</sup>What he did greatly offended the LORD, and the LORD took his life too.<sup>11</sup>

However, this story is a weak basis on which to fashion a rule about withdrawal (*coitus interruptus*), much less about all artificial contraception. To appreciate why, consider the footnote in the *Catholic Study Bible* pertaining to it:

Preserve your brother's line: literally, "raise up seed for your brother." The ancient Israelites regarded as very important their law of levirate, or "brother-in-law" marriage. . . . In the present story, it is *primarily* Onan's violation of this law, rather than the means he used to circumvent it, that brought on him God's displeasure. . . .<sup>112</sup>

In other words, in the terms of chapter 38, verse 10, the key issue is what precisely was that Onan "did" that "greatly offended" God?

The *Book of Genesis* does not answer this question. There are four possibilities:

#### (1) Disrespect of the Father?

Was it that Onan disobeyed his father, Judah, by not impregnating the widow of his brother, Tamar? Onan simply refused to follow direct instructions, and from his father no less. Yet, while certainly not commendable behavior, respect for parents hardly seems to be the point of the story, particularly in view of the legal dimensions (explained below).

<sup>111</sup> *The Book of Genesis*, 38:8-10, in THE CATHOLIC STUDY BIBLE 47 (New York, New York: Oxford University Press, 1990, New American Bible trans.) (emphasis added). [Hereinafter, BIBLE.]

<sup>112</sup> *The Book of Genesis*, in BIBLE, *supra*, fn. 38, 8 at 47 (emphasis added).



## (2) Temporary Contraception?

Was it the intentional act of withdrawal, and thereby spilling semen and using sex for a purpose other than procreation, which angered God and caused Him to punish Onan with death? In 191 A.D., Clement of Alexandria (c. 150-c.215 A.D.), a Christian theologian and teacher of Origen (185-254 A.D.), one of the Fathers of the Church, wrote as follows:

- Because of its Divine institution for the propagation of man, the seed is not to be vainly ejaculated, nor is it to be damaged, nor is it to be wasted.<sup>113</sup>
- To have *coitus [interruptus]* other than to procreate children is to do injury to nature.<sup>114</sup>

However, these statements do not refer explicitly to the story of Onan, hence it is difficult to draw an inference about why God was angry with Onan from them. They do, of course, speak not only to the act of withdrawal, but also to masturbation. Later, in 393 A.D., Saint Jerome (c. 347-420 A.D.), who translated the Bible into Latin (the *Vulgate*) and is a Doctor of the Church, does refer to Onan, asking rhetorically:

But I wonder why he the heretic Jovinianus set Judah and Tamar before us for an example, unless perchance even harlots give him pleasure; or Onan, who was slain because he begrudged his brother his seed. Does he imagine that we approve of any sexual intercourse except for the procreation of children?<sup>115</sup>

Yet, as the above-quoted footnote suggests, modern scholars tend to discount the possible inference that God punished Onan for spilling his seed. The act of withdrawal was the means by which Onan acted, but not the end or intention of his action. In other words, the goal Onan sought, and why he sought it, seem to be particularly condemnable.

## (3) Disobedience of the Law?

Was it that Onan violated the Israelite law of continuing lineage, under which the second brother (Onan) was supposed to maintain the family line by bearing a son with the (Tamar) of the eldest brother (Er)? Under that law, when relatives of the same clan held their property in common, even though they were married, how could property of a deceased man stay in the same clan?<sup>116</sup> The law of "levirate marriage" stated that if the widow of the deceased married her brother-in-law, and they had children, then the property would stay within the clan.

<sup>113</sup> CLEMENT OF ALEXANDRIA, THE INSTRUCTOR OF CHILDREN, 2:10:91-2 (191 A.D.), posted at Onan, WIKIPEDIA, <http://en.wikipedia.org/wiki/Onan>. [Hereinafter, CLEMENT.]

<sup>114</sup> CLEMENT, *supra*, 2:10:95:3 (191 A.D.).

<sup>115</sup> SAINT JEROME, AGAINST JOVINIAN 1:19 (393 A.D.), posted at Onan, WIKIPEDIA, <http://en.wikipedia.org/wiki/Onan>.

<sup>116</sup> See *The Book of Deuteronomy*, in BIBLE, *supra*, fn. 25, 5 at 25. "Levirate" is derived from the Latin word "*levir*," which means "a husband's brother." See *id.*

Selfishly, however, Onan disregarded his family obligations, because he did not want to have any descendants who he could not claim as his own. Hence, he practiced *coitus interruptus*.

The above-quoted footnote indicates the third possibility is the correct inference to draw from the story. Indeed, *The Book of Deuteronomy*, chapter 25, verses 5-10, state:

<sup>5</sup>"When brothers live together [such as Er and Onan] and one of them dies without a son [as did Er], the widow [such as Tamar] of the deceased [Er] shall not marry anyone outside the family; but her husband's brother [Onan] shall go to her and perform the duty of a brother-in-law by marrying her. <sup>6</sup>The first-born son she bears shall continue the line of the deceased brother, that his name may not be blotted out from Israel. <sup>7</sup>If, however, a man does not care to marry his brother's wife, she shall go up to the elders at the gate and declare, 'My brother-in-law does not intend to perform his duty toward me and refuses to perpetuate his brother's name in Israel.' <sup>8</sup>Thereupon the elders of his city shall summon him and admonish him. If he persists in saying 'I am not willing to marry her,' <sup>9</sup>his sister-in-law, in the presence of the elders, shall go up to him and strip his sandal from his foot and spit in his face, saying publicly, 'This is how one should be treated who will not build up his brother's family!' <sup>10</sup>And his lineage shall be spoken of in Israel as 'the family of the man stripped of his sandal.' "<sup>11</sup>

Clearly, not adhering to one's responsibilities had adverse legal ramifications, in terms of property ownership, for a family, and tarnished severely the reputation of that family.

## (4) Lying?

Was it deceit the got Onan into trouble with God? The above-quoted passage from Deuteronomy intimates this possibility. In the passage, a hypothetical brother-in-law openly proclaims his unwillingness to marry the wife of his dead brother. Onan, however, did not make such a proclamation. Rather, he engaged in conjugal relations with Tamar, but then withdrew before she could conceive. Whereas the hypothetical brother-in-law stubbornly refused to follow the law, Onan acted as if he was following it, but in fact did not. Arguably, that deceit was what most offended God, and explains why Onan suffered death, while the hypothetical brother-in-law suffered the less severe penalty of shame.

Honesty and humility call for recognition that not even the finest of theologians can know for sure what Onan "did" to "greatly offend" God. To know that answer would be to know the mind of God, a manifest impossibility for any human. Nevertheless,

<sup>117</sup> *The Book of Deuteronomy*, in BIBLE, *supra*, 25:5-10 at 25-26. Note that Moses is the speaker, presenting to his people the law proclaimed by God to him on Mount Sinai. See *id.*, Introductory Note at 187. See also *id.*, *The Book of Ruth* 2:20 at 280, and fn. 2, 20 at 280 (concerning the right and duty of a near relative of the same clan to marry the widow of a relative who died with no male heirs so as to continue the lineage of that relative); ALAN DEBROWITZ, THE GENESIS OF JUSTICE 169-170 (Grand Central Publishing, 2000) (suggesting the disobedience of Onan, not his sexual behavior; angered Yahweh (God)).

the means Onan used to effect his plan hardly seem appropriate, or to put it differently, he used such means in pursuit of an objectionable plan.

Based in part on this perspective, but also on additional grounds (namely, Natural Law and the Theology of the Body, discussed below), Catholic Christian teaching holds that withdrawal is morally unacceptable. Pope Paul VI writes in Paragraph 14 of *Humanae Vitae*:

Similarly excluded [from licit birth control methods] is *any action which either before, at the moment of, or after sexual intercourse, is specifically intended to prevent procreation* — whether as an end or as a means.<sup>118</sup>

By both explicit reference to “any action,” and by analogy, other temporary methods are regarded in the same manner as withdrawal, namely, impermissible. Note the difference in Islam: withdrawal (*ʿazl*) was practiced historically, and countenanced in the *ḥadīth*, so applying analogical reasoning (*qiyās*), a consensus (*ijmaʿ*) emerged that artificial methods are permissible. In Christianity, the starting point was the opposite: withdrawal had been punished by God, so it cannot be permissible, and thus by analogy other temporary methods also are wrong.

The 6th and 9th Commandments (also set out in the Old Testament, in *Exodus* 20:2-17 and *Deuteronomy* 5:6-21) provide additional bases for the traditional teaching against artificial contraceptive methods. These Commandments, respectively, enjoin adultery and the coveting of a woman other than one's own wife. To be sure, they do not expressly forbid artificial contraception. However, that prohibition has been regarded as an extension of what they do enjoin.

Nevertheless, in 1930, when the Church of England (Anglican Communion) held its decennial conference at Lambeth, it essentially changed its long-standing position. It authorized the use of artificial contraception under certain circumstances.<sup>119</sup> On a vote of 193 to 67, the Anglican bishops approved Resolution 15, which states:

Where there is clearly felt moral obligation to limit or avoid parenthood, the method must be decided on Christian principles. The primary and obvious method is complete abstinence from intercourse (as far as may be necessary) in a life of discipline and self-control lived in the power of the Holy Spirit. Nevertheless in those cases where there is such a clearly felt moral obligation to limit or avoid parenthood, and where there is a morally sound reason for avoiding complete abstinence, the Conference agrees that other methods may be used, provided that this is done in the light of the same Christian principles. The Conference records its strong condemna-

tion of the use of any methods of conception control from motives of selfishness, luxury, or mere convenience.<sup>120</sup>

(Resolution 16 recorded “abhorrence of the sinful practice of abortion,” and Resolution 17 condemned propaganda that treats the use of artificial birth control, rather than changing Christian opinion, as a means of resolving unsatisfactory economic and social conditions.<sup>121</sup>) Later on, the Anglican Church permitted them in all instances. Thereafter, most other Protestant denominations followed suit.

With the 1965 United States Supreme Court decision in *Griswold v. Connecticut* (discussed above), artificial contraceptives became widely available in the United States. Moreover, in the late 1960s and 1970s, social movements in the United States and other western, non-Muslim countries ushered in greater sexual freedom, meaning in particular a change in culture. It became more acceptable for individuals to engage in intercourse outside of marriage. Sex itself became viewed less as about having children and more about personal physical gratification. And, artificial contraceptives were seen as giving individuals the ability to express themselves sexually, when and with whom they wanted, and in particular liberating women so that they could have greater control over their own bodies. Not surprisingly, today a vast array of artificial contraceptives are available over-the-counter in pharmacies, groceries, and convenience stores.

Ironically, many of the promises of artificial contraception, and the birth control pill in specific, remain unfulfilled. In May 1960, when the United States Food and Drug Administration (FDA) gave approval to the pharmaceutical giant, Searle, for a pill that combines the hormones estrogen and progesterone, it was argued this pill would:<sup>122</sup>

- Liberate women from male domination, and free women from being “essentially slaves to their biology,” as Professor Helen Alvare of George Mason University School of Law in Washington, D.C., puts it.<sup>123</sup>
- Lead to fewer divorces.
- Sharply decrease the number of unwanted pregnancies.
- Drastically reduce the number of women seeking abortions, and the actual number of abortions (with the caveat that abortion did not become legal until 1973 with the *Roe v. Wade* decision rendering unconstitutional state criminalization of abortion).
- Increase the well-being of children, because only wanted children would be born.

<sup>120</sup> Resolutions from 1930, The Life and Witness of the Christian Community, Resolution 15, posted at [www.lambethconference.org/resolutions/1930/1930-15.cfm](http://www.lambethconference.org/resolutions/1930/1930-15.cfm). [Hereinafter, Resolutions from 1930.]

<sup>121</sup> Resolutions from 1930, *supra*, Resolutions 16-17, posted at [www.lambethconference.org/resolutions/1930/1930-16.cfm](http://www.lambethconference.org/resolutions/1930/1930-16.cfm) and [www.lambethconference.org/resolutions/1930/1930-17.cfm](http://www.lambethconference.org/resolutions/1930/1930-17.cfm), respectively.

<sup>122</sup> See Nancy Frazier O'Brien, *As the Pill Marks Its 50th Year, Promises Remain Unfulfilled*, CATHOLIC NEWS SERVICE, 17 May 2010, posted at [www.catholicnews.com](http://www.catholicnews.com). [Hereinafter, O'Brien.]

<sup>123</sup> Quoted in O'Brien, *supra*. Professor Alvare served as the Chief Pro-Life Spokeswoman for the United States Conference of Catholic Bishops (USCCB).

<sup>118</sup> *Humanae Vitae*, *supra*, ¶ 14 (emphasis added). See also CATECHISM, *supra*, ¶ 2370 at 570 (quoting *Humanae Vitae* ¶ 14).

<sup>119</sup> See *Birth Control*, posted at [www.catholic.com/library/Birth\\_Control.asp](http://www.catholic.com/library/Birth_Control.asp).

The 1930 meeting was the Seventh such Conference, the first one of which was in 1867, and all of which are convened by the Archbishop of Canterbury. Resolutions passed at such Conferences technically have no legal effect, but are highly influential.



As Catholic moral theologian, Janet Smith, the Father Michael J. McGivney Professor at Sacred Heart Major Seminary in Detroit, Michigan says, none of these expectations was "stupid."<sup>124</sup> It honestly and reasonably was believed "that contraceptives would make for better marriages, fewer unwanted pregnancies, [and] fewer abortions."<sup>125</sup>

Without doubt, the pill "coincided with, and arguably caused, the greatest paradigm shift in relations between the sexes in all of human history," as Barbara Kay, a writer for the National Post in Ontario, Canada, puts it.<sup>126</sup> Yet, mounting medical evidence indicates the pill has adverse side effects: loss of bone mineral density, and increased rates of breast cancer, blood clots, diabetes, depression, and anxiety.<sup>127</sup> Moreover, over the last half-century, statistical evidence in the United States shows the opposite of what was heralded has occurred:<sup>128</sup>

- The divorce rate has doubled from 25 to 50 percent of all marriages, between 1965 and 1975, respectively, precisely as the pill became more widespread. It leveled off at roughly half of all marriages, when (as Professor Smith contends) all women who wanted access to the pill got it.
- In 1960, the percentage of unintended pregnancies (i.e., children born out of wedlock) was 6 percent of white children and 22 percent of black children. By the mid-2000s, the figures skyrocketed: one-third of white births, 70 percent of black births, and half of Hispanic births were to unwed mothers. Overall (according to the National Campaign to Prevent Teen and Unplanned Pregnancy), over 3 million of the 6.4 million pregnancies annually are not planned, and about 1.2 million of them result in an abortion.
- Between 1973, when the Supreme Court legalized abortion, and 2005, there were over 45 million abortions. From 1973 through roughly 2010, the number of abortions has been approximately 50 million. While the number of abortions annually decreased each year in the 2000s, the pill is unlikely to be the reason. About 54 percent of women who have an abortion use a contraceptive method during the month they become pregnant (according to the Guttmacher Institute).
- Children are better off now than in 1960 in a number of respects, but (according to the Federal Interagency Forum on Child and Family Statistics) there are alarming ways in which they are worse off: greater instances of depression, poorer diets leading to increased obesity, more living in poverty, and a higher incidences of child abuse and neglect.
- As for equality with men and women's liberation, Professor Alvare observes it is true that women now have "access to places and positions that once

belonged to men."<sup>129</sup> But, this gain has "nothing to do with the chemicals they've swallowed," and "isn't a full measure of women's equality and dignity." She opines that women "are now in all the places where men were, but they have never been seen more as sex objects than they are now."

Of course, to this day perceptions of the pill vary considerably.<sup>130</sup> Does it improve the lives of women? Overall, 56 percent of Americans think so, with a modest difference by gender: 59 percent of men say "yes," while 54 percent of women agree. Does the pill improve American family life? The answer depends in part on religion. Among mainstream Protestants, 52 percent say "yes." But, only 41 percent of white Evangelical Protestants, and 38 percent of Catholics, think so.

In any event, amidst the "Sexual Revolution" of the 1960s and 1970s, Catholic thinkers devoted considerable attention and debate to the traditional teaching of the Church. By no means did they all agree.<sup>131</sup> The Papal *Encyclical* that emerged in 1968, in the midst of that tumultuous era, reaffirmed traditional Church teaching on licit versus illicit methods of regulating births. To the present day, it would be disingenuous to suggest all Catholic thinkers, including laity, are of one mind on the topic. Indeed, *Humanae Vitae* itself acknowledges in Paragraph 18:

*It is to be anticipated that perhaps not everyone will easily accept this particular teaching. There is too much clamorous outcry against the voice of the Church, and this is intensified by modern means of communication. But it comes as no surprise to the Church that she, no less than her Divine Founder, is destined to be a "sign of contradiction." [Quoting The Gospel According to Luke, 2:34.] She does not, because of this, evade the duty imposed on her of proclaiming humbly but firmly the entire moral law, both natural and evangelical.*

*Since the Church did not make either of these laws, she cannot be their arbiter — only their guardian and interpreter. It could never be right for her to declare lawful what is in fact unlawful, since that, by its very nature, is always opposed to the true good of man.*

In preserving intact the whole moral law of marriage, the Church is convinced that she is contributing to the creation of a *truly human civilization*. She urges man not to betray his personal responsibilities by putting all his faith in technical expedients. In this way she defends the dignity of husband and wife.<sup>132</sup>

<sup>129</sup> Quoted in O'Brien, *supra*.

<sup>130</sup> The statistics on perception are recounted in O'Brien, *supra*, based on a May 2010 CBS News poll, which has a margin of error of  $\pm 4$  percentage points.

<sup>131</sup> See, e.g., BOHR, *supra*, at 251-260 (analyzing *Humanae Vitae* and the developing theology of Christian marriage in the Catholic Church during the 20th century); LESLIE WOODOCK TENTLER, CATHOLICS AND CONTRACEPTION — AN AMERICAN HISTORY ch. 6 and Epilogue (Ithaca, New York: Cornell University Press, 2004) (discussing the events of 1962-1968, *Humanae Vitae*, and its aftermath). Ms. Tentler is a Professor of History at The Catholic University of America, Washington, D.C.

<sup>132</sup> *Humanae Vitae*, *supra*, ¶ 18 (emphasis added). See also *id.*, ¶¶ 28, 30 (exhorting Priests, especially ones who teach Moral Theology, to perform their ministry by presenting the teaching of the Church on marriage, and Bishops, to lead their Priests in helping to safeguard the holiness of marriage).

<sup>124</sup> Quoted in O'Brien, *supra*. Professor Smith is the author of (*inter alia*) a presentation entitled "Contraception: Why Not?," which has been downloaded or reprinted over one million times.

<sup>125</sup> Quoted in O'Brien, *supra*.

<sup>126</sup> Quoted in O'Brien, *supra*.

<sup>127</sup> See Bollig, *supra*, (summarizing an article by Dr. Robert F. Conklin, Natural Family Planning Medical Consultant (NFFPMC), Fellow, American College of Clinical Pharmacology (FCCP)).

<sup>128</sup> See O'Brien, *supra*.

*Humanae Vitae* remains the key document embodying the precepts of the Church on artificial methods of contraception, and is worthy of continued study and meditation.

The teaching of *Humanae Vitae* is based not only on the Old Testament sources, but also on Natural Law, that is, rules that are written into the human heart and discernible through the use of reason. Paragraphs 11 and 12 of that Encyclical explain:

11. The sexual activity, in which husband and wife are intimately and chastely united with one another, through which human life is transmitted, is, as the recent [Second Vatican] Council recalled "noble and worthy." [Quoting *Pastoral Constitution on the Church in the World of Today*, no. 49, 1966.] It does not, moreover, cease to be legitimate even when, for reasons independent of their will, it is foreseen to be infertile. For its natural adaptation to the expression and strengthening of the union of husband and wife is not thereby suppressed. The fact is, as experience shows, that new life is not the result of each and every act of sexual intercourse. God has wisely ordered laws of nature and the incidence of fertility in such a way that successive births are already naturally spaced through the inherent operation of these laws. The Church, nevertheless, in urging men to the observance of the precepts of the natural law, which it interprets by its constant doctrine, teaches that each and every marital act must of necessity retain its intrinsic relationship to the procreation of human life.

12. *This particular doctrine, often expounded by the Magisterium of the Church, is based on the inseparable connection, established by God, which man on his own initiative may not break, between the unitive significance and the procreative significance which are both inherent to the marriage act.*

*The reason is that the fundamental nature of the marriage act, while uniting husband and wife in the closest intimacy, also renders them capable of generating new life — and this as a result of laws written into the actual nature of man and of woman. And if each of these essential qualities, the unitive and procreative, is preserved, the use of marriage fully retains its sense of true mutual love and its ordination to the supreme responsibility of parenthood to which man is called. We believe our contemporaries are particularly capable of seeing that this teaching is in harmony with human reason.*<sup>133</sup>

Notably, Church teaching on matters of contraception, and more generally on sexual morality has been synthesized and advanced in recent decades by what has come to be known as the "Theology of the Body."<sup>134</sup>

<sup>133</sup> *Humanae Vitae*, *supra*, ¶ 14 (emphasis added). See also Catechism, *supra*, ¶ 2366 at 569 (quoting *Humanae Vitae*, ¶ 12).

<sup>134</sup> For excellent explanations of this Theology, see Pope John Paul II, *Theology of the Body in Simple Language* (Scotts Valley, California: CreateSpace (Amazon), 2009); Pope John Paul II, *Man and Woman He Created Them: A Theology of the Body* (Pauline Books, 2006); Christopher West, *Theology*

The catalyst for the Theology of the Body was a seminal book by Karol Wojtyła, *Love and Responsibility*, published in 1960 before he became Pope John Paul II.<sup>135</sup> Because of their profundity, this book, and subsequent publications and pronouncements, still are being digested by Catholic clergy and laity alike. Indeed, the original version of *Love and Responsibility* appeared in Polish, and the first English translation was not published until 1981. The gist, however, is clear enough, and builds on the above-discussed Biblical and Natural Law sources. In brief, the Theology of the Body proposes that sexual intimacy is an act of unconditional and complete mutual self-giving, the husband to the wife, and *vice versa*. Each spouse offers all that he or she has to the other. This mutual self-giving has two meanings: life-giving and love-giving, or the procreative and unitive aspects of intimacy, respectively.

Through their coming together as one, they may give new life, and they do share love in the most personal physical sense possible. When a couple mutually self-gives without recourse to artificial contraception, they hold back nothing from each other, nor do they hold back anything from God. They treat each other as a subject, *i.e.*, as a fully human person endowed by God with dignity. Through their own free will to be open to new life, they allow God to enter their union. Their uninhibited act of sharing helps ensure that neither regards the other as an object for his or her of sexual gratification.

In contrast, artificial contraception de-couples the life-giving from the love-giving dimensions of human sexuality, and easily leads to an inauthentic, materialistic view of intimacy. Love is not viewed as a whole package in which God plays a role. Rather, love is disaggregated and compartmentalized: unprotected sex produces babies, who also can be produced with the assistance of technology; whereas protected sex often is an assertion of the self. Thus, Pope John Paul II writes in his 1981 Encyclical Letter, *Familiaris Consortio* (Of Family Partnership):

When couples, by means of recourse to contraception, separate these two meanings that God the Creator has inscribed in the being of man and woman and in the dynamism of their sexual communion, they act as "arbiters" of the Divine plan and they "manipulate" and degrade human sexuality — and with it themselves and their married partner — by altering its value of "total" self-giving. *Thus the innate language that expresses the total reciprocal self-giving of husband and wife is overlaid, through contraception, by an objectively contradictory language, namely, that of not giving oneself totally to the other. This leads not only to a positive refusal to be open to life but also to a falsification of the inner truth of conjugal love, which is called upon to give itself in personal totality.*

*When, instead, by means of recourse to periods of infertility, the couple respect the inseparable connection between the unitive and procreative meanings of human sexuality, they are acting as "ministers" of God's plan*

of the Body for Beginners — A Basic Introduction to Pope John Paul II's Sexual Revolution (West Chester, Pennsylvania: Ascension Press, 2004).

<sup>135</sup> See KAROL WOJTYŁA (POPE JOHN PAUL II), *LOVE AND RESPONSIBILITY* (1960), FL. Collins, Colorado: Ignatius Press, rev'd ed., 1963).



and they "benefit from" their sexuality according to the original dynamism of "total" self-giving, without manipulation or alteration.

In the light of the experience of many couples and of the data provided by the different human sciences, theological reflection is able to perceive and is called to study further the difference, both anthropological and moral, between contraception and recourse to the rhythm of the cycle: it is a difference which is much wider and deeper than is usually thought, one which involves in the final analysis two irreconcilable concepts of the human person and of human sexuality. The choice of the natural rhythms involves accepting the cycle of the person, that is the woman, and thereby accepting dialogue, reciprocal respect, shared responsibility and self-control. To accept the cycle and to enter into dialogue means to recognize both the spiritual and corporal character of conjugal communion and to live personal love with its requirement of fidelity. In this context the couple comes to experience how conjugal communion is enriched with those values of tenderness and affection which constitute the inner soul of human sexuality, in its physical dimension also. In this way sexuality is respected and promoted in its truly and fully human dimension, and is never "used" as an "object" that, by breaking the personal unity of soul and body, strikes at God's creation itself at the level of the deepest interaction of nature and person.<sup>136</sup>

Moreover, a materialistic view of intimacy has particularly negative consequences for women: rather than being liberated, they become objectified, which is to say demeaned and degraded, by men, who regard them as instruments for their own enjoyment. Thus, in Paragraph 17 of *Humanae Vitae*, Pope Paul VI writes:

Responsible men can become more deeply convinced of the truth of the doctrine laid down by the Church on this issue if they reflect on the consequences of methods and plans for artificial birth control. Let them first consider how easily this course of action could open wide the way for marital infidelity and a general lowering of moral standards. Not much experience is needed to be fully aware of human weakness and to understand that human beings — especially the young, who are so exposed to temptation — need incentives to keep the moral law, and it is an evil thing to make it easy for them to break that law. Another effect that gives cause for alarm is that a man who grows accustomed to the use of contraceptive methods may forget the reverence due to a woman, and, disregarding her physical and emotional equilibrium, reduce her to being a mere instrument of the satisfaction of his own desires, no longer considering her as his partner whom he should surround with care and affection.<sup>137</sup>

In this regard, it may be observed that (as of February 2010), over 40 percent of all children in the United States are born out of wedlock, which is an increase in less than 50 years in the out-of-wedlock birth rate from under 5 percent.<sup>138</sup> Additionally, some contraceptive methods — the pill in particular — have dubious or adverse long-term consequences on the health of women. Herein, then, lies yet another justification for Catholic Christian teaching on artificial contraception: a consequential argument that Pope Paul VI was farsighted in making in 1968.

#### [D] Gravity

Significantly, the above-quoted language in *Humanae Vitae* does not expressly state that use of artificial contraceptive methods is "gravely" or "mortally" sinful. Nevertheless, it is widely seen as such by many in the Church. Paragraph 14 of *Humanae Vitae* not only dubs such methods "intrinsically wrong," but also casts the debate about such methods in the broader and deeper context of good and evil:

Neither is it valid to argue, as a justification for sexual intercourse which is deliberately contraceptive, that a lesser evil is to be preferred to a greater one, or that such intercourse would merge with procreative acts of past and future to form a single entity, and so be qualified exactly by exactly the same moral goodness as these. *Though it is true that sometimes it is lawful to tolerate a lesser moral evil in order to avoid a greater evil or in order to promote a greater good, it is never lawful, even for the gravest reasons, to "do evil that good may come of it" (quoting The Letter of Saint Paul to the Romans 3:8) — in other words, to intend directly something which of its very nature contradicts the moral order, and which must therefore be judged unworthy of man, even though the intention is to protect or promote the welfare of an individual, of a family or of society in general. Consequently, it is a serious error to think that a whole married life of otherwise normal relations can justify sexual intercourse which is deliberately contraceptive and so intrinsically wrong.*<sup>139</sup>

Accordingly, Father Trese states:

... to have marital intercourse and to directly prevent conception by mechanical or chemical means employed by either spouse has always been held by the Church to be contrary to natural law and therefore *gravely* sinful.<sup>140</sup>

Moreover, in quoting from *Humanae Vitae*, the *Catechism of the Catholic Church* uses the term "intrinsically evil" in respect of any action that proposes, as an end or means, to vitiate procreation.<sup>141</sup>

All this said, it is worth quoting Peter Hebblethwaite (1930-1994), a prominent journalist, writer, and teacher who began covering Vatican affairs in 1965, and

<sup>136</sup> Apostolic Exhortation, *Familiaris Consortio*, of Pope John Paul II, § 32, 22 November 1981, posted at [www.vatican.va](http://www.vatican.va) (emphasis added). See also *Catechism*, *supra*, § 2366 at 569 (quoting *Familiaris Consortio*, § 32).

<sup>137</sup> *Humanae Vitae*, *supra*, § 17 (emphasis added).

<sup>138</sup> See Archbishop Joseph F. Naumann, *Readers Urged to Sign Manhattan Declaration Online*, *THE LEAVEN* (Newspaper of the Archdiocese of Kansas City, Kansas), 19 February 2010, at 2.

<sup>139</sup> *Humanae Vitae*, *supra*, § 14 (emphasis added).

<sup>140</sup> Trese, *supra*, at 433 (emphasis added).

<sup>141</sup> *Catechism*, *supra*, § 2370 at 570 (quoting *Humanae Vitae* § 14) (emphasis added).

attended the Fourth and final session of the Second Vatican Council. In his monumental biography, *Paul VI*, Hebblethwaite observes:

... Paul [i.e., Pope Paul VI] himself had modified the final text [of *Humanae Vitae*], making the following changes: he cut out any reference to "mortal sin;" he always refused to qualify the encyclical as "infallible;" and he inserted a passage on "compassion for sinners" [Paragraph 29]:

It is an outstanding manifestation of charity . . . to omit nothing from Christ's saving doctrine, yet this must always be accompanied by tolerance and charity. For when he came, not to judge but to save the world, was he not severe towards sin, but patient and abounding in mercy towards all sinners?

Husbands and wives, therefore, when deeply distressed by reason of the difficulties of their life, must find stamped in the heart and voice of their priest the likeness of the voice and love of our Redeemer.<sup>142</sup>

This observation bears no supporting citation. Possibly, the Holy Father rendered final edits sometime in the summer of 1965, before 29 July when the *Encyclical* was published. Hebblethwaite also observes:

The end of the paragraph [29] urges married couples "to approach more often with great faith the sacraments of the Eucharist and Penance [i.e., Confession]. Nor must they ever despair because of weakness." It would seem that "refusing absolution" and similar high-handed methods are not what is intended here.<sup>143</sup>

As lawyers and judges well understand, final edits to an important document can be highly relevant in interpreting the text. Moreover, the above-quoted observations embody a proposition appreciated by many in the Church, namely: careful moral evaluation is appropriate in assessing the gravity of moral culpability in the use of an artificial contraceptive method, i.e., an invariable rule that this use always and everywhere is a grave sin, as distinct from a venial one, might not be intended by *Humanae Vitae*.

Thus, a variety of publications and pamphlets that provide guidance as to the Examination of Conscience before seeking the Sacrament of Reconciliation (Confession) list use of an artificial contraceptive method as a behavior that a penitent should confess, preferably before receipt of Holy Communion. In this regard, it is worth recalling that there are three elements to the gravity of a sin, all of which must be present for commission of a sin to be deemed "grave" or "mortal:"

- (1) The act is objectively gravely wrong.
- (2) The actor knows the act is objectively gravely wrong.
- (3) The actor fully and freely intended to commit the act.

<sup>142</sup> PETER HEBBLETHWAITE — THE FIRST MODERN POPE 517 (New York, New York: Paulist Press, 1993) (quoting *Humanae Vitae* ¶ 29) (emphasis added). [Hereinafter, Hebblethwaite.]

<sup>143</sup> HEBBLETHWAITE, *supra*, fn. 1 at 518 (quoting *Humanae Vitae* ¶ 29) (emphasis added).

Moreover, commission of even a grave sin, no matter what it is, is forgivable through Reconciliation.

### [E] Compassion

The fourth misunderstanding about Catholic Christian teaching on contraception is that the Church itself is rather harsh or insensitive about it. Quite the opposite is true. Paragraphs 19, 20, and 25 of *Humanae Vitae* explain:

19. Our words would not be an adequate expression of the thought and solicitude of the Church, Mother and Teacher of all peoples, if, after having recalled men to the observance and respect of the Divine law regarding matrimony, they did not also support mankind in the honest regulation of birth amid the difficult conditions which today afflict families and peoples. The Church, in fact, cannot act differently toward men than did the Redeemer [Jesus Christ]. She knows their weaknesses, she has compassion on the multitude, she welcomes sinners. But at the same time she cannot do otherwise than teach the law. For it is in fact the law of human life resorted to its native truth and guided by the Spirit of God.

20. The teaching of the Church regarding the proper regulation of birth is a promulgation of the law of God Himself. And yet there is no doubt that to many it will appear not merely difficult but even impossible to observe. Now it is true that like all good things which are outstanding for their nobility and for the benefits which they confer on men, so this law demands from individual men and women, from families and from human society, a resolute purpose and great endurance. Indeed it cannot be observed unless God comes to their help with the grace by which the goodwill of men is sustained and strengthened. But to those who consider this matter diligently it will indeed be evident that this endurance enhances man's dignity and confers benefits on human society.

25. . . . We have no wish at all to pass over in silence the difficulties, at times very great, which beset the lives of Christian married couples. For them, as indeed for everyone of us, "the gate is narrow and the way is hard, that leads to life." [Quoting *The Gospel According to Matthew* 7:14.] Nevertheless it is precisely the hope of that life which, like a brightly burning torch, lights up their journey, as, strong in spirit, they strive to live "sober, upright and godly lives in this world," knowing for sure that "the form of this world is passing away." [Quoting, respectively, *Timothy* 2:12, 1 *Corinthians* 7:31.]<sup>144</sup>

The Pope who authored *Humane Vitae* expressed the difficulties of conscience associated with Catholic teaching on artificial contraception shortly after he wrote it:

<sup>144</sup> *Humanae Vitae*, *supra*, §§ 19-20, 25 (emphasis added).



How many times we have trembled before the alternatives of an easy condescension to current opinions.<sup>145</sup>

Setting aside the reality that not all Catholic laity agree with the traditional teaching, the fact is that the teaching is to a degree, counter-cultural — a “sign of contraction,” as *Humane Vitae* (Paragraph 18) puts it, borrowing from *The Gospel According to Luke* (chapter 2, verse 34). That is true for other Catholic Christian teachings, and indeed the example of the life of Christ Himself. It also is true in respect of Islam and the example of the Prophet Muhammad. Both faiths propose certain ways of life that are not congruous with moral relativism and secularism, and neither faith seeks to be perfectly “in tune” with contemporary culture. To do so would be to invert the hierarchy of priorities that both faiths propound.

Nevertheless, clergy in both faiths are sensitive and sympathetic to the trials people face in everyday life. They appreciate that Muslims and Catholic Christians live in a “contraceptive culture,” i.e., as Jesuit Father John Hardon (1914-2000) defines, a:

society in which contraception is the accepted way of preventing the conception of unwanted offspring.<sup>146</sup>

Each couple is unique in its circumstances. For some couples, one spouse or the other may be more accepting of Church teaching, which is to say that the husband and wife are at different points in their spiritual journey. Other couples might come from different faiths, i.e., the marriage might be a mixed one. It is hardly consistent with Catholic (or Islamic) teaching to seek to impose a method of contraception on another spouse. Still other couples may be poor and illiterate. They are lucky to break away from back-breaking work to eke out a living and spend even a bit of time in a Church, much less to obtain the education and means needed to practice NFP. They live on garbage heaps in Third World slums like Tondo in Manila, Philippines. For some of them, their brutal reality, as they lack both electricity and a television set to watch in the evening, is that sex may devolve into their only form of entertainment. If so, then children may become acclimatized to their parents' behavior, thereby their accelerating their loss of innocence, and eventually one day following what they witnessed.

In all such cases, both Islam and Catholic Christianity call for love, compassion, and prayer to work through difficulties. Indeed, both faiths proclaim that easy recourse to artificial contraceptive methods is not a long-term solution to disagreements or limitations a couple might have about these methods. It is no panacea for poverty. Such use not only might put one or both spouses in some moral jeopardy, and degrade both of them, but also might inhibit a genuine dialogue between the spouses. Thus, honest efforts to adhere to Catholic Christian teaching, like genuine striving (*jihād*) to discern and submit to the Will of God, are what matter. Paragraph 25 of *Humane Vitae* exhorts couples as follows:

<sup>145</sup> Pope Paul VI, quoted in FATHER JOHN A. HARDON, S.J., MODERN CATHOLIC DICTIONARY 129 (Garden City, New York: Doubleday & Company, 1980) (entry for “contraception”). (Hereinafter, MODERN CATHOLIC DICTIONARY.)

<sup>146</sup> MODERN CATHOLIC DICTIONARY, *supra*, at 130 (entry for “contraceptive culture”) (emphasis added).

... [H]usbands and wives should take up the burden appointed to them, willingly, in the strength of faith and of that hope which “does not disappoint us, because God’s love has been poured into our hearts through the Holy Spirit who has been given to us.” [Quoting *The Letter of Saint Paul to the Romans*, 5:5.] Then let them implore the help of God with unrelenting prayer and, most of all, let them draw grace and charity from that unfailing fount which is the Eucharist [Holy Communion]. If, however, sin still exercises its hold over them, they are not to lose heart. Rather, must they, humble and persevering, have recourse to the mercy of God, abundantly bestowed in the Sacrament of Penance [i.e., Reconciliation, Confession].<sup>147</sup>

Simply put, people of all faiths are not expected to succeed invariably, but rather are called to try sincerely.

As a post-script, in November 2010 the comments of Pope Benedict XVI on the use of condoms to prevent the spread of HIV/AIDS were published in a book, *The Light of the World: The Pope, The Church and the Signs of the Times*. The book is a series of interviews with the Holy Father by German Catholic journalist Peter Seewald. The extensive comments are set in the context of the unparalleled contribution of the Catholic Church in treating HIV/AIDS victims in poor countries. Indubitably, these and other remarks will be studied by moral theologians, clergy, and laity, both Catholic and non-Catholic, for years to come.

For now, four points are worth observing. First, Pope Benedict was not speaking *ex cathedra*. That is, he did not officially propound a new dogma of the Church. He offered his theological opinion, which of course is a considered one.

Second, the Pope repeats the truism that condoms are not a long-term solution to the AIDS epidemic:

As a matter of fact, . . . , people can get condoms when they want them anyway. But this just goes to show that condoms alone do not resolve the question itself. More needs to happen. Meanwhile, the secular realm itself has developed the so-called ABC Theory: Abstinence-Be Faithful-Condom, where the condom is understood only as a last resort, when the other two points fail to work. This means that the sheer fixation on the condom implies a banalization of sexuality, which, after all, is precisely the dangerous source of the attitude of no longer seeing sexuality as the expression of love, but only a sort of drug that people administer to themselves.<sup>148</sup>

In brief, condoms are widely available. Yet, infection rates have not declined dramatically. More generally, sexual intimacy is at risk of becoming self-gratification. The most reliable anti-AIDS strategy is two-pronged — abstinence

<sup>147</sup> *Humane Vitae*, *supra*, § 25. See also *id.*, § 29 (stating “Let them never lose heart because of their weakness”).

<sup>148</sup> BENEDICT XVI, *THE LIGHT OF THE WORLD: THE POPE, THE CHURCH AND THE SIGNS OF THE TIMES* — A CONVERSATION WITH PETER SEEWALD 118–119 (San Francisco, California: Ignatius Press, 2010). (Hereinafter, *THE LIGHT OF THE WORLD*.)

and fidelity. This strategy, in turn, supports authentic mutual self-giving through sexuality.

Third, the observations of Pope Benedict bespeak neither a fundamental change nor radical shift in Church teaching on the use of artificial devices for the purpose of preventing conception. Rather, they elaborate on a long-standing tradition in moral theology about the importance of intention. Here, the intention for use of a condom is critical. If it is to prevent the spread of AIDS, then it may be acceptable:

There may be a basis in the case of some individuals, as perhaps when a male prostitute uses a condom, where this can be a first step in the direction of a moralization, a first assumption of responsibility, on the way toward recovering an awareness that not everything is allowed and that one cannot do whatever one wants. But it is not really the way to deal with the evil of the HIV infection. That can really lie only in a humanization of sexuality.<sup>149</sup>

In the example of a male prostitute, conceiving a child is not possible, because the sexual act at issue is a homosexual one. Might this example be non-exclusive? Perhaps. But, this example alone does not support an inference that condom use is permissible for the express purpose of preventing conception. To suggest it does would be to confuse an evil with a good. Sexual intimacy is not supposed to be death-dealing, but rather should anticipate life-giving. Condom use to prevent the spread of a deadly disease is not on the same moral plane as to block conception of a child.

Finally, and arguably most importantly, as Pope Benedict indicates in the preceding quote, in the context at issue, condoms could be a "first step" toward conversion:

She [the Roman Catholic Church] of course does not regard it [condom use] as a real or moral solution, but in this or that case, there can be nonetheless, in the intention of reducing the risk of infection, a first step in a movement toward a different way, a more human way, of living sexuality.<sup>150</sup>

In sum, conversion is the real issue: a male prostitute who pauses to think he ought to use a condom does so because he is concerned about doing harm to his client. That concern is a moral awakening. This awakening may lead him to consider whether the sexual encounter in which he is about to engage is or is not moral. His answer to that question may, in turn, lead to spiritual conversion.

<sup>149</sup> *LIGHT OF THE WORLD*, *supra*, at 119.

<sup>150</sup> *LIGHT OF THE WORLD*, *supra*, at 119.

## Chapter 40

### ABORTION

If you live to be 100, I hope I live to be 100 minus 1 day, so I never have to live without you.

Winnie-the-Pooh (to Piglet),

A.A. MILNE (1882-1956), *THE COMPLETE TALES AND POEMS OF WINNIE-THE-POOH* (rev'd ed. 2001)

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#### § 40.01 RANGE OF OPINIONS IN SACRED AND SECULAR LEGAL SYSTEMS

Islamic religious and legal scholars (*ulema* and *fukahā'*, respectively) do not speak with one voice about abortion. The Four *Sunni* Schools — *Hanafi*, *Māliki*, *Shāfi'i*, and *Hanbali* — hold varying opinions. Within some Schools, there exist differences. Across and within the Schools, opinion on the permissibility of abortion ranges from absolute prohibition to limited permissibility until 120 days into the pregnancy.<sup>1</sup>

Even within a particular *Sunni* School, and within the same country and institution, there can be a diversity of opinions on abortion. Consider the most prominent mosque in Egypt, Al Azhar in Cairo, and the related Al Azhar University, which is renowned throughout the Islamic world.<sup>2</sup> The views emanating from Al Azhar differ from time to time, depending on the opinion of the Grand *Imām* of that Mosque. In the late 1980s, the Grand *Imām* was Sheikh Gad El Haq. He considered abortion in two contexts: genetic abnormality, and rape. In both of them, he refused to declare that abortion was permissible. His opinion was heavily cited in 1994, as abortion was a prominent controversy at the International Conference on Population and Development, which Cairo hosted that year. Succeeding Sheikh Gad El Haq as Grand *Imām* was Sheikh Mohamed Tantawi, who had a different opinion on abortion. In 2009, he issued a *fatwā* (religious order) that allows post-rape abortion on the condition that the woman is found to be chaste. The successor to Sheikh Tantawi, is Sheikh Ahmed Tayyib, who became Grand *Imām* in 2010. His views on abortion have yet to be publicized widely.

The range of views in the Muslim world on abortion roughly mimics the diversity in Christianity. It has always been the teaching of the Roman Catholic Church that abortion is intrinsically evil and its commission (or the assistance of one in its procurement) is a grave sin. That life begins at conception has been a constant

<sup>1</sup> See Donna Lee Bowen, *Contemporary Muslim Ethics of Abortion*, in *ISLAMIC ETHICS OF LIFE: ABORTION, WAR, AND EUTHANASIA* 51, 56 (Columbia, South Carolina: University of South Carolina Press, Jonathan E. Brockopp ed., 2003). (Hereinafter, Bowen.)

<sup>2</sup> Technically, "Al Azhar" is a generic term that refers to the three main Islamic institutions in Egypt: the Mosque, University, and Islamic Research Council. Historically, the Mosque was the first of the institutions, and spawned the University. All three are part of the body politic of that country. The three institutions are under one umbrella, the Supreme Council of Al Azhar, which is headed by the Grand *Imām*.

Al Azhar University was founded around 970-972 A.D., making it older than Oxford University, at which teaching began in 1096, and which developed after 1167, when King Henry II banned English students from attending the University of Paris.

precept. Across Protestant Christianity, there is a range of opinion on abortion. Some Protestant denominations adopt an essentially Catholic position, thus prohibiting abortion or assistance in its procurement. Other denominations agree abortion may occur under reasonably strict limits, such as within the first or possibly second trimester of pregnancy.

The range of opinions among *Shari'a* scholars also mirrors the diversity of rules in secular legal systems. Some countries ban abortions in all but the rarest of cases, such as to save the life of the mother. Other countries allow for abortion on demand, or nearly so. The United States occupies a middle position on the legal spectrum: abortion is constitutionally permissible, but so too are certain restrictions on it, and they vary from state-to-state. The key American Supreme Court case — the highly controversial 1973 *Roe v. Wade* decision — which led to this legal position is discussed below.

#### § 40.02 RESPECT FOR LIFE

Despite the diversity, one point is common to all sacred and secular legal systems: none of them is premised on the proposition that taking a human life, specifically a baby in the womb, is a morally good act. To the contrary, they all accept, and some even champion, the proposition that life must be protected from conception to natural death. Thus, it would be unfair to characterize Muslims (or Christians, or Americans) as generally "in favor of" abortion. The diversity of opinion tends to occur not on whether abortion is morally acceptable, but on who ought to have the power to decide if and when an abortion may occur, and on the circumstances, if any, under which it may occur.

Thus, it may be said resolutely that Islam places extreme emphasis on the value of human life. That is evident, for example, in the following four passages from the *Qur'ān*:

- *Surah 5, ayah 32*:  
 . . . We decreed to the Children of Israel that *if anyone kills a person — unless in retribution for murder or spreading corruption in the land — it is as if he kills all mankind*, while *if any saves a life it is as if he saves the lives of all mankind*.<sup>3</sup>
- *Surah 6, ayah 151*:

Say, "Come, I will tell you what your Lord has really forbidden you! Do not ascribe anything as a partner to Him; be good to your parents; *do not kill your children in fear of poverty*." — We will provide for you and for them — stay well away from committing indecent deeds whether openly or in secret; do not take the life God has made sacred, except by right. This is what He commands you to do so that you may use your reason.<sup>4</sup>

<sup>3</sup> THE *QUR'AN* — *A New Translation* by M.A.S. Abdel Haleem 5:32 at 71 (Oxford, England: Oxford University Press, 2004) (emphasis added). (Hereinafter, *QUR'AN*.)

<sup>4</sup> *QUR'AN*, *supra*, 6:151 at 92 (emphasis added).

- *Surah 17, ayah 31:*

*Do not kill your children for fear of poverty — We shall provide for them and for you — killing them is a great sin.*<sup>5</sup>

- *Surah 60, ayah 12:*

Prophet, when believing women come and pledge to you that they will not ascribe any partner to God, nor steal, nor commit adultery, *nor kill their children*, nor lie about who has fathered their children, nor disobey you in any righteous thing, then you should accept their pledge of allegiance and pray to God to forgive them: God is most forgiving and merciful.<sup>6</sup>

These passages highlight the importance of preservation of life, even in the face of poverty and unfortunate circumstances. It is easy to infer from them a general, strong inclination against abortion. If one is not to kill one's "children," then the inference is direct, if "children" include persons in the womb. Or, it is by analogical reasoning (*qiyās*), if "children" are post-birth beings and persons in the womb are pre-birth beings.

### [A] Embryonic Development

In two remarkable passages, the Qur'an chronicles the stages of embryology. All Four Schools rely on these passages to guide their opinions on abortion. In particular, Islamic religious and legal scholars (*ulema* and *fukahā'*, respectively) cite these verses to predict at what stage a fetus is regarded as a human being, separate from the mother:

- *Surah 22, ayah 5:*

People, remember, if you doubt the Resurrection, that We created you from dust, then a drop of fluid, then a clinging form, then a lump of flesh, both shaped and unshaped: We mean to make our power clean to you whatever we chose we cause to remain in the womb for an appointed time, then we bring you forth as infants, and then you grow and reach maturity. Some die young and some are left to live on to such an age that they forget all they once knew. You sometimes see the earth lifeless, yet when we send down water it stirs and swells and produces every kind of growth.<sup>7</sup>

- *Surah 23, ayah 12-14:*

We created man from an essence of clay, then We placed him as a drop of fluid in a safe place, then We developed that drop into a clinging form, and We developed that form into a lump of flesh, and We developed that lump into bones, and We clothed those bones with flesh, and later We developed him into other forms — glory be to God, the best of creators!<sup>8</sup>

<sup>5</sup> QUR'AN, *supra*, 17:31 at 177 (emphasis added).

<sup>6</sup> QUR'AN, *supra*, 60:12 at 369 (emphasis added).

<sup>7</sup> QUR'AN, *supra*, 22:5 at 209.

<sup>8</sup> QUR'AN, *supra*, 23:12-14 at 215.

From these verses and *hadiths*, *ulema* and *fukahā'* deduce that there are four continuous stages in the pre-natal development of a human being.<sup>9</sup>

- (1) The first stage takes place in the fallopian tube where the fertilized ovum remains for approximately three days. Cell division is initiated at this stage.
- (2) The next stage involves implantation in the uterus, where cell division continues.
- (3) Two weeks after conception, the embryonic stage begins. It is during the embryo stage that organ differentiation occurs and all organs are present, in at least an elementary form by the end of six weeks.
- (4) Lastly, the fetal stage is defined as the time between eight weeks and birth. No new organs appear, only continuous growth of the fetus occurs.

Therefore, for purposes of the *Shari'a*, a "fetus" is defined as the pre-natal stage during which all necessary human characteristics are present.

### [B] When Does Life Begin and Ensoulment Occur?

Based on the above considerations, the *ulema* and *fukahā'* generally agree life begins at the moment of conception. This question — when does human life begin? — is essential to the discussion of abortion. Patently, the earlier in time a "life" is said to commence, in a physical or biological sense, then the stronger the injunction against abortion is likely to be. That is because the injunctions will be applicable earlier, rather than later. The earliest possible biological moment, of course, is conception. Accordingly, the general impulse of the *ulema* and *fukahā'* is to view abortion with great suspicion, and indeed, to consider it at a minimum reprehensible (*makrūh*).

However, when human life begins is not the only relevant question. The second, and closely related, issue is when ensoulment occurs. That is, at what moment does God (Allāh) put a soul into a human life? Within Catholic Christianity, and indeed among Greek philosophers, there has been a robust and fascinating debate as to when ensoulment occurs. Aristotle, and some theologians in the first few centuries of the history of the Catholic Church, proposed that ensoulment occurs after conception, such as during the third month, when the fetus takes on a recognizable human form. Saint Thomas Aquinas theorized that ensoulment occurs at some time after fertilization of an egg by a sperm, a position taken in the Roman Catechism used around the time of the Council of Trent (1545-1563 A.D.). Subsequent study has not led to a resolution of the debate in favor of the teaching that ensoulment occurs at conception. Accordingly, God creates life, and places a soul in that life, but exactly when He does so is uncertain. Notably, in the 1974 *Declaration on Procured Abortion*, the Congregation for the Doctrine of the Faith states:

<sup>9</sup> See MOHAMMAD HASHIM KAMALI, *THE RIGHT TO LIFE, SECURITY, PRIVACY, AND OWNERSHIP IN ISLAM* 37 (Cambridge, England: Islamic Texts Society, 2008) (discussing the four stages of pre-natal development). [Hereinafter, KAMALI.]



19. *This declaration expressly leaves aside the question of the moment when the spiritual soul is infused. There is not a unanimous tradition on this point and authors are as yet in disagreement.* For some it dates from the first instant; for others it could not at least precede nidation [i.e., implantation of the early embryo in the uterus]. It is not within the competence of science to decide between these views, because the existence of an immortal soul is not a question in its field. It is a philosophical problem from which our moral affirmation remains independent for two reasons: (1) supposing a belated animation [i.e., delayed implantation of the soul in an embryo], there is still nothing less than a human life, preparing for and calling for a soul in which the nature received from parents is completed, (2) on the other hand, it suffices that this presence of the soul be probable (and one can never prove the contrary) in order that the taking of life involve accepting the risk of killing a man, not only waiting for, but already in possession of his soul.<sup>10</sup>

In other words, there is not an official or definitive declaration from the Catholic Church on the precise moment when ensoulment occurs.<sup>11</sup> Nevertheless, the

<sup>10</sup> Sacred Congregation for the Doctrine of the Faith, *Declaration on Procured Abortion*, ¶ 13 endnote 19 (18 November 1974), posted at [www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_19741118\\_declaration-abortion\\_en.html](http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19741118_declaration-abortion_en.html) (emphasis added).

<sup>11</sup> For instance, the 1987 document from the Congregation of the Doctrine of the Faith, *Donum Vitae*, states:

This Congregation [for the Doctrine of the Faith] is aware of the current debates concerning the beginning of human life, concerning the individuality of the human being and concerning the identity of the human person. The Congregation recalls the teachings found in the Declaration on Procured Abortion: "From the time that the ovum is fertilized, a new life is begun which is neither that of the father nor of the mother; it is rather the life of a new human being with his own growth. It would never be made human if it were not human already. To this perpetual evidence . . . modern genetic science brings valuable confirmation. It has demonstrated that, from the first instant, the program is fixed as to what this living being will be: a man, this individual-man with his characteristic aspects already well determined. Right from fertilization is begun the adventure of a human life, and each of its great capacities requires time . . . to find its place and to be in a position to act" [citing the 1974 *Declaration on Procured Abortion*, ¶¶ 12-13]. This teaching remains valid and is further confirmed, if confirmation were needed, by recent findings of human biological science which recognize that in the zygote resulting from fertilization the biological identity of a new human individual is already constituted.

Certainly no experimental datum can be in itself sufficient to bring us to the recognition of a spiritual soul; nevertheless, the conclusions of science regarding the human embryo provide a valuable indication for discerning by the use of reason a personal presence at the moment of this first appearance of a human life: how could a human individual not be a human person? *The Magisterium has not expressly committed itself to an affirmation of a philosophical nature*, but it constantly reaffirms the moral condemnation of any kind of procured abortion. This teaching has not been changed and is unchangeable (citing Pope Paul VI, *Discourse to Participants in the Twenty-third National Congress of Italian Catholic Jurists*, 9 December 1972).

Thus the fruit of human generation, from the first moment of its existence, that is to say from the moment the zygote has formed, demands the unconditional respect that is morally due to the human being in his bodily and spiritual totality. The human being is to be respected and treated as a person from the moment of conception; and therefore from that same moment his rights as a person must be recognized, among which in the first place is the inviolable right of every innocent human being to life.

Congregation for the Doctrine of the Faith, *Instruction on Respect for Human Life in Its Origin and on the Dignity of Procreation Replies to Certain Questions of the Day* (*Donum Vitae* — The Gift of Life),

general and practical understanding is that a fully human person, with a soul, exists at conception. In turn, aborting this person is considered wrong, and seriously so. Yet, the wrongness of abortion from a Catholic perspective does neither solely nor ultimately depends on the question of when an embryo is infused with a soul, or when an embryo becomes a person.

Among the *ulema* and *fukahā*, the issue of when ensoulment occurs has not been definitively answered. There are two *hadīths* on this topic, and each attributes the date of ensoulment differently. The *hadīth* related in *Sahih Bukhari*, as narrated by Abdullah ibn Mas'ud, dates ensoulment at 120 days after pregnancy commences:

*(The matter of the Creation of) a human being is put together in the womb of the mother in forty days, and then he becomes a clot of thick blood for a similar period, and then a piece of flesh for a similar period. Then Allāh sends an angel who is ordered to write four things. He is ordered to write down his (i.e. the new creature's) deeds, his livelihood, his (date of) death, and whether he will be blessed or wretched (in religion). Then the soul is breathed into him. So, a man amongst you may do (good deeds till there is only a cubit between him and Paradise and then what has been written for him decides his behavior and he starts doing (evil) deeds characteristic of the people of the (Hell) fire. And similarly a man amongst you may do (evil) deeds till there is only a cubit between him and the (Hell) fire, and then what has been written for him decides his behavior, and he starts doing deeds characteristic of the people of Paradise.)*<sup>12</sup>

Yet, *Imām* Muslim relates a *hadīth* of Hudhayfa bin Usaid, who narrates that ensoulment occurs at 42 nights after pregnancy commences:

When the drop of (semen) remains in the womb for *forty or fifty (days) or forty nights*, the angel comes and says: My Lord, will he be good or evil? Then both these things would be written. Then the angel says: My Lord, would he be male or female? So both these things are written. And his deeds and actions, his death, his livelihood; these are also recorded. Then his document of destiny is rolled and there is no addition to nor subtraction from it.<sup>13</sup>

The precise figure of 42 days appears to come from the so-called "organogenesis *hadīth*" of Muhammad, which *Imām* Muslim narrates from Hudhayfa ibn Asad as follows:

§ 1, ¶ 1 (February 1987), posted at [http://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_19870222\\_respect-for-human-life\\_en.html](http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19870222_respect-for-human-life_en.html) (emphasis added).

<sup>12</sup> THE TRANSLATION OF THE MEANINGS OF SAHIH AL-BUKHARI, ARABIC-ENGLISH by Dr. Muhammad Muhsin Khari, vol. IV, book LIV (The Book of the Beginning of Creation), p. 290, *hadīth* no. 430 (Dar Ahyā Us-Sunnah, Al Nabawiya, March 1978). [Hereinafter, *BUKHARI*.]

<sup>13</sup> SAHIH MUSLIM — BEING TRADITIONS OF THE SAYINGS AND DEEDS OF THE PROPHET MUHAMMAD AS NARRATED BY HIS COMPANIONS AND COMPILED UNDER THE TITLE AL-JAM'U-S-SAHIH BY IMAM MUSLIM, RENDERED INTO ENGLISH BY ABDUL HAMID SIDDIQI, WITH EXPLANATORY NOTES AND BRIEF BIOGRAPHICAL SKETCHES OF MAJOR NARRATORS, CORRECTED AND REVISED BY DR. HASSAN VOL. IVB, book 46 (Book of Fate), p. 209, *hadīth* no. 2644 (Lahore, Pakistan: Sh. Muhammad Ashraf Booksellers and Exporters, 1990). [Hereinafter, *MUSLIM*.]

After the sperm-and-ovum drop (*nutfā*) has been [in the uterus] *forty-two days*, Allāh sends it an angel that gives it form and fashions its hearing, sight, skin, flesh, and skeleton.<sup>14</sup>

One contemporary *Sunni* scholar, Sheikh G.F. Haddad, explains the rationale for this figure:

The time frame given cited [in the organogenesis *ḥadīth*] above is in conformity with embryological observation. The embryo reaches the sixth week without showing the semblance of human form but by the seventh week of its life — about three centimeters in size and beginning to move — that semblance becomes visible in the formation of the essential organs including the sensory organs and grown bone tissue. The arms and legs have lengthened. The foot and hand areas are distinguishable and they have digits. The first recordable brain wave activity occurs.<sup>15</sup>

In brief, organogenesis — the establishment of all organs — reaches its peak at 42 days.

Accordingly, differences of opinion among the *ulema* and *fukahā'* on ensoulment stem from differences narrated in these *ḥadīths*. While the *ḥadīths* do not provide a single answer, they play a vital role in the *Shar'ī'a*. They are Prophetic inspiration, which along with revelation are foundational sources for rulings on abortion.<sup>16</sup>

## § 40.03 BASIC RULES

### [A] Forbidden (*Ḥarām*) After 120 Days, Except to Save Mother

Indubitably, all Muslim scholars register an increasing dislike of abortion as pregnancy approaches 120 days, unless there is compelling justification.<sup>17</sup> The clear consensus (*ijma*) of all Four Schools is that after 120 days, abortion is *ḥarām* unless it is performed to save the life of the mother of the child. In fact, after 120 days the consensus is that "abortion is tantamount to murder."<sup>18</sup>

There is some debate about the exception to save the life of the mother. A minority of scholars from some Schools prohibit abortion even if it is necessary to save the life of the mother.<sup>19</sup> That said, the principal debate among the *ulema* and *fukahā'* is not over the necessity exception for the life of the mother.

<sup>14</sup> Posted at [www.livingislam.org/h/hfhl\\_e.html](http://www.livingislam.org/h/hfhl_e.html) (emphasis added).

<sup>15</sup> Sheikh G.F. Haddad, *Hadiths on the Formation of Human Life — What Modern Science Confirms Today Was Known to Islamic Science 1,400 Years Ago*, posted at [www.livingislam.org/h/hfhl\\_e.html](http://www.livingislam.org/h/hfhl_e.html) (April 2003).

<sup>16</sup> See SA'DIYYA SHAJER, *SACRED RIGHTS: THE CASE FOR CONTRACEPTION AND ABORTION IN WORLD RELIGIONS* 105, 121 (New York, New York: Oxford University Press, Daniel C. Maguire ed., 2003).

<sup>17</sup> See Bowen at 56.

<sup>18</sup> MUHAMMAD IBN ADAM AL-KAWTHARI, *BIRTH CONTROL AND ABORTION IN ISLAM* 53 (Santa Barbara, California: White Thread Press, 2006). (Hereinafter, AL KAWTHARI).

<sup>19</sup> AL KAWTHARI, *supra*, at 56.

Rather, the key debate concerns abortion in the first 120 days of pregnancy. Is it permissible in this period, and if so, under what circumstances? This question splits scholars, leading to a variety of opinions.

### [B] Cases of Necessity

A general principle of Islamic jurisprudence (*fiqh*) is that God (Allāh) does not burden a soul with more than it can bear. *Surah* 2, *ayah* 286, which is the last verse in the longest Chapter of the Qur'an, states:

God does not burden any soul with more than it can bear; each gains whatever good it has done, and suffers its bad — [The faithful say:] "Lord, do not take us to task if we forget or make mistakes. Lord, do not burden us as You burdened those before us. Lord, do not burden us with more than we have strength to bear. Pardon us, forgive us, and have mercy on us. You are our Protector, so help us against the disbelievers."<sup>20</sup>

In respect of abortion, the *ulema* and *fukahā'* invoke this principle when ruling on the permissibility of abortion before 120 days of a pregnancy have elapsed.

There are scholars who argue abortion is permitted (*halal*) in a case in which the life of an already existing child will be in direct danger if another child is born. An example is when breastfeeding milk is the only sustenance for the existing child, and no alternative affordable nutrition exists. In such an instance, writes *Imām* ibn 'Abidin, a *Hanafi* School scholar, there is a compelling justification for abortion:

Abortion will be permissible for a valid reason, such as when the milk of a pregnant woman ceases and the father of the child is not in a position financially to hire a wet nurse, and there is a fear of the child perishing, they (the jurists) state that it will be permissible to terminate the pregnancy . . . provided that the period of 120 days has not elapsed. This is permissible because the fetus has not yet developed into a human, and by aborting it we are saving a human life.<sup>21</sup>

Note the two implicit assumptions underpinning this reasoning of *Imām* ibn 'Abidin.

First, until 120 days, the fetus is not yet "human," and thus may be referred to as "it." Second, killing "it" is outweighed by saving a fully human person, namely, the extant child. If, however, the fetus is regarded as a human person from the moment of conception (not 120 days later), then the calculus changes: abort the baby to save the child, or let the child live and hope that the circumstances of the family change. The second option would be the better one, as there is hope both children might survive, whereas the first option results in the certain death of one child.

<sup>20</sup> QUR'AN, *supra*, 2:286 at 33.

<sup>21</sup> See AL KAWTHARI, *supra*, at 61 (quoting RADD AL-MUKHTAR 'ALA 'L-DURR AL-MUKHTAR 6:429).

The full name of *Imām* ibn 'Abidin was Muhammad Amin ibn 'Abidin, and on the Indian Subcontinent he is known as *Imām* Shami. He was born in Damascus, and lived between 1198-1252 A.H.



Generally, Muslim scholars permit abortion before 120 days of a pregnancy have elapsed if reasons are adduced that directly affect the mother. Not all reasons are persuasive. The justifications the *ulema* and *fukahā'* regard as religiously acceptable are:

- (1) The pregnancy constitutes danger to the physical health of the mother.
- (2) The pregnancy constitutes danger to the psychological health of the mother.
- (3) The pregnancy is caused by rape.
- (4) The pregnant woman is severely crippled or suffers from serious psychological illness and is thereby unable to take care of herself, and putting the child up for adoption is not a viable option.<sup>22</sup>

In these circumstances, the overwhelming majority of Muslim scholars permit abortion. It must be stressed they do not do so with enthusiasm. They well recognize the difficulty, indeed tragedy, of such cases, and fashion such exceptions narrowly.

Is abortion permissible (*halal*) if a medical examination is conducted and reveals serious disabilities or genetic diseases in the fetus that will cause undue burden for both the parents and the child? Many contemporary scholars respond "yes," again assuming 120 days have not elapsed.<sup>23</sup> For example, the Islamic Fiqh Academy of India opined on a case in which a woman suffering from HIV-AIDS became pregnant:

[If a qualified doctor] "confirms that in all likelihood, the fetus will also develop AIDS, in that case, prior to the life coming in the embryo during the period which the Muslim jurists have fixed at 120 days, permission for abortion can be given."<sup>24</sup>

Again, the exception is a narrow one.

Once a pregnancy crosses the 120 threshold, the clear majority of *ulema* and *fukahā'* agree that there is only one necessity justification for abortion: to save the life of the mother. As mentioned earlier, a minority of scholars do not allow even for this justification, holding that abortion is forbidden (*harām*) in all instances after 120 days, including when the life of the mother is in extreme danger.

### [C] Role of Medical Practitioner

Assuming an abortion is justified under Islamic *fiqh* (jurisprudence), a Muslim physician is permitted to perform the procedure.<sup>25</sup> Whether a non-Muslim physician could do so in accordance with the *fiqh* is unclear. There appears to be no requirement in the *Sharī'a* that the doctor be a Muslim. What is clear is certain

non-Muslim physicians, including Catholic Christian doctors, refuse to do so. For them, the teachings of their faith, not justification under the *fiqh*, is dispositive.

Suppose there is no compelling justification under the *fiqh* for an abortion. Then, a Muslim doctor cannot conduct the abortion. Doing so, and indeed assisting in an abortion, when there is no compelling justification under the *fiqh*, is *harām*.<sup>26</sup>

### [D] Blood Money (*Ghurra* and *Diyyah*)

Pertinent to abortion is *ghurra* (blood money) to be paid for an aborted fetus. The term "*ghurra*" connotes blood money, but it is a specific kind of such payment. It is an indemnity payment (i.e., compensation for loss incurred) made for causing the death of an unborn child through an abortion or miscarriage. For example, the traditional amount of *ghurra* is 500 *dirhams* if an abortion occurs without the consent of the father.

A concept related to *ghurra* is "*diyyah*." "*Diyyah*" is a generic term for "blood money." *Diyyah* is paid if the mother dies in connection with an abortion. The two payments are linked. The amount of *ghurra* is 5 percent of the total figure for *diyyah*.<sup>27</sup>

Both *ghurra* and *diyyah* are concepts with a punitive dimension to them. As abortion is hardly championed in the *Sharī'a*, when one is performed under a necessity justification, some kind of sanction is to be imposed — namely, blood money. The punishment is triggered by the induced detachment of a fetus from the womb of the mother, regardless of whether or not the fetus emerges alive or dead.<sup>28</sup> Any act, violent or otherwise, which induces an abortion, is enough to invoke the offense of abortion.

Muslim scholars differentiate among three specific situations in respect of the payment of *ghurra* and *diyyah*.<sup>29</sup>

#### • Case #1: Baby Lives, Mother Dies

First, suppose a fetus is detached from the mother and born alive as a result of an act of violence inflicted on the mother, but the mother subsequently dies. This act might involve hitting or kicking the mother, or pushing her down a set of stairs. The perpetrator of the crime must pay a full *diyyah* to the family of the victim, i.e., the family of the mother. If this offender acted intentionally, i.e., intentionally killed the mother, then the killer must pay the *diyyah*. If the killing was unintentional, then the relatives and associates of the killer can pay the *diyyah* to the family of the victim. What happens if the fetus, born alive, subsequently dies? Then, the *diyyah* must be paid on behalf of the dead infant, as well as on behalf of the dead mother.

<sup>26</sup> AL KAWTHARI, *supra*, at 67.

<sup>27</sup> KAMALI, *supra*, at 42.

<sup>28</sup> See Marion Holmes Katz, *The Problem of Abortion in Classical Sunni Fiqh*, in ISLAMIC ETHICS OF LIFE: ABORTION, WAR, AND EUTHANASIA 27-29 (Columbia, South Carolina: University of South Carolina Press, Jonathan E. Brockopp ed., 2003). (Hereinafter, Katz.)

<sup>29</sup> See KAMALI, *supra*, 44-46 (discussing *ghurra* and *diyyah*).

<sup>22</sup> See AL KAWTHARI, *supra*, at 62.

<sup>23</sup> AL KAWTHARI, *supra*, at 63.

<sup>24</sup> Quoted in KAMALI, *supra*, at 40.

<sup>25</sup> AL KAWTHARI, *supra*, at 67.

These *diyyah* payment rules governing this first scenario are based on a *hadith*. During the time of the Prophet, there was a case of wrongful miscarriage brought to Muhammad in which he ordered *diyyah* to be paid. *Imām* Bukhari records that Abū Hurairah narrated the following:

Two women from Hudhail [a tribe] fought with each other and one of them hit the other with a stone that killed her and what was in her womb. The relatives of the killer and the relatives of the victim submitted their case to the Prophet . . . who judged that the *diyyah* for the fetus was a male or female slave, and the *diyyah* for the killed woman was to be paid by the 'Aṣaba (near relatives) of the killer.<sup>30</sup>

*Imām* Muslim relates the same incident, highlighting the objectionable reaction of the relatives of the killer, who did not see the wisdom of paying *diyyah* for the unborn child:

Abū Hurairah reported that two women of the tribe of Hudhail fought with each other and one of them flung a stone at the other. Killing her and what was in her womb. [sic] The case was brought to Allāh's Messenger. . . . He judged that the *diyat* (indemnity) of her unborn child is a male or female slave of the best quality, and that the *diyat* of the woman is to be paid by her relatives, and he (the Holy Prophet) made her sons and those who were her heirs [eligible to receive it]. Hamal b. Al-Nābigha Al-Huthali [her male relative] said: Messenger of Allāh, why should I pay blood-money for one who neither drank, nor ate, nor spoke, nor made any noise; it is like a nonentity (it is, therefore, not justifiable to demand blood-money for it). Thereupon Allāh's Messenger . . . said: *He seems to be one of the brothers of soothsayers on account of the rhymed speech which he has composed.*<sup>31</sup>

The reference by the Prophet to "rhymed speech" is a clear indication that Muhammad was displeased with the argument of Al-Huthali.<sup>32</sup> That argument confused the issue, and did so with an artificial style of expression that Muhammad compared to fortune tellers, who use rhymed phrases. It may be inferred that Muhammad was specifically unhappy with the proposition that a fetus was essentially a non-entity, unworthy of compensation.

There also are two *hadiths* concerning a case in which two co-wives came to the Prophet after one of the co-wives had struck the other co-wife with a tent pole, killing both the woman and her fetus.<sup>33</sup> The Prophet required the guilty co-wife to pay *diyyah* for the deceased woman and *ghurra* for the fetus. The *ghurra* was set

at one-twentieth of the amount of the *diyyah*, and was to be paid for the lost life of the fetus. The *diyyah*, set at twenty times the amount of *ghurra*, was to be paid for the lost life of the mother. Moreover, the relative of the killer and his comments were rejected by the Muhammad as words of a soothsayer, i.e., merely empty words, and thus untruthful. Thus, this emphasizes the importance of both the born and unborn life under Islamic law.

#### • Case #2: Baby Dies, Mother Lives

Second, suppose a mother suffers an assault and the fetus is detached from the womb of the mother, emerging stillborn, but the mother survives. In this case, the punishment is *ghurra*.<sup>34</sup> The amount to be paid for *ghurra* is the same for males and females, and it is the same for both intentional and unintentional inducement of the detachment of the fetus. This money belongs to the child. Because the child is stillborn, the funds are transferable to the heirs of the dead infant. However, not every heir is eligible. For example, if the offender is the father of the child, then he may not inherit the *ghurra*.<sup>35</sup> What if the mother herself induces the abortion after the permissible time period under the *fiqh* for an abortion, by taking a drug to induce the abortion? Then, she is liable to pay a *ghurra*, as long as fetus has a distinguishable human form.<sup>36</sup>

#### • Case #3: Baby Dies, Mother Dies

Third, suppose a fetus emerges alive, but then dies. A *diyyah* is to be paid to the male relatives of the child.<sup>37</sup> Suppose further that an injury is inflicted on the mother, and the fetus is lost first, followed by the subsequent death of the mother. In this scenario, a full *diyyah* is paid for the mother, and a *ghurra* is paid for the fetus. These rules would apply when the mother is given medicine to induce abortion, and the mother dies after the abortion of the fetus. Suppose a living fetus is aborted, following which the mother also dies. Then, two separate *diyyahs* should be paid by the offender.

Still another scenario is where a perpetrator stabs a woman who is pregnant with twins. In consequence, the mother dies. One of the twins emerges dead with a clear injury marking, while the other twin is born alive, and then dies after two days. In this case, the offender must pay three separate penalties:

- (1) *qisās* (legal retribution) for the death of the mother;
- (2) *diyyah* for the fetus born alive, and
- (3) *ghurra* for the fetus that emerged dead.

In addition, there is a special *kaffāra* (atonement) the offender must perform because of the abortion of the fetus caused by the offender, regardless of whether the fetus is born dead or alive. (It also must be performed in the event of a

<sup>30</sup> BUKHARI, *supra*, vol. IX, book LXXXIII (The Book of *Ad-Diyat* (Blood Money)), p. 34, *hadith* no. 45.

<sup>31</sup> MUSLIM, *supra*, vol. IIIA, book 28 (The Book Pertaining to the Oath, For Establishing the Responsibility of Murders Fighting, Requit and Blood Money), p. 125, *hadith* no. 1681R2 (emphasis added).

<sup>32</sup> See MUSLIM, *supra*, vol. IIIA, book 28 (The Book Pertaining to the Oath, For Establishing the Responsibility of Murders Fighting, Requit and Blood Money), p. 125, fn. (3) to *hadith* no. 1681R2.

<sup>33</sup> See MUSLIM, *supra*, vol. IIIA, book 28 (The Book Pertaining to the Oath, For Establishing the Responsibility of Murders Fighting, Requit and Blood Money), p. 126, *hadith* nos. 1682, 1682R1. See also KATZ, *supra*, at 27 (discussing these *hadiths*).

<sup>34</sup> See KATZ, *supra*, at 28.

<sup>35</sup> See KATZ, *supra*, at 29.

<sup>36</sup> See KATZ, *supra*, at 28.

<sup>37</sup> See KAMALI, *supra*, at 44-46 (discussing *ghurra* and *diyyah*).



self-inflicted abortion.) For example, a mother who seeks an abortion before the prohibited period for a valid reason often will be ordered to make a *kaffāra* as retribution for carrying out a discouraged act.

However, not all schools require *ghurra* or *kaffāra* to be paid in the case of abortion or miscarriage. On the one hand, the *Shāfi'i* and *Ḥanbalī* Schools hold *kaffāra* as obligatory for an aborted or miscarried fetus. On the other hand, the *Ḥanafī* and *Mālikī* Schools call for only an optional act of devotion (*taqarrub*), because the fetus is not unqualifiedly a human life.

#### § 40.04 DIVERSITY OF ISLAMIC OPINIONS

##### [A] *Ḥanafī* School

On abortion, the *Ḥanafī* School is the most liberal of the Four Schools. The majority opinion is abortion is permissible, yet prohibitively disliked (*makrūh*) at anytime before ensoulment, which this School sets at 120 days.<sup>38</sup> Disagreement exists about the particular circumstances under which abortion is allowed. But, the overwhelming consensus is that abortion requires a compelling justification, or "*udhr*."<sup>39</sup>

For *Ḥanafī* scholars, development of discernibly human features, or *al-takhalluq*, is a crucial factor in determining whether an abortion is *makrūh*, or whether it is *ḥarām* (forbidden).<sup>40</sup> Ibn Abidin, a prominent *Ḥanafī* jurist, highlights that:

It is permissible for the woman to undergo a treatment to expel the blood to terminate pregnancy as long as the fetus is a clump of flesh or clot of blood and none of its limbs have been formed.<sup>41</sup>

In sum, before 120 days of a pregnancy have expired, the *Ḥanafī* School permits — though does not affirmatively encourage — an abortion. This permission rests on two premises: during this period, a fetus has neither prominent physical human characteristics nor a soul. Of course, after 120 days of a pregnancy, abortion is not permitted.

##### [B] *Mālikī* School

Of the Four Schools, on abortion the *Mālikī* School is regarded as the most restrictive. The majority view in the *Mālikī* School regards abortion as strongly disapproved (*makrūh*). However, the *Mālikī* School has a modest range of

opinions.<sup>42</sup>

Some opinions forbid abortion anytime after implantation, that is, after a fertilized egg is implanted in the womb of the mother. Other opinions permit abortion only until the end of the *nutfa* stage. Literally, "*nutfa*" refers to a drop or few drops of water, but the term is used in the Qur'an to connote a gamete.<sup>43</sup> A "gamete" is the scientific term for a reproductive cell, which may be a male sperm or female ovum (egg). Through sexual intercourse, the mature reproductive cell of one sex unites with another mature cell of the opposite sex to form a "*nutfa amshaj*," or zygote. Thus, to say that abortion is permitted until the end of the *nutfa* stage seems to mean it is allowed only until conception. Following the common contemporary understanding of what an abortion is, namely, the destruction of a fertilized ovum, such opinions essentially prohibit all abortion.

Significantly, recent *Mālikī* scholars follow the famous classical *Mālikī* jurist *Imām* Al Qurtubī.<sup>44</sup> They regard the fetus in the *nutfa* stage as not yet coalesced in the womb. Consequently, they attach no legal consequences to its expulsion. This view is based in part on the remark of Al Qurtubī that "at this stage it is as though it [the fetus in the *nutfa* stage] were still part of the man in his loins."<sup>45</sup>

##### [C] *Shāfi'i* School

With four variants, the range of opinion in the *Shāfi'i* School is considerable. One group of *Shāfi'i* legal scholars (*fukahā*), like their *Ḥanafī* counterparts, regard abortion as prohibitively disliked (*makrūh*) before 120 days.<sup>46</sup> The second group of *Shāfi'i fukahā* permit abortion until a fetus begins to take on the first signs of human form. They define this threshold as 40 days after conception.<sup>47</sup> The third group prohibits abortion after 80 or 90 days from conception.<sup>48</sup> The fourth group of *Shāfi'i* jurists hold that expelling semen anytime after it is implanted in the womb is forbidden (*ḥarām*).<sup>49</sup> This last opinion is redolent of one of the views in the *Mālikī* School.

<sup>42</sup> See Katz, *supra*, at 31.

<sup>43</sup> See *surah* 53, *ayat* 45-46, *surah* 80, *ayat* 17-19.

<sup>44</sup> The full name of Al Qurtubī is Abū 'Abdullah Al-Qurtubī, or Abū 'Abdullah Muhammad ibn Ahmad ibn Abū Bakr al-Ansari Al Qurtubī. Born in Cordoba, Spain, he lived from 1214-1273 A.D., and is renowned for his 10-volume commentary (*tafsīr*) on the Qur'ānic passages dealing with legal topics, known as "*Tafsīr Al-Qurtubī*," or *Al-Jamī' li Akhām al Qur'ān*.

<sup>45</sup> Quoted in Bowen, *supra*, at 60.

<sup>46</sup> See Bowen, *supra*, at 56.

<sup>47</sup> See Bowen, *supra*, at 56.

<sup>48</sup> See Bowen, *supra*, at 56.

<sup>49</sup> See Bowen, *supra*, at 56.

<sup>38</sup> See KAMALI, *supra*, at 57.

<sup>39</sup> See Katz, *supra*, at 24, 31.

<sup>40</sup> See Katz, *supra*, at 32.

<sup>41</sup> Quoted in Katz, *supra*, at 36.

Born in Damascus, the full name of Ibn Abidin (1198-1252 A.H.) is Muhammad Amin Ibn Abidin. On the Indian Subcontinent, he is renowned as *Imām* Shami.

### [D] *Ḥanbalī* School

Some *Ḥanbalī fukahā'* (jurists) permitted drinking medicine to abort a *nutfā* with compelling justification ("udhr).<sup>50</sup> Note again the question of precisely what point in a pregnancy to which a *nutfā* corresponds. Other *Ḥanbalī* jurists rule that this act — aborting a *nutfā* — is *ḥarām*. These scholars require a woman who engages in it to pay *ghurra*.<sup>51</sup> Still other *Ḥanbalī* jurists agree with their *Ḥanafī* counterparts, who regard abortion as prohibitively disliked (*makrāh*), yet permit it with a compelling justification.<sup>52</sup> Thus, as with the *Shāfi'i* School, there is a diversity of views in the *Ḥanbalī* School on abortion.

### [E] *Shī'ite* Schools

Classical *Ibādī* and Twelver (*Jafarī* or *Imāmī*) *Shī'ite* legal scholars share the opinions of the classical *Mālikī* School.<sup>53</sup> However, contemporary Twelver *Shī'ites* in Iran prohibit abortion after 120 days of a pregnancy have elapsed.<sup>54</sup> During the first 120 days, permission of two doctors is required before an abortion may be performed.<sup>55</sup> The doctors must attest to the need of the mother based on a valid physical or psychological reason, otherwise an abortion is forbidden (*ḥarām*).

### [F] 1984 Synthesis Opinion of Sheikh Al Qaradawi

The opinion on abortion of the Muslim scholar Sheikh Yusuf Al Qaradawi, which was issued in 1984 by the *Fatwā* Committee of Kuwait, is accepted by many mainstream Muslims around the world.<sup>56</sup> Born in 1926 in Egypt, the Sheikh is highly influential, being not only a leading intellectual in the Muslim Brotherhood, but also a trustee of the Oxford University Centre for Islamic Studies. He has been described as "the most influential living Sunni Muslim scholar."<sup>57</sup>

While the overall philosophy of the Sheikh appears to be centrist (*wasatiyyah*), a few of his arguments are highly controversial (including endorsing suicide bombings under specific conditions, and adopting certain homophobic views).<sup>58</sup> Sheikh Al Qaradawi hosts a popular talk-show on the internationally-renowned, Qatari-based television network, Al Jazeera, called "*Sharī'a and Life*." The mission of the program is "the *jihād* of our era," he says, namely, to guide Muslims.<sup>59</sup> He plays a prominent role in the website IslamOnline, which commenced in 1997 as a

project by students at the University of Qatar, with funds from Sheikh Moza (wife of the Emir of Qatar), and approbation from Sheikh Al Qaradawi.<sup>60</sup> This website provides religious advice on contemporary topics, including sexuality, from a straightforward, rather conservative, but not dogmatic perspective. Notably, the Sheikh is barred from entry into the United Kingdom and United States.<sup>61</sup>

The opinion of Sheikh Al Qaradawi on abortion is a synthesis in two senses. It combines the jurisprudence of all Four Schools. Further, it integrates scientific evidence with the guidelines of *Sharī'a*.<sup>62</sup> There are four key points to his opinion.

First, it is prohibited for a physician to attempt abortion on a pregnant woman after the expiration of 120 days from the date of '*uluq* (seed, i.e., conception) or when the *janīn* (i.e., fetus) turns into a blood clot, unless an abortion is needed to save the life of the mother. In other words, an abortion is forbidden (*ḥarām*) after 120 days into a pregnancy, with the only exception being necessity to save the life of the mother.

Second, an abortion is permissible with the agreement of the spouses before the completion of 40 days of '*uluq*. That is, within the first 40 days following conception, there is no bar to abortion, as long as both father and mother agree. Notably, the rights of a father are acknowledged via this second point.

Third, an abortion is not permissible between 40 and 120 days of pregnancy except in two situations: (1) when continued pregnancy would substantially harm the health of the mother; or (2) when it is established that the fetus would be invalid or permanently deficient and the deficiency is incurable. The first exception surely includes saving the life of the mother. The second exception is not limited to instances in which a fetus is dead, but rather covers cases of irreversible disability. Thus, the period between 40 and 120 days after conception is a sort of "grey zone." Abortion is not strictly *ḥarām*, but there are only two justifications for it. Neither exception is clear cut. Substantial harm to a mother, or deficiency of the fetus, is a matter that calls for expert medical judgment.

Fourth, except in circumstances of urgency, an abortion must be carried out by a committee of specialist physicians. Moreover, it must be approved by two Muslim physicians of upright moral character (unless they are absolutely not available).

<sup>50</sup> See Katz, *supra*, at 31.

<sup>51</sup> See Al KAWTHARI, *supra*, at 59.

<sup>52</sup> See Al KAWTHARI, *supra*, at 61.

<sup>53</sup> See Bowen, *supra*, at 56.

<sup>54</sup> See Bowen, *supra*, at 59.

<sup>55</sup> See Bowen, *supra*, at 59.

<sup>56</sup> See Brian Whitaker, *Fundamental Union*, THE GUARDIAN, 25 January 2005, posted at [www.guardian.co.uk](http://www.guardian.co.uk).

<sup>57</sup> *Bitter Religious Rivalry in the Air*, THE ECONOMIST, 10 April 2010, at 50-51. [Hereinafter, *Bitter Religious Rivalry*.]

<sup>58</sup> See *Bitter Religious Rivalry*, *supra*.

<sup>59</sup> See *Bitter Religious Rivalry*, *supra*.

<sup>60</sup> See *Bitter Religious Rivalry*, *supra*.

<sup>61</sup> See *Bitter Religious Rivalry*, *supra*; Yusuf Al Qaradawi, WIKIPEDIA, posted at [http://en.wikipedia.org/wiki/Yusuf\\_al-Qaradawi](http://en.wikipedia.org/wiki/Yusuf_al-Qaradawi).

<sup>62</sup> See KAMALI, *supra*, at 46-47.



## § 40.05 CONTRASTING OPINIONS: AMERICAN LAW AND 1973 SUPREME COURT DECISION IN *ROE v. WADE*

### [A] What *Roe* Says

*Roe v. Wade* was the first case on abortion decided by the United States Supreme Court.<sup>63</sup> The case arose from a Texas law that made it a crime to procure or perform an abortion. Thus, the statute could be directed against individuals seeking an abortion, as well as doctors providing abortion services. In other words, the statute made abortion a crime at any stage of pregnancy, except to save the life of the mother. One Texan woman, a single mother, who sought an abortion, challenged the statute. She claimed the law violated her right of privacy as protected by the Due Process Clause of the 14th Amendment to the United States Constitution.<sup>64</sup> In its 1973 opinion, the Supreme Court held that the Texas criminal law prohibiting abortion was unconstitutional.

The case evokes strong emotions. Many of its features are relatively unknown, such as the fact the woman at the center of the case, Norma McCorvey, later spoke out against abortion and converted to Catholicism. Further, the basic legal points of the case often are lost, as the two sides in the abortion debate rush into a heated emotional exchange. The champions of *Roe* hail it as a great decision like *Marbury v. Madison*<sup>65</sup> and *Brown v. Board of Education*.<sup>66</sup> The critics of *Roe* decry it as a horrible decision akin to *Dred Scott v. Sandford*,<sup>67</sup> *Plessy v. Ferguson*,<sup>68</sup> and *Korematsu v. United States*.<sup>69</sup> Arguably, the Supreme Court in *Roe* tried to find a middle ground. But, query whether there is a middle ground — is this issue an all-or-nothing one?

Both sides in the debate tend to accept a common public perception that Supreme Court justices vote on abortion questions based on whether they personally, morally, and religiously favor or disapprove of abortion. In truth, whether they do so, and which ones do, is uncertain. No one knows the inside of the mind of a Justice. Each Justice wrestles with laws that have some direct or indirect underlying moral basis. It also is sometimes thought that it is unconstitutional to legislate from the bench on purely moral grounds. Yet, this point also is an uncertain one. In reality, depending on the moral interests at stake, Justices and lower-court judges sometimes render legislative-like, morally-based decisions. For example, they uphold, apply, and interpret bans on polygamy and incest.

What is certain is that as a legal matter, there are principled reasons to disagree about *Roe*. Thus, a crucial question is: from a strictly legal perspective, what did

the Supreme Court actually decide, and not decide, in *Roe v. Wade*? The key points are:<sup>70</sup>

#### • Three Key Issues —

The Supreme Court identified three controversial issues in *Roe*:

- (1) *Individual rights*: Is there a right to an abortion? To be sure, the Court did not opine on the Bill of Rights (the first 10 Amendments to the Constitution), but rather focused on the 14th Amendment. More generally, are there rights that are not explicit in the Constitution, but that should be protected?
- (2) *Federalism*: In deciding questions of abortion, what power should States in a Federal system have vis-à-vis the federal government? More generally, are individual rights best decided at the Federal level, or by the individual 50 States?<sup>71</sup>
- (3) *Separation of powers*: Abortion is partly a political issue, thus what role should the judiciary play in comparison with a democratically-elected Federal legislature, or State legislature, in regulating it? More generally, are individual rights best decided by an unelected judiciary, or by a democratically elected legislature?

While the abortion context was new, the questions raised by *Roe* hardly were. They date back to 1787, yet in the abortion context they are particularly dramatic.

<sup>70</sup> This SYNOPSIS is drawn in part from a lecture by Professor Steve McAllister, University of Kansas School of Law, 22 January 2010, entitled “*Roe v. Wade*: What Did the Supreme Court Do in *Roe*?” *Doe v. Bolton*, the companion case to *Roe*, was decided the same day as *Roe*. See 410 U.S. 179 (1973). For this reason, the Court in *Doe* refers to the ensoulment analysis found in *Roe*. *Doe* involved a psychologically impaired woman. Her physician recommended that she not have any more children. She already had authorized the adoption of her older child, because of her significant emotional and mental impairment, and the poverty in which she lived. The primary distinction between the *Doe* and *Roe* cases, however, is the nature of the State laws involved. At issue in *Doe* were Georgia requirements of the (1) approval of two medical practitioners before an abortion, (2) approval of a hospital abortion committee of the abortion, and (3) freedom of the hospital to reject performance of the abortion for moral and religious reasons. In *Doe*, the Supreme Court held all three requirements were “unduly restrictive of the patient’s rights and needs that, at this point, have already been medically delineated and substantiated by her personal physician.” *Id.* at 198-99.

The only other relevant connection between the two cases lies in the brief mention of paternal rights, because in *Doe* the woman was married, while in *Roe* she was not. The Supreme Court grouped the discussion from both cases in *Roe*. The Court observed that no father attempted to assert a right, and the State statutes at issue were devoid of discussion regarding the father’s right. The Court thus declared that its holdings on abortion, without mention of the father’s right — were “consistent with the relative weights of the respective interests involved” as those interests were presented to it. 410 U.S. at 165. Had either case involved a minor female under 18 years of age, the Court may well have treated the situation differently by the Court.

<sup>71</sup> As an interesting illustration of the interplay of the first two issues, consider a Missouri tort law that declares life begins at conception. Under this law it is punishable to cause the death of an unborn. This statute is not unconstitutional, because it does not impact on the Federal Constitutional right to an abortion that *Roe* created. Rather, the statute covers a matter regulated by states, namely, torts. In contrast, because of the Supremacy Clause in the Constitution, whereby Federal law trumps State law, Missouri cannot declare an unborn is a “person” and make it illegal to procure or perform an abortion.

<sup>63</sup> See *Roe v. Wade*, 410 U.S. 113 (1973), 93 S.Ct. 705. [Hereinafter, *Roe*.]

<sup>64</sup> See *Roe*, *supra*, at 410 U.S. at 129.

<sup>65</sup> See 1 Cranch 137 (1803).

<sup>66</sup> See 347 U.S. 483 (1954), 74 S.Ct. 686.

<sup>67</sup> See 60 U.S. 393 (1857), 19 Howard 393.

<sup>68</sup> See 163 U.S. 537 (1896), 16 S.Ct. 1138.

<sup>69</sup> See 323 U.S. 214 (1944), 65 S.Ct. 193.

Note that Islamic Law does not deal with the latter two issues. They are matters left to each individual Muslim country and its system of governance. Rather, the *Shari'a* looks at abortion entirely as an individual rights issue, and examines it from a religious and moral perspective.

• *Individual Rights —*

On the issue of individual rights, *Roe* established there is no basis, in the sense of an express reference, in the United States Constitution for a right to have an abortion. However, *Roe* also established there are two indirect, or general, bases for such a right. First, the 14th Amendment to the Constitution protects liberty interests. Second, the 9th Amendment states that not every right protected by the Constitution appears explicitly in the Constitution. By identifying these two Amendments, the Court announced where it looks in the Constitution to decide questions of abortion.

• *"Liberty" and Holding on Individual Rights Issue —*

As between the 9th and 14th Amendments, the Court focused especially on the 14th Amendment, specifically on the reference in the Due Process Clause to "liberty." The Court in *Roe* thus viewed abortion as very much a 14th Amendment "liberty" issue.

Stressing the 14th Amendment "liberty" interest at stake, the Supreme Court in *Roe* legalized abortion.

• *Limitation of Holding: No Absolute Right —*

Arguably, the Court went so far as to make abortion a fundamental Constitutional right. However, *Roe* did not create an absolute right to terminate a pregnancy.

Neither *Roe* nor any subsequent Supreme Court ruling on abortion declares abortion to be an absolute right. To the contrary, the Court has consistently stated abortion is not an absolute right. Indeed, under its 14th Amendment jurisprudence, the Supreme Court generally declares that individual liberty interests are not absolute, and in some instances may be over-ridden by governmental interests.

That there is no absolute right to an abortion under *Roe* is clear from the three-stage policy the Supreme Court declared in *Roe* to regulate State abortion law:

- (1) During the first trimester, abortion decisions are solely left up to the mother and her attending physician.
- (2) During the second trimester, a State may promote its interest in the health of the mother and regulate the abortion procedure in ways reasonably related to maternal health.
- (3) During the third trimester, a State may choose to regulate, and even proscribe, abortion when necessary so long as it is consistent with sound medical judgment and protects the life and health of the mother.<sup>72</sup>

<sup>72</sup> See *Roe, supra*, 410 U.S. at 165.

• *Rationale —*

Examining the Texas criminal statute at issue in *Roe*, the Supreme Court recognized two of the justifications cited in support of that law: the interest of the State in the protection of women from unsafe abortion techniques, and in the protection of pre-natal life.<sup>73</sup>

Yet, as part of its rationale to support its holding on the individual rights issue, the Supreme Court in *Roe* decided that the unborn are not "persons" whom the United States Constitution protects. That is, for the purposes of the Constitution, the unborn are not "persons." When the Constitution uses the word "persons," said the Court, the meaning of this word has been understood "post-natally," i.e., the word is interpreted as a post-natal reference. The Court asserted that this interpretation reflects the Common Law, wherein the dividing line between a "person" and "non-person" is birth. Notably, since the *Roe* case, the Supreme Court has shown no interest in revisiting the question of whether the unborn are "persons."

• *When Does Life Begin? —*

Before reaching its holdings, the Supreme Court examined the historical significance of the prohibition of abortion. The Court contrasted modern day "trimesters" with the ancient life stages articulated by Aristotle: the vegetable, animal, and rational stages.<sup>74</sup> The vegetable stage is marked at conception, the animal stage at "animation," and the rational stage after birth. Specifically, the animal stage is 40 days after conception for a male, and 80-90 days after conception for a female.<sup>75</sup> These dates subsequently became marked by Christian theologians as the ensoulment dates, and were developed by Saint Augustine, who distinguished the *embryo inanimatus* (the thing grown inside, having not been quickened) from the *embryo animatus* (the thing grown inside, having been quickened).<sup>76</sup> The Court also reviewed the Common Law on abortion. Under it, prior to the "quickening," or first recognizable movement of a fetus *in utero* (in the womb) before the 16th or 18th week of pregnancy, abortion was an indictable offense.<sup>77</sup>

Unable to find a clear answer to clarify when ensoulment occurs, or shed light on quickening, Justice Blackmun stated:

We do not need to resolve the difficult question of when life begins. When those trained in . . . medicine, philosophy, and theology are unable to

<sup>73</sup> See *Roe, supra*, 410 U.S. at 150.

<sup>74</sup> *Roe, supra*, 410 U.S. at 134.

<sup>75</sup> See *Roe, supra*, 410 U.S. at 165.

<sup>76</sup> See *Roe, supra*, 410 U.S. at 165.

"Embryo" is Greek in origin, and in Latin is the nominative, neuter, singular case for "swelled inside" or "grown inside." "Inanimatus" is the perfect passive participle verb meaning "not having been quickened, enlivened, or animated." "Animatus" is the perfect passive participle of the very meaning "having been quickened, enlivened, or animated."

<sup>77</sup> *Roe, supra*, 410 U.S. at 132.

"In" is the Latin preposition meaning "in" or "into." "In/tero" is the dative, masculine, singular case for "womb."



arrive at any consensus, the judiciary . . . is not in a position to speculate as to the answer.<sup>78</sup>

With these words, the Court eschewed what it saw as speculation that had fueled the abortion debate for centuries. In turn (as explained earlier), the Court went on to focus on the legality of State abortion laws, and whether or not they respected the rights of Due Process as guaranteed by the 14th Amendment.

#### • Legal Implications —

An obvious outcome of the holding in *Roe* is that any outright ban on abortion is forbidden. However, another clear outcome is that limits on abortion are permissible. That is, while an outright ban on abortion is unconstitutional, regulations that permit abortions in narrow instances — in particular, to save the life or health of the mother — are constitutionally permissible. Exactly how “narrow” a restriction is allowed continues to be a matter of debate and litigation. For example, on the one hand, an exception to save the life or health of the mother could be unconstitutionally narrow depending on the definition of “health.” On the other hand, if the exception included “mental health,” then it would be so broad as to swallow the general rule against abortion, as any proposed abortion could go forward.

The aforementioned points are legal ones to be understood before their merits and demerits are debated. Both criticism and defense of *Roe* should follow, not precede, an understanding of what *Roe* actually says.

### [B] Aftermath

By no means did *Roe* settle the abortion debate in America. As a political matter, the Supreme Court in *Roe* inflamed the abortion debate. The Court likely made the debate infinitely more difficult to resolve. That is because, for the time being, only the Court — not the 50 State legislatures — can do so. As a matter of Constitutional Law, the Supreme Court has had to revisit the topic, such as in its 1993 *Planned Parenthood v. Casey* decision,<sup>79</sup> and in dealing with a legislative ban on partial-birth abortions. Notably, in the *Casey* decision, the Supreme Court held that the core decision in *Roe* was correct, but the Court allowed more significant State restrictions on abortion than *Roe* did. That is because the *Casey* Court redefined the point of viability from 28 weeks to 22 weeks in a pregnancy. The *Casey* Court looked back at *Roe* and said the earlier decision undervalued state interests in regulation, and also under-valued the interest of potential life. In the partial-birth abortion case, the Court essentially upheld a prohibition on this technique.

What might happen if the Supreme Court overturns its decision in *Roe*? The abortion debate would revert to the 50 states. Three different outcomes could occur:

- (1) Some state legislatures could outlaw the procurement or performance of an abortion, and also decide whether the penalties are civil or criminal.

<sup>78</sup> *Roe*, *supra*, 410 U.S. at 159.

<sup>79</sup> See *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), 112 S.Ct. 2791.

- (2) Some state legislatures could elect to do nothing. That is, they would have no laws on abortion, leaving the procurement or performance open and unregulated.
- (3) Still other state legislatures could recognize abortion as a state right, and even a fundamental right under their state constitutions.

Clearly, then, over-ruling *Roe* would not mean that abortion automatically become illegal throughout the United States. Rather, each State would be faced with deciding who is a “person,” whether a woman has a right to choose and abortion, and a doctor to perform one, and whether the State itself ought to have any say on these questions.

### [C] Critique

Criticism of *Roe* has come from (*inter alia*) American legal scholars such as Professor John Hart Ely (1938-2003, who taught at the law schools of Yale, Harvard, Stanford, and Miami), who finds no guaranteed right to privacy inferable from the Constitution. Professor Ely studied the thinking of the Framers in regards to contraception, values derived from the provisions the Framers did include in the Constitution, and the governmental structure of the United States.<sup>80</sup> The right to privacy was a battle previously fought in *Griswold v. Connecticut*,<sup>81</sup> when the Supreme Court found a right to “marital privacy” inherent in the concept of “liberty” in the 14th Amendment. The holdings of both *Roe* and *Griswold* emphasized the right of a woman to privacy, up to some level, as part of the liberties guaranteed in the 14th Amendment.

This right of privacy, which the Supreme Court sources in the 14th Amendment, is the dominant basis for the critique by anti-*Griswold* and anti-*Roe* scholars. Critics find that the “right to privacy” is not a right articulated or alluded to in the Constitution. Ultimately, critics like Professor Ely find that the holdings of the Court in both *Griswold* and *Roe* are unconstitutional:

But if it [i.e., a neutral, durable principle grounded in the Constitution] lacks connection with any value the Constitution marks as special, it is not a constitutional principle and the Court has no business imposing it.<sup>82</sup>

Professor Ely argues both decisions lack this key connection. Indeed, the decision in *Roe* protecting abortion rights is wrong, urges Ely, because it is neither Constitutional Law nor even shows an obligation to try to be constitutional law. In other words, interpreting the 14th Amendment “liberty” interest to encompass abortion is legally dubious at best. It may be added that the Supreme Court holding that the unborn are not “persons” is morally repugnant, legally wrong-headed, and contrary to science.

<sup>80</sup> John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE LAW JOURNAL 920, 936 (1973). [Hereinafter, Ely.]

<sup>81</sup> *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

<sup>82</sup> Ely, *supra*, at 949.

A close examination of *Roe* shows the Supreme Court does not endorse an unrestrained concept of privacy. Indeed, *Roe* also holds that while a woman is entitled to a certain level of privacy, she "cannot be isolated in her privacy."<sup>83</sup> The Court states:

[a] pregnant woman cannot be isolated in her privacy. She carries an embryo, and later, a fetus. . . . It is reasonable and appropriate for a State to decide that at some point in time another interest, that of health of the mother or that of potential human life, becomes significantly involved. The woman's privacy is no longer sole and any right of privacy she possesses must be measured accordingly.<sup>84</sup>

Still, critics like Professor Ely find that the value of privacy given by the Court in *Roe* is unaccounted for by any of the Founding Fathers in the text of the Constitution.

### [D] Islamic Law and *Roe*

How does the United States Supreme Court decision in *Roe v. Wade* compare with Islamic legal thinking? In one sense, the question is easy to answer: the two approaches are entirely different. One is grounded in a secular legal system, albeit with underlying moral and religious foundations, while the other is squarely in a sacred legal context in which decisions are made expressly on the basis of morality and religion. In another sense, the question is not an easy one to address, because Islamic jurisprudence on the topic is not monolithic. There is a range of opinion in the *Shari'a*. Either way, however, comparing the way in which the American and Islamic legal systems approach this highly charged debate is edifying. Table 40-1 highlights the key points.

Table 40-1:  
Summary of Comparisons on Abortion between Islamic Law and *Roe v. Wade*

Issue	Shari'a on Abortion	Roe v. Wade
Is there an explicit right to privacy?	No, not in the Qur'an. Arguably, may be inferred from the spirit of the Qur'an.	No, not in the Constitution. Arguably, may be inferred from 14 <sup>th</sup> Amendment Due Process Clause, specifically, liberty interest.
Is there an absolute right to an abortion?	No.	No.
Is there a restricted right to an abortion, i.e., is abortion permissible under certain circumstances?	Yes. Continuing debate about the circumstances.	Yes. Continuing, and heated, debate about the circumstances.
Is abortion viewed with disapproval?	Yes, it is explicitly reprehensible ( <i>makrah</i> ).	Arguable.

<sup>83</sup> *Roe, supra*, 410 U.S. at 159.

<sup>84</sup> *Roe, supra*, 410 U.S. at 159.

Issue	Shari'a on Abortion	Roe v. Wade
Is there a period during which abortion is permissible?	Yes, up to 40 or 120 days into a pregnancy, depending on the School of Law.	Yes, based on trimester system.
To whom is the decision about abortion left?	Principally, the mother, father, physician.	Principally, the mother, father, physician.
Are the individual rights of the mother the focus of attention?	No, not exclusively. The relationship of the mother to God (Allāh), fetus to Allāh, parents to Allāh, fetus to parents, and fetus to mankind matter, too.	Yes.

Under Islamic Law, up to a certain point in a pregnancy (which varies depending on the *hadith* that is followed), the decision as to whether to have an abortion is left to the mother, father, and physician. Much religious contemplation often is involved. Under *Roe*, these same parties are the key decision-makers, and much soul-searching also is typical. Neither the *Shari'a* nor *Roe* encourages abortion, and it is openly considered to be reprehensible (*makrah*) by Islamic religious and legal scholars (*ulema* and *fukahā'*, respectively). However, the *Shari'a* and *Roe* differ as to the allowable time, i.e., the time period during which an abortion may take place. *Roe* relies on the trimester method, as amended by *Casey*, whereas Islamic Law identifies the 40 or 120 day time period.

None of the Four Schools endorses unconditional abortion, just as *Roe* does not create an absolute right to an abortion. Abortion is permissible under the *Shari'a* in instances other than saving the life of the mother, as in cases of pregnancy as a result of rape or if the mother is psychologically incapable of raising a child, which was true in the companion case to *Roe*, *Doe v. Bolton*.<sup>85</sup> Communication between the physician and the mother is crucial and necessary under Islamic Law. Similarly, *Roe* encourages, or at least does not gainsay the importance of, this communication. Like the American Constitution, the Qur'an is devoid of any direct statement guaranteeing the privacy right of a woman. Arguably this right may be inferred from the general spirit of the Qur'an. Indeed, it may be said that it is from this spirit that scholars hold matters of abortion to be decisions confined to the family and physician until a certain time in the development of a fetus.

Islamic legal reasoning generally favors examination of specific instances, rather than comprehensive rulings. Abortion is no exception. In the United States, following the 1973 *Roe* decision, the debate about abortion is a polarizing one. Perhaps that is ineluctable, because (as indicated earlier) abortion is an issue on which there is no obvious middle way. Yet, Beth Conklin and Lynn Morgon, two scholars of anthropology, argue in favor of shifting to a more relational understanding of personhood, removing the need for an "all or nothing nature of American

<sup>85</sup> See 410 U.S. 179 (1973).



debates."<sup>86</sup> Comprehensive rulings, devoid of exceptions, tend to divide the legal and political landscape into two territories. Courts and activists on each side search for universal laws and principles to apply in every case. It is "their insistence on framing those principles in unqualified and universal terms . . . that] has done much to make the whole debate irresoluble."<sup>87</sup> Interestingly, the writings of Saint Thomas Aquinas may reveal some concurrence of opinion with the Islamic legal approach to abortion. Scholars Albert Jonsen and Stephen Toulmin cite Saint Thomas, finding that casuistic argumentation orients the debate in a more useful direction:

Aquinas acknowledges that the balance of moral considerations necessarily tilts in different directions at different stages in a woman's pregnancy, with crucial changes beginning around the time of quickening.<sup>88</sup>

To be sure, a careful examination of the work of Saint Thomas is required, and this work cannot be taken in isolation. It must be viewed in the light of the whole teaching of the Catholic Church on abortion.

In the meantime, it is fair to say that at the heart of complying with Islamic Law on abortion (or on any other topic) is the concept of the created pleasing the Creator. American discussions of abortion in the paradigm of *Roe* tend to revolve around an individualist model of personhood, and place the interest of one individual at odds with the interest of another individual. Islamic opinions on abortion are founded on a relational, socio-centric view. Deciding to abort a fetus or not does not revolve solely around the rights of the mother. Instead, the relation of the fetus to God (Allāh) is highly significant, as are the relations between the parents and Allāh, the fetus and parents, and even the fetus and mankind.

Islam, like many religious teachings, views fetal life as sacred. But, Islam has promoted the view that fetal life is one interest among others, including the life of the mother and the good of the community at large.<sup>89</sup> The fact that relationships change is what shapes the Islamic framework towards abortion. For example, consider a hypothetical example of Salma and Omar, two married adults who decide to have a child.

Salma becomes pregnant. Prior to ensoulment (again depending on which *hadith* is followed, either 40 or 120 days), scholars regard the fetus as inherently part of Salma. As time passes, the fetus develops into its own being — with its own heart, brain, and organs. After birth, the new baby, named Saleem, is considered to be his own independent being. Salma and Omar nurture Saleem, teach him Islamic guidelines so that they fulfill their responsibility as servants of God (Allāh) to raise a healthy, observant Muslim. Saleem soon grows up and fulfils his sacred duty as the son to care for Salma and Omar as they age. After Salma and Omar pass away, Saleem prays to Allāh to forgive them for any of their shortcomings. As their child,

<sup>86</sup> Katz, *supra*, at 47.

<sup>87</sup> Katz, *supra*, at 47.

<sup>88</sup> Katz, *supra*, at 47 (quoting ALBERT R. JONSEN AND STEPHEN TOULMIN, *THE ABUSE OF CASUISTY: A HISTORY OF MORAL REASONING* (Berkeley, California: University of California Press, 1988)).

<sup>89</sup> See JONATHAN E. BRICKOFF, *ISLAMIC ETHICS OF LIFE: ABORTION, WAR, AND EUTHANASIA* 24 (Columbia, South Carolina: University of South Carolina Press, 2003).

the supplication of Saleem is encouraged by the Prophet in his *Sunnah*. Whereas Salma and Omar prayed for protection during the childhood of Saleem, it is now Saleem who prays for mercy to be shown to his deceased parents. Indeed, there is always a connection between Saleem, Salma, Omar, and the Divine. Undoubtedly, Saleem is to improve and serve his community, much like his parents did he was a baby. This natural cycle of life helps explain why abortion is regarded as reprehensible (*makrūh*) under the *Sharī'a*. Had Saleem been aborted, this cycle never would have started.

In sum, the Islamic approach to abortion bears some resemblance to the articulation of the United States Supreme Court in *Roe v. Wade*. Critically, though, Islam differs in its religiously-grounded framework to the abortion debate. To Muslims, abortion is not about pitting one interest against another, but rather about balancing several relationships that all lead back to pleasing the Creator.

## § 40.06 CONTRASTING OPINIONS: CATHOLIC CHRISTIAN TEACHING

### [A] Two Misconceptions

Obviously, as with the *Sharī'a*, Catholic Christianity proposes a religiously-based framework on abortion. As on the topic of contraception, there is considerable misunderstanding about Catholic Christian teaching on abortion. Both topics evoke strong, passionate debate, but abortion has been much more of a public discussion in recent decades in the United States than contraception. At times, the debate has become uncivil, which of course it should not be, but which mirrors an endemic problem concerning respectful discussion in the American public realm.

Despite all the disagreement, there are two points on which persons of differing opinions can (or ought to be able to) agree. First, the majority of Americans, regardless of their religious affiliation, do not favor abortion. This majority sees it as the taking of a human life in the womb. To be sure, Americans in this majority hardly are of one mind as to whether abortion ought to be legally permissible under certain circumstances, and if so, what those exceptions should be. The range of opinion varies from moderate discomfort to vocal opposition. How a pollster words a question can affect the response given. But, trends in public polling clearly indicate that the beliefs of average Americans are more accurately characterized as a "pro-life" than a "pro-abortion" country.

Second, there has been very little sharing of information across faiths as to religious perspectives on abortion. That is, while Catholic and Protestant Christian views are put forth in the public debate, the perspectives of Islam, or for that matter, Eastern religions and philosophies, including Buddhism, are not widely presented or understood. As a corollary to the second point, there seems to be little information as to the different secular legal regimes on abortion. One exception is the Guttmacher Institute, which inclines toward a pro-abortion position.<sup>90</sup> Thus,

<sup>90</sup> See [www.guttmacher.org/about/mission.html](http://www.guttmacher.org/about/mission.html). The Mission Statement of this Institute states it is:

while Americans know what they think about abortion, and why, they tend not to know much about what persons of other faiths, or who live in other non-Christian countries, think.

In respect of Catholic Christian teaching on abortion, it is sometimes thought — erroneously — that the precepts sum up to a harsh “no” that insensitively suppresses the rights of women, abortion being one such supposed right. This characterization is conveyed, directly or indirectly, by some mainstream media outlets, pro-abortion action groups such as the National Abortion Rights Action League (NARAL) and the National Organization of Women (NOW), and purveyors of abortion services, such as Planned Parenthood, which view the issue from a different perspective. (To be sure, it is important that neither side of the debate demonize the other.) In truth, Catholic Christian teaching on abortion can be summarized in one simple word, uttered with enthusiasm: “Yes.” That is, the teaching is a hearty “yes” to life, a response that in word and deed embraces both mother and child, and indeed considers also the interests of the father.

A second misconception about Catholic Christian teaching on abortion is that it has evolved, and even changed, over two millennia. The *Catechism of the Catholic Church* makes plain this error:

Since the first century [A.D.] the Church has affirmed the moral evil of every procured abortion. This teaching has not changed and remains unchangeable. Direct abortion, that is to say, abortion willed either as an end or a means, is gravely contrary to the moral law:

You shall not kill the embryo by abortion and shall not cause the newborn to perish. [*Didache (Teaching of the Twelve Apostles)* 2, 2, written before 80 A.D.]

God, the Lord of life, has entrusted to men the noble mission of safeguarding life, and men must carry it out in a manner worthy of themselves. Life must be protected with the utmost care from the moment of conception: abortion and infanticide are abominable crimes. [Second Vatican Council, *Gaudium et Spes*, Pastoral Constitution on the Church in the Modern World, 51 § 3, promulgated by His Holiness Pope Paul VI, 7 December 1965.]<sup>91</sup>

dedicated to the advancement of women's reproductive health, which includes public education as one of its main goals in order to stimulate enlightened public debate, informed public policy and, ultimately, informed individual decision-making.

However, the Institute also states under its “Guiding Principles” that:

The Institute regards sexual and reproductive health as encompassing a wide range of people's needs from adolescence onward. The Institute works to protect, expand and equalize access to information, services and rights that will enable women and men to

- avoid unplanned pregnancies;
- prevent and treat sexually transmitted infections, including HIV;
- exercise the right to choose abortion; . . .

*Id.* (emphasis added).

<sup>91</sup> CATECHISM OF THE CATHOLIC CHURCH ¶ 2271 at 548 (United States Catholic Conference, Inc., Washington, D.C.: Libreria Editrice Vaticana, 2nd ed. 1997) (emphasis added). [Hereinafter, CATECHISM.]

Despite the plain language of the *Catechism*, this misconception has been encouraged, intentionally or not, by certain American politicians, notably, Speaker of the House of Representatives Nancy Pelosi (Democrat — California) during the 2008 Presidential Election.<sup>92</sup> In fact, since the earliest days of the Church, the teaching has not wavered. Jesuit Father John Hardon (1914-2000) explains:

The Roman Empire into which Christianity was born practiced abortion and infanticide on a wide scale. Chronologically, the exposure of unwanted infants came earlier, and was sanctioned by Roman law. By the first century B.C., Romans were gradually getting away from exposure, while abortions were on the increase. The distinction they made between infanticide and abortion was due to the difference between the emotional reactions to what they must see and what they could avoid seeing.

From the outset, therefore, the Christian religion was confronted with a society in which abortion was the rule rather than the exception. The Church reacted immediately and vigorously. The *Didache* (composed before A.D. 80) told the faithful what they must not do: “You shall not procure abortion. You shall not destroy a newborn child.”

Before the year A.D. 138, the epistle of Barnabas was equally explicit, placing the crime of abortion among the actions of those who walk the Way of Darkness. “There are two Ways of instruction,” Christians were told, “as there are two powers, that of Light and that of Darkness. And there is a great difference between the Two Ways. The one is controlled by God's light-bearing angels, the other by the angels of Satan. And as the latter is

<sup>92</sup> The comments of the Speaker were made during a television interview in August 2008, as follows:

REP. PELOSI: I would say that as an ardent, practicing Catholic, this is an issue that I have studied for a long time. And what I know is, over the centuries, the doctors of the church have not been able to make that definition. And Senator — St. Augustine said at three months. We don't know. The point is, is that it shouldn't have an impact on the woman's right to choose. *Roe v. Wade* talks about very clear definitions of when the child — first trimester, certain considerations; second trimester; not so third trimester. There's very clear distinctions [*sic*]. This isn't about abortion on demand, it's about a careful, careful consideration of all factors and — too — that a woman has to make with her doctor and her god. And so I don't think anybody can tell you when life begins, human life begins. As I say, the Catholic Church for centuries has been discussing this, and there are those who've decided . . .

MR. BROKAW [INTERVIEWER]: The Catholic Church at the moment feels very strongly that it . . .

REP. PELOSI: I understand that.

MR. BROKAW: . . . begins at the point of conception.

REP. PELOSI: I understand. And this is like maybe 50 years or something like that. So again, over the history of the church, this is an issue of controversy. But it is, it is also true that God has given us, each of us, a free will and a responsibility to answer for our actions. And we want abortions to be safe, rare, and reduce the number of abortions. That's why we have this fight in Congress over contraception. My Republican colleagues do not support contraception. If you want to reduce the number of abortions, and we all do, we must — it would behoove you to support family planning and, and contraception, you would think. But that is not the case. So we have to take — you know, we have to handle this as respectfully — this is sacred ground. We have to handle it very respectfully and not politicize it, as it has been — and I'm not saying [American Evangelical Christian Minister] Rick Warren (1954-) did, because I don't think he did, but others will try to.



the Ruler of the present era of lawlessness, so the former is Lord from eternity to eternity." Among the precepts of the Way of Light is this: "Do not murder a child by abortion, or commit infanticide." Significantly, the two operative words in the prohibition are explicitly "murder" (Greek *phoneuō*, bloody slaughter) and "child" (*teknon*).

As the Christian attitude toward abortion began to penetrate Roman society, Christian believers were challenged by the prevalent [Greek] Stoic theory of human life beginning only at actual birth of the fully developed infant. This would mean that there could be no destruction of a child by abortion. The faithful were therefore reminded that this was not true; rather that the life begun at conception continued essentially unchanged during its whole period of development. Induced abortion at any stage was a homicide.

*On the level of morality, Roman Catholicism has always held that the direct attack on an unborn fetus, at any time after conception, is a grave sin. The history of this teaching has been consistent and continuous, beginning with earliest times and up to the present.*

The Church's teaching on abortion is just that; it is doctrine the Church proclaims on the prior assumption that the Magisterium is empowered by Christ to proscribe and prescribe in any area of human conduct that touches on the commandments of God, whether derived from nature or supernatural revelation.<sup>93</sup>

Additionally, as Father Hardon summarizes:

Hundreds of ecclesiastical documents from the first century through the present testify to the same moral doctrine, with such nuances as time, place, and circumstances indicated. The Second Vatican Council declared: "Life must be protected with the utmost care from the moment of conception," so that "abortion and infanticide are abominable crimes" (*Constitution on the Church in the Modern World*, IV, 51). Pope Paul VI confirmed this teaching in 1974. "Respect for human life," he wrote, "is called for from the time that the process of generation begins. From the time that the ovum is fertilized, a life is begun which is neither that of the father nor of the mother. It is rather the life of a new human being with its own growth. It would never be made human if it were not human already." Consequently, "divine law and natural reason exclude all right to the direct killing of an innocent human being" (*Declaration on Procured Abortion*, III, 12).<sup>94</sup>

<sup>93</sup> JOHN A. HARDON, S.J., *THE CATHOLIC CATECHISM — A CONTEMPORARY CATECHISM OF THE TEACHINGS OF THE CATHOLIC CHURCH* 334-335 (New York, New York: Doubleday, 1981). [Hereinafter, HARDON, CATHOLIC CATECHISM.]

<sup>94</sup> JOHN A. HARDON, S.J., *MODERN CATHOLIC DICTIONARY* 5 (Doubleday: Garden City, New York, 1980) (entry for "abortion"). [Hereinafter, MODERN CATHOLIC DICTIONARY.] For a brief historical review of the hundreds of Church documents dating from the 1st century A.D. to modern times on abortion, see HARDON, CATHOLIC CATECHISM, *supra*, 339-341.

Simply put, the basic precepts have remained unchanged, and if anything, have been reinforced by developments in science, philosophy, and theology.

Not surprisingly, the Church mourns the consequences of abortion, not only for the mother and father (discussed below), but also — and foremost — in terms of the loss of life. Since the 1973 *Roe v. Wade* decision, there have been approximately 50 million abortions in the United States. Specifically, in 2005, 1.21 million abortions were performed, down from 1.31 million in 2000.<sup>95</sup> From 1973 through 2005, more than 45 million legal abortions occurred.<sup>96</sup> Catholic teaching not only counsels for an end to abortion, but also the Social Justice teaching of the Church urges an improvement of the conditions, including poverty, in which many women, especially minorities, find themselves and thereby regrettably view abortion as an appropriate choice.

The statistics relating to this teaching are stark and sobering. In the United States, abortions disproportionately happen to minority women. In 2000-2001, the abortion rates among Black (African-American) and Hispanic women were 49 per 1,000 and 33 per 1,000, respectively, as compared with 13 per 1,000 among non-Hispanic White women. Moreover, 40 percent of pregnancies among White women are unintended, while among Blacks the figure is 69 percent, and among Hispanics it is 54 percent. Of all abortions, 37 percent occur to Black women, 34 percent to non-Hispanic white women, 22 percent to Hispanic women, and 8 percent to women of other races. These figures are out-of-proportion with the percentage of minorities in the American population: Blacks make up 12.8 percent of the American population, and Hispanics and Latinos another 15.4 percent.<sup>97</sup> (Non-Hispanic Whites account for 65.6 percent.) Thus, the number of abortions of Black babies exceeds the percentage of Blacks in the American population.<sup>98</sup>

## [B] "Yes" to Life

Evidently, in contrast not only to the 1973 United States Supreme Court decision in *Roe v. Wade*, but also to Islamic legal precepts, Catholic Christian teaching holds that a direct, deliberate abortion cannot under any circumstances be condoned. That is true even if the reasons seem compelling. Father Leo J. Trese (1902-1970) distinguishes self-defense from abortion:

[T]he principle of self-defense applies only when we are the victim of an unjust attack. It never is permissible directly to take the life of an innocent person in order to save one's own. If I am shipwrecked with

<sup>95</sup> See R.K. Jones et al., *Abortion in the United States: Incidence and Access to Services, 2005*, 40 PERSPECTIVES ON SEXUAL AND REPRODUCTIVE HEALTH issue 1, 6-16 (2008). [Hereinafter, Jones et al.] Note that the numbers reported are voluntary and do not include data on abortions performed before *Roe v. Wade* that would have been done in private to avoid legal consequences. Moreover, because reporting of abortions is not mandatory, statistics are of varying reliability. The Centers for Disease Control (CDC) endeavors to keep statistics on abortion.

<sup>96</sup> See Jones et al., *supra*.

<sup>97</sup> See <http://quickfacts.census.gov/qft/states/00000.html>. These data are based on 2000 estimates.

<sup>98</sup> The distributions are published by the Centers for Disease Control and Prevention, adjusted for year-to-year changes in the reporting states, and applied to the total number of abortions in Jones et al., *supra*. See [www.guttmacher.org/pubs/ab\\_induced\\_abortion.html#fn1](http://www.guttmacher.org/pubs/ab_induced_abortion.html#fn1).

another person and there is only food enough for one, I may not kill the other person in order to save my own life. Neither may an unborn infant be directly killed in order to save the life of the mother. The unborn child is *not* an unjust aggressor against the mother and has a right to life as long as God permits him to live. To destroy the life of an unborn child directly and deliberately is a most grave sin; murder made more vicious by sending into eternity a soul with no opportunity for baptism. This is another sin which the Church has tried to check by imposing excommunication on all who have any willing part in it; not only the mother but also the cooperating father and any doctor or nurse involved.<sup>99</sup>

Here, then, is the enthusiastic "yes" to life: newly created life is to be respected in all instances. The *Catechism of the Catholic Church* (quoted above) sets out this precept.

### [C] "Direct" Abortion, Conception, and Intention

As is evident from the foregoing discussion, Catholic Christian teaching distinguishes between a "direct" and an "indirect" abortion. Technically, it is the former that is strictly forbidden. The *Catechism of the Catholic Church* defines "abortion" with this distinction in mind: Abortion is the:

*Deliberate termination of pregnancy by killing the unborn child. Such direct abortion, willed either as an end or means, is gravely contrary to the moral law. The Church attaches the canonical penalty of excommunication to this crime against life.<sup>100</sup>*

Father Hardon elaborates on the meaning of "abortion":

The term "abortion" as understood in Catholic morality means expelling an immature fetus from the mother's womb. The fetus must, first of all, be living; if it is certainly dead, its removal is not only permissible but ordinarily necessary. Moreover, the fetus must be immature or nonviable, by which is meant that it cannot live outside the womb even with the most extraordinary medical care. In ordinary circumstances a fetus is considered viable by the end of the twenty-eighth week of pregnancy, allowing for two or so weeks earlier if the child is to have special medical assistance like an incubator.

<sup>99</sup> LEO J. THEIS, *THE FAITH EXPLAINED* 211 (Manila, Philippines: Sinag-Tala Publishers, Inc. 1965, 6th Philippine printing, 1991, updated by Father Robert Bucciarelli) (emphasis original).

On the legitimate invocation of self-defense, see *CATECHISM*, *supra*, ¶¶ 2263-2266 at 545-546, ¶¶ 2302-2317 at 554-558.

Note that traditionally, the Church — without ever affirmatively favoring or advocating capital punishment — viewed the death penalty as an extension of the self-defense principle, justified as concomitant with the duty of a lawfully constituted government to protect the common good of citizens against an unjust attack. See *id.* at 211-212. However, because of the availability in many countries of an alternative, non-lethal sanction that has an equivalent protective effect, namely, life imprisonment without parole, many clergy and laity within the Church now oppose capital punishment as both unnecessary and unjustified.

<sup>100</sup> *CATECHISM*, *supra*, at 564 (definition of "abortion") (emphasis added).

Since the modern legalization of abortion, however, the same term is used medically to describe what is more properly a form of feticide, where the living fetus is *directly* killed by a variety of now sophisticated physical or chemical means. In moral language, this too is abortion, but with the added malice of a *direct* assault on human life within the womb.<sup>101</sup>

As with the *Catechism* definition, note from the above elaboration the question of whether an "abortion" or "feticide" is "direct."

Indeed, vitally important to Catholic teaching on "abortion" is a distinction between "direct" and "indirect" abortion. Father Hardon explains:

In Catholic morality, abortion is either direct (induced) or indirect. *Direct* abortion is any destruction of the product of human conception, whether before or after implantation in the womb. A direct abortion is one that is *intended either as an end in itself or as a means to an end*. As a willful attack on unborn human life, no matter what the motive, direct abortion is always a grave objective evil.

*Indirect* abortion is the foreseen but merely permitted evacuation of a fetus which cannot survive outside the womb. The evacuation is *not the intended or directly willed result, but the side effect, of some legitimate procedure*. As such it is morally allowable.<sup>102</sup>

In other words, an abortion is "direct" if the intended aim is to kill the child. In no circumstance, including saving the life of the mother, rape, or incest, does Catholic teaching condone a direct abortion. Again, there is a "yes" to life in all instances. The rationale is that life is sacred, and taking it, even to save another life, or under unfortunate circumstances surrounding the pregnancy, cannot be justified. From a common sense perspective, would be to compound one tragedy with another, or to commit another grave moral evil following the first one. The victim, of course, would be the most innocent, vulnerable, and defenseless — the child in the womb.

Why, exactly, is a direct abortion always a grave, objective evil? That is, what is the justification for Catholic Christian teaching on abortion? It certainly is true that Catholic Christianity holds that life begins at conception, a precept now widely accepted by science, and one that appears in some medical school textbooks.<sup>103</sup> Thus, it is often thought that abortion is wrong because it involves killing a human

<sup>101</sup> HARDON, *CATHOLIC CATECHISM*, *supra*, at 336 (emphasis added).

<sup>102</sup> MODERN CATHOLIC DICTIONARY, *supra*, at 5 (emphasis added).

<sup>103</sup> For example, Dr. Keith L. Moore, University of Toronto School of Medicine Professor Emeritus of Anatomy and former Associate Dean for Basic Medical Sciences writes:

Human development begins after the union of male and female gametes or germ cells during a process known as fertilization (conception). Fertilization is a sequence of events that begins with the contact of a sperm (spermatozoon) with a secondary oocyte (ovum) and ends with the fusion of their pronuclei (the haploid nuclei of the sperm and ovum) and the mingling of their chromosomes to form a new cell. This fertilized ovum, known as a zygote, is a large diploid cell that is the beginning, or primordium, of a human being.

KEITH L. MOORE, *ESSENTIALS OF HUMAN EMBRYOLOGY* 2 (St. Louis, Missouri: Elsevier (Mosby-Year Book), 1988) (emphasis original).



life inside the womb, *i.e.*, it is murder. This rationale is not erroneous. After all, the *Catechism* states:

2274 Since it must be treated from *conception* as a person, the embryo must be defended in its integrity, cared for, and healed, as far as possible, like any other human being.

...

2322 From its *conception*, the child has the right to life. . . .

2323 Because it should be treated as a person from *conception*, the embryo must be defended in its integrity, cared for, and healed like every other human being.<sup>104</sup>

On the issue of when life begins, the 1973 United States Supreme Court decision in *Roe v. Wade* is inconsistent with Catholic teaching.

Indeed, contrary to what defenders of *Roe* believe, that decision is out of step with legal precedent about when a "person" exists and acquires legal rights. The Supreme Court based its arguments narrowly on the work of a law professor (Cyril Chesnut Means, Jr. (1919-1992) of New York Law School) and historian (James C. Mohr of the University of Oregon). However, as Professor Joseph W. Dellapenna of Villanova Law School argues in *Dispelling the Myths of Abortion History* (2006), Anglo-American law always has treated abortion as a serious crime.<sup>105</sup> Prosecutions (and even executions) date back 800 years in England, thereby establishing a legal regime that carried into Colonial America. Regrettably, from a Catholic perspective, the majority in *Roe* was unwilling to follow this long legal tradition, and instead eschewed endowing a fetus with the title "person." Once the Court made this choice, the dye was cast — a fetus had no right to life.

There is yet more to the rationale for Catholic teaching on abortion. Its gravely sinful nature lies in what at law is called "*mens rea*," *i.e.*, culpable intent. Father Hardon states:

The essential sinfulness of direct abortion consists in the *homicidal intent to kill innocent life*. This factor places the controverted question as to precisely when human life begins, outside the ambit of the moral issue; as it also makes the now commonly held Catholic position that human life begins at conception equally outside the heart of the Church's teaching about the grave sinfulness of direct abortion.<sup>106</sup>

Father Hardon explains further:

<sup>104</sup> CATECHISM, *supra*, §§ 2274, 2322-2323 at 549, 558 (emphasis added).

Concerning pre-natal diagnosis, this procedure is "morally licit" as long as it is not done with a view to an abortion depending on the results, as "a diagnosis must not be the equivalent of a death sentence." See *id.*, § 2274 (quoting Congregation for the Doctrine of the Faith, *Donum Vitae* I, 2). On the topic of procedures carried out on a human embryo, see *id.*, § 2275.

<sup>105</sup> See JOSEPH W. DELLAPENNA, *DISPELLING THE MYTHS OF ABORTION HISTORY* (Durham, North Carolina: Carolina Academic Press, 2006).

<sup>106</sup> MODERN CATHOLIC DICTIONARY, *supra*, at 5 (emphasis added).

More important, though, from the moral standpoint [than the use of the term "abortion" to describe what medically is "feticide"] is the *intention that motivates an abortion*. Although the same word "abortion" is used, it has a totally different moral meaning — depending on whether the motive is to directly attack the fetus, no matter what purpose is alleged to excuse the attack; or whether the motive is to save the life of a pregnant mother and, in the process, the unborn child is reluctantly permitted to die.

...

Wherein lies the essential sinfulness of abortion? It consists in the *homicidal intent to kill innocent life*.<sup>107</sup>

Accordingly, because it is the intent to kill that makes abortion a grave, objective evil, it does not matter exactly when life begins, nor when ensoulment occurs.<sup>108</sup> That is, even if it is thought that life does not begin at conception, the religious and moral outcome does not change. As Father Hardon states:

The exact time when the fetus becomes "animated" has *no practical significance* as far as the morality of abortion is concerned. By any theory of "animation," abortion is gravely wrong. Why so? Because *every direct abortion is a sin of murder by intent*. It is, to say the least, probably that every developing fetus is a human being. To deliberately kill what is probably human is murder.<sup>109</sup>

Succinctly put, if the goal procuring or performing an abortion is to kill, then act itself is wrong by virtue of that goal.

## [D] Further Rationales Against Direct Abortion

Beyond considerations of intention, it may be asked what are the theological and philosophical bases for the precept that a direct abortion is gravely sinful? There are five such bases. The first three of them are distinctly theological. They reflect the three sources of Catholic Christianity: Sacred Tradition, Sacred Scripture, and the Magisterium of the Church. The fourth basis also is theological in nature, but not tied to Catholicism. The fifth basis is largely philosophical in nature. Taken individually or together, they serve as further rationales, in addition to that concerning intent, for the Catholic precept.

First, consider Sacred Tradition. As the *Didache* and *Epistle of Barnabas* (quoted earlier) make clear, it always has been Catholic Christian practice to regard a deliberate abortion as seriously morally wrong. This practice pre-dates even the New Testament, as the *Didache* and *Epistle* predate agreement on a

<sup>107</sup> HARDON, CATHOLIC CATECHISM, *supra*, at 336-337 (emphasis added).

<sup>108</sup> In effect, when a sperm fertilizes an egg, life begins. All of the material needed for a full human being exists from that moment onward. Consequently, the moment of ensoulment is not directly relevant to the issue of abortion. No one can see when God places a soul in an embryo — it is not a phenomenon visible under even the most powerful of imaging technologies. It may well be at the moment of conception, not thereafter. But, for purposes of the issue, it does not matter. What matters — according to Catholic teaching — is that a life exists at that moment.

<sup>109</sup> HARDON, CATHOLIC CATECHISM, *supra*, at 338 (emphasis added).

canonical text of the New Testament (which occurred in 393 A.D. at the African Synod of Hippo, and was reaffirmed by the Councils of Carthage in 397 and 419 A.D., both of which occurred under the authority of Saint Augustine).<sup>110</sup>

Second, in respect of Sacred Scripture, the Bible, specifically, the 5th Commandment — “You shall not kill” — set out in the Old Testament Books of *Exodus* (20:13) and *Deuteronomy* (5:17) is not restricted to the taking of post-natal life. Furthermore, as recorded in the Chapter 5 of the New Testament *Gospel According to Matthew*, in the Sermon on the Mount Jesus states:<sup>111</sup>

“<sup>21</sup>You have heard that it was said to your ancestors, ‘You shall not kill; and whoever kills will be liable to judgment.’ <sup>22</sup>But I say to you, whoever is angry with his brother will be liable to judgment. . . .”<sup>112</sup>

That is, Jesus reiterates and supplements the 5th Commandment to include anger, hatred, and vengeance.

Third, the teaching of the Church — the Magisterium — on the subject has been consistent through the ages. It has been reiterated on many occasions, including at the 1962-1965 Second Vatican Council in *Gaudium et Spes* (quoted earlier).

The fourth basis is theological in nature, but asserts a principle accepted by all religions: the sanctity of human life and, consequently, the imperative of respecting human dignity. Each and every human being, regardless of his or her religious affiliation, is a creature of God, whether or not he or she recognizes or accepts this Divine origin. As such, each person is endowed by the Creator with dignity. If human life is sacrosanct, then it follows that it must be respected as such, i.e., its dignity must be upheld. The *Catechism* explains:

2258 “*Human life is sacred* because from its beginning it involves the creative action of God and it remains for ever in a special relationship with the Creator, who is its sole end. God alone is the Lord of life from its beginning until its end: no one can under any circumstance claim for himself the right to destroy an innocent human being.” [Congregation for the Doctrine of the Faith, Instruction, *Donum Vitae*, intro. 5.]

2270 Human life must be respected and protected absolutely from the moment of conception. From this first moment of his existence, a human being must be recognized as having the *rights of a person* — among which is the inviolable right of every innocent being to life.

<sup>110</sup> The decision to commission the Latin Vulgate edition of the Bible was made by Pope Damasus I around 383 A.D., following the 382 A.D. Council of Rome, and implying that by the 4th century A.D., the Church was unified as to what constituted the canonical text of the Bible. The 1546 A.D. Council of Trent issued a full, dogmatic articulation of the complete Bible as used in Roman Catholicism. See *Bible Canon*, Wikipedia, [http://en.wikipedia.org/wiki/Biblical\\_canon](http://en.wikipedia.org/wiki/Biblical_canon).

<sup>111</sup> See *Catechism*, *supra*, § 2262 at 545. Notably, Christ himself, when arrested though innocent, did not resort to violence to defend himself, and rebuked Peter for his use of the sword, telling him to leave it in his sheath. See *id.*

<sup>112</sup> *The Gospel According to Matthew*, 5:21-22, in *THE CATHOLIC STUDY BIBLE 14* (Oxford: Oxford University Press, 1990), also quoted in part in *Catechism*, *supra*, § 2262 at 544.

Before I formed you in the womb I knew you, and before you were born I consecrated you. [*The Book of Jericho*, 1:5.]

My frame was not hidden from you, when I was being made in secret, intricately wrought in the depths of the earth. [*The Book of Psalms*, 139:15.]<sup>113</sup>

In brief, the right to life (and physical integrity) is a fundamental and inalienable human right.<sup>114</sup> It is not conceded by a political or judicial authority, nor does it spring from civil society. It does not depend on a particular individual or parent. Rather, this right inheres in a human being, because of the human nature of that being, which is inherent in that being by virtue of the creative act from which the being originated.<sup>115</sup> Significantly, not only is this right consistent with Muslim teachings about the relationship between God (Allāh) and man, but also the way in which it is articulated is familiar to Islam.

Natural Law provides a fifth basis for declaring direct abortion to be gravely sinful. Essentially, Natural Law is written into the human heart, and discernible by reason. It is innate in us, or (to use a computer term), hard-wired into us, as human beings. Even if a person rejects the first four bases for the teaching that abortion is a serious moral wrong, it is difficult to reject the fourth basis. The human heart, when searched carefully with an open mind using the faculty of rationale thinking, comes to know the wrongness of intentionally taking a life in the womb.

## [E] “Indirect” Abortion and Principle of the Double Effect

An abortion is “indirect” if the purpose of a surgical procedure is not to kill the child, but the death of the child is a result of the procedure. Father Hardon explains:

[E]ven though pregnancy is involved, it is lawful to extract from the mother a womb that is dangerously diseased (e.g., cancerous). This is not the same as direct abortion, and Catholic morality allows this kind of increasingly rare surgery according to what has come to be known as the principle of the double effect. To be licitly applied, the principle must observe four limiting norms:

1. The action (removal of the diseased womb) is good; it consists in excising an infected part of the human body.
2. The good effect (saving the mother's life) is not obtained by means of the evil effect (death of the fetus). It would be just the opposite, e.g., if the fetus were killed in order to save the reputation of an unwed mother.

<sup>113</sup> *Catechism*, *supra*, § 2262 at 545 (emphasis in § 2258 original, emphasis in § 2270 added).

<sup>114</sup> See *Catechism*, *supra*, § 2273 at 548.

<sup>115</sup> See Congregation for the Doctrine of the Faith, *Donum Vitae* III, quoted in *Catechism*, *supra*, § 2273 at 548. Consequently, when a state deprives a category of its people the protection of the right to life, and thereby does not use its power to serve the interests of all of its people, including the most vulnerable, the state behaves inconsistently with the principle of equality before the law, and undermines its foundation as a state based on the rule of law. See *id.*



3. There is sufficient reason for permitting the unsought evil effect that unavoidably follows. Here the Church's guidance is essential in judging that there is a sufficient reason.
4. The evil effect is not intended in itself, but is merely allowed as a necessary consequence of the good effect.

Summarily, then, the womb belongs to the mother just as completely after a pregnancy as before. If she were not pregnant, she would clearly be justified to save her life by removing a diseased organ that was threatening her life. The presence of the fetus does not deprive her of this fundamental right.<sup>116</sup>

In sum, the Principle of the Double Effect allows for the commission of an action that has a good effect, as long as the good effect is not obtained by means of the evil effect, that evil effect is nothing more than an ineluctable result of the good effect, and a sufficient justification exists to permit the unwanted evil effect.

Regrettably, from a Catholic perspective, the number of abortions that occur in practice for purported therapeutic reasons is far larger than the number of *bona fide* therapeutic cases.<sup>117</sup> Father Hardon states:

With the development of modern science, these so-called therapeutic abortions, where the mother's life is in immediate danger, are becoming increasingly rare. The point has now been reached that more and more doctors come to reject the idea of therapeutic abortion entirely.<sup>118</sup>

Why does this asymmetry between claimed and actual therapeutic cases exist? The reason lies in part because of language permitting abortion in secular legal systems for reasons such as grave impairment of the physical or mental health of the mother, or a grave physical or mental defect in the child. Such expansive language is characterized as "equivalent to abortion on demand," and permission for an abortion because of the "mental" health of the mother encompasses any instance, including anxiety of having a child, in which termination of an unwanted pregnancy is sought.<sup>119</sup>

A point related to the principle of the double effect is a "sophism that the Church prefers the life of the child over that of the mother." In 1951, Pope Pius XII spoke directly to this fallacious argument:

Never and in no case has the Church taught that the life of the child must be preferred to that of the mother. It is erroneous to put the question with this alternative: either the life of the child or that of the mother. No, neither

the life of the mother nor that of the child can be subjected to an act of direct suppression. In the one case as in the other, there can be but one obligation: to make every effort to save the lives of both, of the mother and the child.<sup>120</sup>

In brief, both lives are sacred. They are unique, unrepeatable, and of inestimable value.<sup>121</sup>

## [F] Compassion

Catholic Christian teaching holds that it is not compassionate to deny a pregnant woman full information about the possible short- and long-term physical and psychological consequences of abortion. That also is true in respect of alternatives to the procedure, particularly adoption. Likewise, to deny her support if she chooses to carry through with her pregnancy is uncompassionate.

On the first point, therefore, in a secular legal regime in which abortion is legal under some circumstances, the Catholic Church encourages that pregnant women inquiring about abortion be presented with what lawyers would call all "material" information, that is, information significant to making an informed choice. Examples of such information include medical studies (or synopses thereof) that demonstrate links between abortion and breast cancer, and abortion and depression. It also includes witnessing a sonogram. Pro-abortion advocates sometimes characterize presentation of material information as a "restriction" on the right of a woman to choose. In truth, from a Catholic vantage point, offering such data is consistent with treating a mother as a fully human, intelligent being competent to weigh evidence and make a decision. As a practical legal matter, whether a mother has access to such information differs from one American state to another. Under cases following *Roe*, such as *Planned Parenthood v. Casey*, the United States Supreme Court is willing to give states some latitude in deciding what is, and what is not, an unconstitutional "restriction."<sup>122</sup> Not surprisingly, therefore, a considerable volume of litigation occurs on a state-by-state basis as to what regulations are appropriate under *Roe* and its progeny cases.

On the second point, social services to support a mother who chooses to give birth to her child are essential. These services include adoption. But, they also

<sup>120</sup> Pius XII, *Allocution to the Association of Large Families, Acta Apostolicae Sedis* (1951), XLIII, at 855, quoted in HARDON, *CATHOLIC CATECHISM*, *supra*, at 341.

<sup>121</sup> A related and difficult issue concerns the treatment of rape victims. Catholic teaching concerning their treatment is that they must be accorded compassion, respect, and understanding, and further that:

it is morally permissible to prescribe medication and other treatments that can prevent fertilization from occurring, but nothing may be done to stop the implantation of a fertilized egg in the uterine wall. . . . Unlike the sperm from a conjugal act [which is freely and deliberately entered into by a husband and wife], the rapist's sperm is unjustly deposited in the woman's vagina, and the woman has the right to treat the sperm accordingly. Once fertilization has taken place, however, even the rape-conceived human possesses all the rights and dignity of any other human being. The embryo is completely innocent of the evil involved in the rape act.

DAVID BOHR, *CATHOLIC MORAL TRADITION* 300-301 (Huntington, Indiana: Our Sunday Visitor, rev'd ed., 1999).

<sup>122</sup> See *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

<sup>116</sup> HARDON, *CATHOLIC CATECHISM*, *supra*, at 337.

<sup>117</sup> See generally Martha F. Davis, *Abortion Access in the Global Marketplace*, 88 NORTH CAROLINA LAW REVIEW 1657-1685 (2010) (arguing that in most countries with an official health care system, and in which some abortions are legal, a "therapeutic" abortion — one performed to protect the life or health of the mother — is regarded as part of a fundamental right to health care, and public funding is available for therapeutic abortions for low-income women).

<sup>118</sup> HARDON, *CATHOLIC CATECHISM*, *supra*, at 337 (emphasis added).

<sup>119</sup> HARDON, *CATHOLIC CATECHISM*, *supra*, at 337.

must include help for the mother to continue with her educational and career aspirations following her pregnancy, whether or not she elects to give her child up for adoption. Catholic Christian teaching thus supports efforts to provide greater funding for such services. This encouragement is redolent of *Shari'a* precepts in favor of charitable trusts (*waqf*).

A final point concerns the position of a mother who intentionally chooses to undergo a direct abortion. Strictly speaking, and assuming all pertinent conditions (explained below) are met, the result for the mother, and anyone who materially assisted her in procuring an abortion, is excommunication from the Catholic Church. The *Catechism* states:

2272 Formal cooperation in an abortion constitutes a grave offense. The Church attaches the canonical penalty of excommunication to this crime against human life. "A person who procures a completed abortion incurs excommunication *latae sententiae*" [under the Code of Canon Law § 1398], "by the very commission of the offense" [see Code of Canon Law § 1314], and subject to the conditions provided by Canon Law [see §§ 1323-1324]. The Church does not thereby intend to restrict the scope of mercy. Rather, she makes clear the gravity of the crime committed, the irreparable harm done to the innocent who is put to death, as well as to the parents and the whole of society.<sup>123</sup>

However, it is important to appreciate what "excommunication" means. It is a:

severe ecclesiastical penalty, resulting from grave crimes against the Catholic religion, imposed by ecclesiastical authority or incurred as a direct result of the commission of an offense. Excommunication excludes the offender from taking part in the Eucharist or other sacraments and from the exercise of any ecclesiastical office, ministry, or function.<sup>124</sup>

To be clear, it is not the case that Church authorities aggressively scout for persons to excommunicate.

Quite the contrary, it is an unusual sanction imposed with reluctances only in egregious cases. Excommunication cannot be imposed on a person who has not reached the age of majority (which is 16 years), nor can it be imposed on a person who did not know that it was the penalty for procuring or performing and abortion.<sup>125</sup> Critically, then, excommunication results when a person willfully has separated himself or herself from the most essential Catholic principles, fully aware of the consequences of that decision. By making the choice of abortion, a mother and anyone who abets her have cut themselves off from the Church, its unequivocal teaching, and indeed what it means to be "Catholic." The key point, then, is that the Church does not condemn the mother or others involved — as a general matter, people condemn themselves.

<sup>123</sup> *Catechism, supra*, ¶ 2272 at 548.

<sup>124</sup> *Catechism, supra*, at 878 (definition of "excommunication").

<sup>125</sup> See Code of Canon Law §§ 1314, 1323-1324.

Moreover, mercy always triumphs over judgment. The remedy — that is, the means for lifting an excommunication — is clear and readily available: an honest, sincere confession by those involved will reconcile them to the Church. As the *Catechism* states:

1463 Certain particularly grave sins incur excommunication, the most severe ecclesiastical penalty, which impedes the reception of the sacraments and the exercise of certain ecclesiastical acts, and for which absolution consequently cannot be granted, according to canon law, *except by the Pope, the bishop of the place or priests authorized by them* [see Code of Canon Law §§ 1331, 1354-1357]. *In danger of death any priest, even if deprived of faculties for hearing confessions, can absolve from every sin and excommunication* [see Code of Canon Law § 976].<sup>126</sup>

Thus, the Church offers a Sacramental means to restore a broken relationship with God. There is considerable anecdotal evidence that many mothers who have suffered the tragedy of an abortion take advantage of the Sacrament of Reconciliation, sometimes after carrying the guilt of an abortion they had 20, 30, 40, 50, and even 60 years earlier, and feel a deep sense of peace in doing so.

## [G] Synopsis of Contrasts

There are crucial distinctions on abortion between Catholic teaching and the *Shari'a*. First, Islamic precepts on abortion have evolved and continue to be debated. Catholic Christian teaching on the subject is invariant and invariable.

Second, Catholic morality emphasizes the intent to destroy innocent human life, making the precise moment at which life begins or ensoulment occurs immaterial. Islamic rules are based in part on when life begins and ensoulment occurs, hence the debate among the Four Schools as to the number of days into a pregnancy (*e.g.*, 40, 42, 120) when abortion is permissible.

Third, Islamic Law by no means champions abortion, it does admit a narrow necessity exception, such as to save the life of the mother. In part, the *Shari'a* does so because of the different starting points and reasoning processes of scholars in the two faiths. Islamic scholars are not resolute about defining these moments, and generally identify 120 days into a pregnancy, not conception, as the critical threshold. Consequently, when they examine Qur'anic passages to the effect that Muslims should not kill their "children," they interpret the word "child" differently from Catholic scholars. During the period when there arguably is no "child," abortion to them becomes less unacceptable than otherwise is true. In contrast, Catholic teaching starts with culpable intent. Aiming to kill an innocent life never can be justified.

Despite these distinctions, Catholic Christian teaching and the *Shari'a* are broadly similar on perhaps the most important point of all: the dislike of abortion.

<sup>126</sup> *Catechism, supra*, ¶ 1463 at 368 (emphasis added).

As a pastoral matter, often a priest can give absolution to a penitent who confesses to procuring or performing an abortion without first needing to send the penitent away, obtaining approval of the local bishop to give absolution, and then having the penitent return to the confessional to receive absolution.



In Islamic legal terms, Catholic Christianity regards direct abortion as *ḥarām* (forbidden), not merely *makrūh* (reprehensible). Yet, in Catholic terms, calling abortion "*makrūh*" understates the gravity of the sin as viewed from the hearts and minds of many Muslims.

## PART ELEVEN

### INHERITANCE LAW

## Chapter 41

### WILLS (WAṢĀ YĀ), CHARITABLE TRUSTS (WAQFS), AND EUTHANASIA

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My momma always said life was like a box of chocolates . . . you never know what you're gonna get.

From the Movie *Forrest Gump* (1994)

Winner of 6 Academy Awards, including Best Picture, spoken by Tom Hanks, Best Actor

#### SYNOPSIS

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## § 41.01 OVERVIEW

### [A] SYNOPSIS of Islamic Inheritance Law

Among sacred legal systems, Islamic Law contains the most particular and technical scheme of inheritance rules. Indeed, one *Shari'a* scholar opines that Islamic Inheritance Law is the most detailed system of succession known to man.<sup>1</sup> The Qur'an, especially in *Surah Al Nisa* (*Surah* 4), lays down the main components of Inheritance Law. The key passage is in *ayat* 11-12:

<sup>11</sup>Concerning your children, God commands you that a son should have the equivalent share of two daughters.

If there are only daughters, two or more should share two-thirds of the inheritance, if one, she should have half.

Parents inherit sixth each if the deceased leaves children; if he leaves no children and his parents are his sole heirs, his mother has a third, unless he has brothers, in which case she has a sixth. [In all cases, the distribution comes] after payment of any bequests or debts.

You cannot know which of your parents or your children is more beneficial for you: this is a law from God, and He is all knowing, all wise.

<sup>12</sup>You inherit half of what your wives leave, if they have no children; if they have children, you inherit a quarter. [In all cases, the distribution comes] after payment of any bequests or debts. If you have no children, your wives' share is a quarter; if you have children, your wives get an eighth. [In all cases, the distribution comes] after payment of any bequests or debts.

If a man or a woman dies leaving no children or parents, but a single brother or sister, he or she should take one-sixth of the inheritance; if there are more siblings, they share one-third between them. [In all cases, the distribution comes] after payment of any bequests or debts, with no harm to anyone: this is a commandment from God: God is all knowing and benign to all.<sup>2</sup>

Further details are sourced in the *Sunnah* (tradition) and *ijma'* (consensus) of scholars.<sup>3</sup>

Presently, only the Iran, Saudi Arabia, and Sudan fully recognize the *Shari'a*, including its inheritance rules, as the official law of the land. To a lesser degree than these countries, Bahrain, Kuwait, Qatar, and Yemen acknowledge *Shari'a* principles.

The rest of the Muslim world follows a hybrid system of Islamic and European law.<sup>4</sup> Nevertheless, among many Muslims in Islamic and non-Islamic countries, there is greater interest in exploring the possibility of applying the *Shari'a* principles to their estates. Further, and not surprisingly in an age of globalization, many Muslims have assets in multiple jurisdictions, some of which are Islamic countries. Thus, lawyers specializing in trusts and estates in Tallahassee, Florida, or Topeka, Kansas are presented with questions about a "*Shari'a* will" or multi-jurisdictional asset dispositions.

In general, when making a will, a Muslim has the freedom to bequest up to one-third of her estate to an outsider and even to a legal (*i.e.*, Qur'anic) heir (under both *Sunni* and *Shiite* law).<sup>5</sup> The rest of the estate, the remaining two-thirds, is strictly meant for legal heirs, after payment of funeral expenses and debts.<sup>6</sup> Statutory law in Muslim countries, such as Egypt and Tunisia, may allocate an obligatory bequest for predictable situations, even if a bequest has not been made.<sup>7</sup> A Muslim is not restricted to distribute her estate among specific individuals as a gift, or *hibah*, to specific heirs, and cannot do so through a fictitious sale to them. (For example, under Egyptian law, a fictitious sale is a voidable contract if its only reason was to violate inheritance rules.) Muslims also may convert parts of the entirety of estates into charitable endowments, or *waqfs*, and instruct only specific individuals as managers of benefactors of these endowments.

In a radical contrast to pre-Islamic times, a Muslim woman can inherit, own, and manage, her own property. Because the proportion of allotment between men and women is generally two to one, Islamic Inheritance Law is censured for gender discrimination. One response to this charge is it is overly simplistic. Women are granted religious and spiritual equality in Islam.<sup>8</sup> The proposition Inheritance Law is innately unfair to women contradicts that general principle of equality. Rather than gender itself, the difference in distribution between men and women is the consequence of their respective roles in the Islamic society. For example, unequal distribution between a man and woman does not hold true in a case in which they belong to the same class (such as siblings or parents).

### [B] Four Key Features and Evaluation Using Scale of Five Qualifications (*Al Ahkam Al Khamsa*)

There are four key features of Islamic Inheritance Law:

<sup>4</sup> IRSHAD ABDUL-HAQQ, *Islamic Law: An Overview of its Origins and Elements*, 7 JOURNAL OF ISLAMIC LAW & CULTURE ISSUE 27, 68-69 (2002). [Hereinafter, Abdul-Haqq.]

<sup>5</sup> See MOHAMMAD HASHIM KAMALI, *SHARIAH LAW: AN INTRODUCTION* 274 (London, England: One World Publications, 2008). [Hereinafter, SHARIAH LAW.] Under *Sunni* Law, with the consent of all surviving heirs, a bequest to a legal heir is made if he or she is suffering from a disability. See *id.*

<sup>6</sup> See Qur'an, *supra*, 4:11-12 at 51.

<sup>7</sup> See SHARIAH LAW, *supra*. The example used by the author (of a predictable situation) is one of an orphaned grandchildren precluded from an uncle who also may be a son.

<sup>8</sup> Regarding the equality of men and women in creation, see, e.g., Qur'an, *supra*, 4:1, 7:189, 16:72, 42:11, and 49:13. Regarding spiritual equality, see, e.g., *id.*, 4:24, 6:97, 33:35, 74:38.

<sup>1</sup> See HAMID KHAN, *ISLAMIC LAW OF INHERITANCE: A COMPARATIVE STUDY WITH EMPHASIS ON CONTEMPORARY PROBLEMS* 1 (Lahore, Pakistan: Lahore Law Times Publications, (1989)). [Hereinafter, HAMID KHAN.]

<sup>2</sup> M.A.S. ABDEL HALEEM, *THE QUR'AN: A NEW TRANSLATION* 4:11-12 at 51 (Oxford, England: Oxford University Press (2004)). [Hereinafter, Qur'an.] Spacing between the rules has been inserted to facilitate comprehension of the passage.

<sup>3</sup> MOHAMMED ZAID ABDULAZIZ, *THE ISLAMIC LAW OF BEQUEST* 9 (London, England: Scorpion Publishing Ltd., (1986)). [Hereinafter, ABDULAZIZ.] Professor Abdulaziz is a prominent Saudi scholar and member of the *Hanbali* School, and his book is widely cited on Islamic Inheritance Law.

- (1) The *Sharī'a* provides fixed percentage shares for chosen beneficiaries (from two-thirds of the estate of a Muslim), which subsequently reach an array of other family members. A share is known in Arabic as a "*fard*." The *fards* are set out in *surah* 4, *ayat* 11-12 (quoted above). The chosen beneficiaries are the legal, or Qurānic, heirs.
- (2) A Muslim may only bequeath one-third of his estate.
- (3) Inheritance is a guaranteed right governed by the *Sharī'a*.
- (4) Inheritance rules are based upon the concept of Islam as a "*deen*," i.e., a system of life based upon complete surrender to God (*Allāh*).<sup>9</sup> Accordingly, an Islamic will, the *waṣiyya*, is divided into two parts. The first permits the fulfillment of binding obligations that satisfy the rights of God, such as *zakāt* and *Hajj*, and the rights of people.<sup>10</sup> These are called *wājib* (obligatory) rights. The second contains *mustahab* or praiseworthy acts, and concern discretionary bequests.<sup>11</sup>

Relevant to each of these four elements are the Scale of Five Religious and Legal Qualifications, or "*Al Ahkām Al Khamsa*."

Briefly, in respect of the Scales, in Islamic jurisprudence (*fiqh*), all actions fall into various categories of sanctions or *ahkām*. Thus, any potential act (or omission) is evaluated — from a religious and a legal perspective — according to whether it is:

- *ḥarām* (forbidden)
- *makrūh* (reprehensible)
- *mubāh* (neutral, or permissible)
- *mandub* or *mustahabb* (recommended), or
- *wājib* (obligatory).

*Ḥarām* acts are completely forbidden in Islam and Islamic Law.

It is *ḥarām* to bequeath to a legal heir (under *Sunni* Law) if the bequest is not approved by other heirs.<sup>12</sup> It also is *ḥarām* to bequeath more than one-third of the estate (regardless of whether the beneficiaries are legal heirs or in some other category), again unless the heirs approve crossing above that one-third threshold. And, it is *ḥarām* to bequeath something that promotes religious disobedience (such as a brothel or pub).<sup>13</sup> There are variations among Islamic countries. The

<sup>9</sup> Property rights stem from the belief that people are mere trustees for God, since everything in this world belongs to *Allāh*. For example, *surah* 5, *ayah* 120 states:

Control of the heavens and earth and everything in them belongs to God: He has power over all things.

Qur'ān, *supra*, 5:120 at 79.

<sup>10</sup> See ABDULAZIZ, *supra*, at 9.

<sup>11</sup> See ABDULAZIZ, *supra*, at 9.

<sup>12</sup> See ABDULAZIZ, *supra*, at 9.

<sup>13</sup> See ABDULAZIZ, *supra*, at 9.

forementioned rules hold in Saudi Arabia. But, in Egypt it is unnecessary to obtain the approval of other heirs to bequeath to a legal heir, unless the amount bequeathed exceeds one-third of the estate.

As for *makrūh* acts are those that are reprehensible, but not forbidden. It is *makrūh* for a poor Muslim to make bequests.<sup>14</sup> *Mubāh* acts are considered neutral, in other words, they are neither liked nor disliked. They are simply permissible. It is *mubāh* to bequest to a legal heir if the other heirs approve the bequest. Likewise, it is *mubāh* to bequest more than one-third of the estate, if the heirs approve. And, it is *mubāh* to make a bequest to someone who is already rich.<sup>15</sup> Finally, *mandub* (*mustahabb*) acts are those that are recommended and praiseworthy, but not obligatory (*wājib*). It is *mandub* to bequeath to a poor relative, a poor non-relative, or a pious person.<sup>16</sup>

## § 41.02 FORM OF WILL (WAṢIYYA)

### [A] Oral or Written

The Arabic term for a "will," which also is used for a "legacy," is "*waṣiyya*." (The plural is "*waṣāyā*.".) If the will is in writing, then it is called a "*waṣiyya nama*." Under the *Sharī'a*, a will does not have to be in any particular written or verbal form. However, for an oral bequest, it is necessary to have two men, or one man and two women, testify as witnesses to the validity of the bequest.<sup>17</sup> Further, the testimony of two men is necessary for the appointment of guardians for the minor heirs of the testator.<sup>18</sup>

In the event witnesses are needed, they should be respectable persons, i.e., of good moral character (*ʿadl*), who have not violated Islamic Law.<sup>19</sup> The testimony of heirs (even one) also is considered sufficient to certify a written or oral bequest, provided they are trustworthy and can support their testimony under oath.<sup>20</sup> Another method of confirming a bequest is by a declaration of the testator (*muai*) of her wishes in front of a judge, the contents of which are then recorded in a registry.<sup>21</sup>

<sup>14</sup> See ABDULAZIZ, *supra*, at 14.

<sup>15</sup> See ABDULAZIZ, *supra*, at 15.

<sup>16</sup> See ABDULAZIZ, *supra*, at 13.

<sup>17</sup> See ABDULAZIZ, *supra*, at 39.

<sup>18</sup> See ABDULAZIZ, *supra*, at 39.

<sup>19</sup> See ABDULAZIZ, *supra*, 39.

<sup>20</sup> See ABDULAZIZ, *supra*, at 41.

In some Muslim countries, retraction by an heir is not permitted. In one Saudi case, an heir who testified to a bequest subsequently retracted it by telling the court that he was mistaken, when the co-heirs rejected his testimony. The court, however, held him responsible for his acknowledgement and ordered that his share in the bequest be taken over by the trustee of the public *waqf* (trust). See *id.* However, in Egypt, retraction is permitted.

<sup>21</sup> See ABDULAZIZ, *supra*, at 47.



## [B] Holographic or Bequest-Under-Seal

There are two types of written wills (*wasfiyyat nama*): a holographic will, and a bequest-under-seal. A holographic will is one that is entirely prepared, dated, and signed, by the testator (*musi*) himself or herself. Although a holographic will requires no attestation, it is only permitted if the hand writing of the *musi* is distinct and recognizable.<sup>22</sup> A signature is not necessary to confirm a will, as long as it can be confirmed through handwriting analysis that the bequest was made by the decedent.<sup>23</sup> But, a signature of the *musi* is important to certify a will that has been typed or has been drawn by someone other than the testator. Holographic wills are common and are often created in emergency situations, such as when the testator is alone, trapped, or gravely ill.

A bequest-under-seal is a *wasfiyyat nama* that is prepared and written by a lawyer, lawyers, or witnesses. In effect, it is a will prepared by professionals, or at least witnesses to the desires of the testator. Jurists require that witnesses in both types of *wasfiyyat namas* should be aware of the contents of the document that the *musi* signs.<sup>24</sup> A formal attestation clause, such as, "We, the undersigned witnesses, affirm the correctness of this document. . ." is not necessary, but is regarded as desirable.<sup>25</sup>

## [C] Sample

A sample, standard form written Islamic will is presented below.

### Sample:

#### A Standard Form Islamic Will<sup>26</sup>

### LAST WILL AND TESTAMENT

OF \_\_\_\_\_ SS# \_\_\_\_\_

#### ARTICLE I: PREAMBLE

All praise is for Allah (swt) the creator of the heavens. I praise Him, I seek His help and His forgiveness. I believe in Him and put my trust entirely in Him. I seek refuge with Allah (swt) from the evils of myself and my deeds. Whom Allah (swt) guides no one can mislead, and whom Allah (swt) misleads no one can guide. I testify that there is no deity except Allah, He is One and has no partners, and I further testify that Muhammed (peace and blessings of Allah be upon him) is Allah's servant and Last Messenger.

I, \_\_\_\_\_, a Muslim, presently resident of \_\_\_\_\_, being of sound mind and memory declare the following is my will (waseeat). I do

<sup>22</sup> See ABDULAZIZ, *supra*, at 43.

<sup>23</sup> See ABDULAZIZ, *supra*, at 45.

<sup>24</sup> See ABDULAZIZ, *supra*, at 46.

<sup>25</sup> See ABDULAZIZ, *supra*, at 46.

<sup>26</sup> Posted at <http://muttaqun.com/pc/will.doc>. Other sample Islamic wills may be found online. Generally, they are freely available and downloadable.

hereby revoke any and all former wills and codicils that I have previously made. I ask all my relatives, friends, and others, whether they be Muslims or non-Muslims, to honor my right to be a Muslim. I ask them to honor the spirit and letter of this document and not to try to obstruct or change it in any way. Let them see to it that I am buried as a Muslim should be, and my properties are divided as I wanted them to be divided according to the Sunni (Orthodox) Muslim laws of inheritance. I ordain that under no circumstances should the contents of this will be changed voluntarily.

#### ARTICLE II: MY IMMEDIATE FAMILY

1. I am married to \_\_\_\_\_ and all references in this will to my husband/wife are to him/her.
2. I am the father/mother of the following children whose names and dates of birth are:
  1. \_\_\_\_\_
  2. \_\_\_\_\_
  3. \_\_\_\_\_
  4. \_\_\_\_\_
  5. \_\_\_\_\_
  6. \_\_\_\_\_

#### ARTICLE III: EXECUTOR AND BENEFICIARY

1. I hereby give all my estate: cash, bank accounts, real property, shares in any business, and any other property not mentioned in this will, to the person named below, who shall act also as an executor to serve without bond, to distribute it according to Sunni (Orthodox) Muslim Shariah.

My husband/wife \_\_\_\_\_, or, if he/she fails to survive me by 45 days,

\_\_\_\_\_, or, if he/she fails to survive me by 45 days,

\_\_\_\_\_, or, if he/she fails to survive me by 45 days,

\_\_\_\_\_, or, if he/she fails to survive me by 45 days,

\_\_\_\_\_ the Imam of the local Sunni (Orthodox) Muslim community.

2. I ordain that the executor of this will be a Muslim.
3. I direct that the executor take all actions legally permissible to have the probate of my estate done as simply and as expeditiously as possible.
4. I give my executor named above power to sell any property, real, personal or mixed, in which I have interest, without a court order and without bond.
5. I give my executor power to settle any claim for or against my estate.

#### ARTICLE IV: BURIAL ARRANGEMENTS

I ordain that:

1. My body be prepared for burial in keeping with the Sunni (Orthodox) Muslim Law (Shariah),

2. Under no circumstances my body be voluntarily turned over for an autopsy, or embalming or for organ donation.
3. My body be prepared for burial by Sunni (Orthodox) Muslims according to the dictate of Shariah (Sunni Islamic Law). Once the body is prepared for burial there is to be no viewing of my remains.
4. Absolutely no non-Islamic religious service or observance shall be conducted upon my death, or on my body or at the grave site. No pictures, crescents and stars, decorations, crosses, flags, flowers, plants, any symbols or music be involved at any stage of my burial.
5. My body may not be transported over any unreasonable distance from the locality of death unless necessitated by the circumstances or consensus of my Muslim family members.
6. My grave me dug in complete accordance with the Islamic practice. It should face in the direction of the Qiblah (towards the Ka'aba at Makkah, Saudi Arabia).
7. My body be buried without casket or any other encasement that separates the shroud from the surrounding soil.
8. My grave be covered with dirt only. The marking, if necessary, should be a simple rock. There should be no inscriptions or symbols.
9. My burial should take place as soon as possible, preferable before sunset on the day of my death or the following day. Under no circumstances should the burial be unduly delayed.
10. In the event that the local laws require casket encasement, I command that such encasement be of the simplest, most modest, and least expensive type possible, and I furthermore command that the encasement be left open during burial and filled with dirt unless prohibited by law.
11. No one is permitted to cry out, moan or wail. I demand that such a person leave the burial site. Only what comes from the eye is acceptable (tears). Muslims should say a dua'a for me and that there be a moment of silence when they pray that my grave is made spacious and comfortable. No recitation of the Qur'an is permitted over my grave.

#### ARTICLE V: CUSTODY OF MINOR CHILDREN AND GUARDIAN

If at my death any of my children are minors, I recommend that my husband/wife \_\_\_\_\_ be appointed guardian of the person(s) of my minor children, provided he/she is a Muslim. If he/she is unable or unwilling to serve as personal guardian, I recommend that \_\_\_\_\_ be appointed guardian of the person(s) of my minor children. If he/she is unable or unwilling to serve as personal guardian, I recommend that \_\_\_\_\_ be appointed guardian of the person(s) of my minor children. In all cases I urge that all my minor children be raised to be practicing Muslims and not in any way be indoctrinated into any other faith or religion. I direct that no bond be required of any personal guardian. Any property or other inheritance that this will gives to any of my minor children shall be administered by their personal guardian in the best interest of the children.

#### ARTICLE VI: DEBTS AND EXPENSES

I direct my executor:

1. To return to the rightful owners all trust and properties that are in my care

at the time of my death.

2. To first apply the assets of my estate to the payment of all my legal debts, including such expenses incurred by my last illness and burial as well as the expenses of the administration of my estate.
3. To pay any outstanding "obligation due to Allah (swt)" (*huquq Allah*) which are binding on me including unpaid zakat, *kaffaraat* of unperformed pilgrimage (Hajj), etc.

#### ARTICLE VII: BEQUESTS

I direct my executor to:

1. Pay the following amount from the remainder of my estate after paying all the expenses mentioned above, to the person/s or organization/s named below. The total must not exceed 33 percent (one third) of the remainder of my estate.
  1. \_\_\_\_\_ % of the total remainder
  2. \_\_\_\_\_ % of the total remainder
  3. \_\_\_\_\_ % of the total remainder
  4. \_\_\_\_\_ % of the total remainder
  5. \_\_\_\_\_ % of the total remainder

TOTAL BEQUESTS (must not be more than 33%) \_\_\_\_\_ % of the total remainder

#### ARTICLE VIII: DISTRIBUTION OF THE REMAINDER OF MY ESTATE

I direct my executor to:

1. Distribute the residue and remainder of my estate strictly in accordance with the tenets of Sunni (Orthodox) Muslim law of inheritance.
2. Ensure that no part of the remainder of my estate shall be inherited by any non-Muslim, no matter how he/she is related to me.
3. Ensure that should I die as a result of murder, no part of the remainder of my estate shall be inherited by my adjured murderer responsible for direct unlawful killing (actionable homicide), no matter how he/she is related to me.
4. Ensure that no part of the remainder of my estate shall be inherited by a person whose claimed relationship to me, ascending or descending, is the result of a non-Islamic or unlawful marriage, or through adoption, except if this relationship to me is through his/her mother who is biologically (through blood) related to me or if he/she is specifically mentioned in bequests above.
5. Regard a fetus, conceived before my death, whose relationship to me qualifies it to be an heir according to this article if it is born alive within the limit of time specified by Shariah. If such a fetus exists at the time of my death, the executor may delay the distribution of the residue and remainder of my estate after the execution of Articles I to VII, until after the birth of the fetus. If he/she chooses to distribute the estate prior to the birth of the fetus then he must withhold a portion of the estate equal to the share of the fetus for distribution until after the birth of the fetus.
6. That in case of any difficulty in distributing my estate according to this will, the matter should be referred to a Muslim knowledgeable in Islamic Inheritance Law for advice and guidance.
7. That the residue and remainder of my estate after the execution of Articles



I to VII and Article VIII sections 1 to 6 above be donated to the following person/s or organization/s for the establishment of Islamic communities and Masajid.

8. That any portion of my estate disclaimed or refused to be received by any of the legatees names or referred to in this document be donated to the following person/s or organization/s for the establishment of Islamic communities and Masajid.

#### ARTICLE IX: SEPARABILITY

I direct that no part of this will be invalidated by a court unless competent in Sunni (Orthodox) Muslim Law. If any part of this will is determined invalid by a court the other parts shall remain valid and enforceable.

I subscribe my name to this will this day \_\_\_\_\_ at \_\_\_\_\_ and do hereby declare that I sign and execute this instrument as my list will and that I sign it willingly, that I execute it as my free and voluntary act for the purposes therein expressed, and that I am of the age of majority or otherwise legally empowered to make a will, and under no constraint or undue influence.

Name \_\_\_\_\_ Signature \_\_\_\_\_ Date \_\_\_\_\_

#### WITNESSES

On this \_\_\_\_\_ day of \_\_\_\_\_,

\_\_\_\_\_ declared to us, the undersigned, that this instrument was his/her will and requested us to act as witnesses to it. He/She thereupon signed this will in our presence, all of us being present at the same time. We now, at his/her request, in his/her presence, and in the presence of each other, subscribe our names as witness and declare that we understand this to be his/her last will, and that to be the best of our knowledge the testator is of the age of majority, or is otherwise legally empowered to make a will, and under no constraint or undue influence.

We declare under penalty of perjury that the foregoing is true and correct.

Witness 1. \_\_\_\_\_

Witness 2. \_\_\_\_\_

Notary Public \_\_\_\_\_ date \_\_\_\_\_

My Commission Expires \_\_\_\_\_

#### § 41.03 FOUR ELEMENTS OF WILL (WAṢIYYA)

Regarding the elements of a will, some *Hanafi* School jurists return to their liberal roots and consider just the offer (of a bequest) enough to constitute a valid will.<sup>27</sup> The majority of *Hanafi* scholars require just two elements for a legal will:

<sup>27</sup> Attique Tahir, *The Requisites Of A Valid Will — A Comparative Study Of Shariah & Law*, Al. Awwa 35 (Lahore, Pakistan: Al-Adwa, Sheikh Zayed Islamic Centre, University of the Punjab, 2009), posted at [www.pu.edu.pk/szic/journal/currentissue\\_pdf/E-2%20Atiq%20Tahir.pdf](http://www.pu.edu.pk/szic/journal/currentissue_pdf/E-2%20Atiq%20Tahir.pdf). (Hereinafter, Tahir.) The author is a Lecturer, Faculty of Shariah & Law, International Islamic University, Islamabad,

offer and acceptance.<sup>28</sup> The *Māliki*, *Shāfi'i*, and *Hanbali* Schools demand the existence of all four elements for a legitimate will:<sup>29</sup>

- (1) *Sighah*, i.e., the offer and acceptance, or declaration.
- (2) *Musi* (Testator).
- (3) *Musa Lahu* (Legatee).
- (4) *Waṣi* (Executor).

Implicit is a fifth element: existence of bequeathed property, called "*musa bihi*."

#### [A] *Al Sighah* (The Offer and Acceptance, or Declaration)

The term "*sighah*" in Islamic jurisprudence (*fiqh*) refers to both an offer (*ijāb*) and acceptance (*kabūl*), i.e., two of the constituent elements of a contract taken together. In the context of Islamic Inheritance Law, the term refers to the offer of a gift, i.e., the making of a bequest, by a testator (*musi*) to a legatee (*musa lahu*), and an acceptance of that gift by the legatee. In effect, a "*sighah*" in this context is a declaration.

All jurists agree that a specific method of obtaining *sighah* is not required. Therefore, an offer and acceptance may be express or implied, i.e., by words or conduct.<sup>30</sup> However, a valid acceptance is one that is both unequivocal and unconditional.<sup>31</sup> The acceptance should not vary from the offer, i.e., the binding contract contemplated by the will occurs only when the acceptance matches the offer. Whether there is a distinction between material and non-material variations, so that mirror-image matching is not required, is unclear. Note, however, acceptance is not required if a bequest is made to an entire tribe, or to a charity (e.g., a *waqf*).<sup>32</sup>

The result of a valid acceptance is that ownership of the legatee over the property of the testator as bequeathed by her to the legatee is established. That is true regardless of whether the legatee takes possession of the property. Depending on the nature of the property, actual (physical) possession may not occur. Suppose uncertificated financial instruments, such as United States Treasury securities, are at issue. They would be held in an electronic account over which the legatee has constructive possession.

When must acceptance occur? An acceptance by a *musa lahu* is valid only after the death of the *musi*.<sup>33</sup> Acceptance or rejection by a legatee has no effect if it is made during the lifetime of the testator. What happens, then, in the usual case in which a testator dies before the legatee accepts or rejects the bequest? The gift is

Pakistan. The journal *Al Adwa* is unnumbered and undated.

<sup>28</sup> Tahir, *supra*. Hence, the rights of a legatee are not legitimate without acceptance. *Id.*

<sup>29</sup> Tahir, *supra*.

<sup>30</sup> Tahir, *supra*, at 36.

<sup>31</sup> Tahir, *supra*, at 37.

<sup>32</sup> See ABDULAZIZ, *supra*, at 84.

<sup>33</sup> Tahir, *supra*, at 36-37.

not transferred immediately or automatically to the legatee. Rather, the gift is considered property of the legal heirs of the decedent.<sup>34</sup> However, the *musa lahu* has discretion to accept or reject the bequest right after the death of the testator. The *musa lahu* also has discretion to delay acceptance or rejection, and the delay could be protracted, as there is no prescribed maximum period.<sup>35</sup> The *Shāfi'i* School maintains the legal heirs have a right to demand a decision from the legatee,<sup>36</sup> and the *Hanbali* School agrees with this position. Both Schools agree anything less than a clear acceptance of the bequest is considered a rejection.<sup>37</sup> In effect, once a testator dies, the onus is on the legatee to accept or reject the gift, and the sooner the better, as the legal heirs can press the legatee for a decision.

Is an acceptance, whether expressed as an express or implied decision of a legatee, irrevocable?<sup>38</sup> Consider the odd case in which a legatee subsequently rejects a bequest after having accepted it initially. The *Hanafi* School considers the rejection valid. The *Shāfi'i* and *Hanbali* Schools regard rejection after acceptance to be ineffective. They give pre-eminent importance to the proof of ownership established by the initial acceptance, which is reinforced if the legatee takes possession of the property.

Suppose a legatee rejects a bequest. What happens to the gifted property (*musa bihi*)? The share the legatee has rejected reverts back to the legal heirs.<sup>39</sup> What happens if a legatee dies before accepting or rejecting the will? Then, the right to the bequest is passed on to the legal heirs of the legatee.<sup>40</sup> In effect, the untimely death of the *musa lahu* is treated as a rejection of the *musa bihi*.

What happens if the legatee dies after the death of testator, but before an acceptance or rejection by the legatee? According to the *Hanafi* School, such a bequest is enforceable. The death of the legatee is deemed to be an implied acceptance by the legatee.<sup>41</sup> However, the rest of the Schools do not hold this view. They state that the bequest should be distributed among the legal heirs of the legatee.<sup>42</sup>

Must a bequest be accepted in its entirety? The answer is "no." It is possible that a legatee might accept certain property (such as a house), but reject other property (such as a parcel of land). In such a case, the will is enforced as to the accepted property, but declared void as to the rejected property.<sup>43</sup> Similarly, if a testator wills property to a group of people, and some accept it while others reject it, then the will is enforced in favor of the persons who accepted, and considered

void as to the persons who rejected. In other words, rejection by some persons does not taint the entire group. There is an exception, namely, when the will stipulates that the property is indivisible.

### [B] *Al Musī* (The Testator)

A testator is one who can make a bequest with resolution and certainty. Consequently, to make a valid will, a *musī* must be competent. That is, he or she must have the capacity to make the will. Psychological or physical ailments, namely, insanity or weakness, respectively, indicate incapacity. The *Hanafi* School takes a conservative approach to the loss of capacity. Insanity or weakness lasting six months prior to the death of a *musī* constitutes incapacity, and is sufficient reason for the nullification of an otherwise valid bequest.<sup>44</sup> This conservative position is rejected by the rest of the *Sunni* Schools, and also by the *Shī'ites*.<sup>45</sup> Their criteria for incapacity are less restrictive than that of the *Hanafi* School. The *Hanafi* School also considers the possibility that a competent testator might revoke her bequest at the last minute, before death.<sup>46</sup> Therefore, this School reasons that the possibility of the now incompetent testator creates an uncertainty, which is best resolved by nullifying the will.

To elaborate on how "competence" is defined in Islamic Inheritance Law, it is necessary for a person — in order to qualify as a testator — to be free, in the sense of being unaffected by duress, menace, fraud, mistake, or other undue influence. It also is necessary for the person to be in a mental state that allows her to appreciate the consequences of her actions. The Arabic term for this state is "*ʿāqil*," which literally means "knowledgeable," connoting full mental competence, or simply put, sanity.<sup>47</sup>

There is disagreement between jurists as to when a person should be considered '*ʿāqil*. The *Hanbali* School agrees a child of 7 years generally is capable of making a bequest.<sup>48</sup> This position is based on analogical reasoning (*qiyās*): children should start observing prayer by age 7.<sup>49</sup> Additionally, psychologists such as C.I. Sandstrom have conducted studies demonstrating that by age 7, children have the capacity to make logical decisions.<sup>50</sup> The *Hanafi* School states children are '*ʿāqil* by the start of adolescence.<sup>51</sup> Scientific studies indicate an adolescent, starting from age 14, is as capable of rational decision-making as an adult.<sup>52</sup> The *Māliki* jurists

<sup>34</sup> Tahir, *supra*, at 36.

<sup>35</sup> Tahir, *supra*, at 36.

<sup>36</sup> Tahir, *supra*, at 36.

<sup>37</sup> Tahir, *supra*, at 36.

<sup>38</sup> See ABDULAZIZ, *supra*, at 85.

<sup>39</sup> See ABDULAZIZ, *supra*, at 79.

<sup>40</sup> See ABDULAZIZ, *supra*, at 80.

<sup>41</sup> See ABDULAZIZ, *supra*, at 85.

<sup>42</sup> See ABDULAZIZ, *supra*, at 85.

<sup>43</sup> See Tahir, *supra*, at 36.

<sup>44</sup> See ABDULAZIZ, *supra*, at 48.

<sup>45</sup> See ABDULAZIZ, *supra*, at 48.

<sup>46</sup> See ABDULAZIZ, *supra*, at 48.

<sup>47</sup> See ABDULAZIZ, *supra*, at 17.

<sup>48</sup> See ABDULAZIZ, *supra*, at 18.

<sup>49</sup> See ABDULAZIZ, *supra*, at 18.

<sup>50</sup> See ABDULAZIZ, *supra*, at 18.

<sup>51</sup> See generally THE MEJELLE — BEING AN ENGLISH TRANSLATION OF MAJALLAH EL-AHKAM-I-ADLIYA AND A COMPLETE CODE OF ISLAMIC CIVIL LAW Articles 96-97 at 15 (Petaling Jaya, Malaysia: The Other Press, January 2001) (translated by C.R. Tybirk, B.A.L., D.G. Demetriades & Iemai Haqqi Effendi) (concerning adolescence).

<sup>52</sup> See T.P. Bartholomew, *Challenging Assumptions About Young People's Competence: Clearing the*



do not regard a will made by a minor as valid.<sup>53</sup> However, they grant an exception: where a minor is capable of making logical decisions, and decides to make a bequest for a pious purpose (e.g., building a mosque). The *Shāfi'i* School, and *Shī'ites*, adhere to the same view as the *Mālikī* School.<sup>54</sup>

### [C] *Al Musa Lahu* (The Legatee)

A bequest is considered valid at the time of the death of the testator (*musi*). Thus, determination of the status of legatees and legal heirs must be postponed until after this death.<sup>55</sup> As suggested earlier, a legatee who can answer to her description in the will must show acceptance of the bequest by actions or words.<sup>56</sup>

All jurists accept the proposition, which hardly is controversial, that there can be no bequest to a non-existent legatee.<sup>57</sup> Notably, a will in favor of a child in the womb of the mother is valid.<sup>58</sup> The key in all instances is that the identity of a legatee must be clearly stated. If upon the death of a testator, the description of the legatee creates confusion, then the bequest is considered invalid.<sup>59</sup>

A bequest also may be made to an institution, such as a mosque or university.<sup>60</sup> No special formulation is required, according to the majority of jurists. However, the *Hanafi* School considers a bequest to an institution void if it does not contain a phrase such as "to be spent thereupon," which indicates the purpose and method of disposal of the gifted property.<sup>61</sup> Interestingly, the social and religious status of a legatee is important when a bequest is made for a benevolent purpose. Consequently, a bequest is invalid if made to a person who will use it against the well being of society.<sup>62</sup>

Significantly, being a Muslim is not a condition to become a legatee. That is because the Prophet, permitted transactions with and donation of gifts to unbelievers.<sup>63</sup> This flexibility allows a Muslim husband to bequest shares of his property to his non-Muslim wife or wives. Non-Muslim spouses, because of their religious status, are not entitled to any share of the estate of their husbands under succession rules.<sup>64</sup>

*Pathway to Policy?*, Paper Presented at the Fifth Australian Family Research Conference, Australian Institute of Family Studies (1996), posted at [www.aifs.gov.au/institute/afrcpapers/barthol.html](http://www.aifs.gov.au/institute/afrcpapers/barthol.html). The author is a Tutor at the Department of Criminology, University Melbourne.

<sup>53</sup> See Tahir, *supra*, at 38.

<sup>54</sup> See Tahir, *supra*, at 38.

<sup>55</sup> See ABDULAZIZ, *supra*, at 72.

<sup>56</sup> See ABDULAZIZ, *supra*, at 77.

<sup>57</sup> See ABDULAZIZ, *supra*, at 56.

<sup>58</sup> See ABDULAZIZ, *supra*, at 56.

<sup>59</sup> See ABDULAZIZ, *supra*, at 58.

<sup>60</sup> See ABDULAZIZ, *supra*, at 58.

<sup>61</sup> See ABDULAZIZ, *supra*, at 58.

<sup>62</sup> See ABDULAZIZ, *supra*, at 64.

<sup>63</sup> See ABDULAZIZ, *supra*, at 66.

<sup>64</sup> See ABDULAZIZ, *supra*, at 67.

### [D] *Al Waṣī* (The Executor)

The usual practice in Islamic Inheritance Law is that through a testament (*i.e.*, a will) a testator makes a legacy, and appoints an executor, and possibly also a guardian. An executor, or *waṣī*, is responsible for carrying out the wishes of the testator (*musi*) as the manager of the estate of the decedent, and as an agent of heirs who are minor or absent.<sup>65</sup> The term "*waṣī*" also can mean "guardian." Accordingly, a *waṣī* is a legal guardian appointed by testament (*i.e.*, in a will) as executor of an estate.

Note that a *waṣī* is a specific type of agency relationship, as the person appointed to this position is serving as agent (*wakil*) on behalf of multiple principles: the testator, upon the death of the testator, and any minor or absent heirs. This fact illustrates a more general point about the *Shari'a*, namely, the widespread use of agents. In principle, there appears to be no barrier to a woman serving as a *waṣī*, though in practice the role seems to be filled by men.

The *waṣī* formally accepts the appointment as such, either before or after the death of the testator. Under *Hanafi fiqh*, a *waṣī* cannot reject the responsibility following the death of the *musi*. However, according to *Hanbali fiqh*, a *waṣī* may accept or reject the charge, even after the death of the *musi*.<sup>66</sup> If rejection occurs, it is not allowed to, and does not, disrupt, prevent, or otherwise affect the relevant duties to be carried out by a *waṣī*. Thus, to assure continuity in the event of rejection, the power to appoint an executor or guardian rests with a *Shari'a* court.<sup>67</sup> It is unusual for a *waṣī* to be remunerated services the *waṣī* provides, although a testator may set apart a sum of money for the *waṣī*.<sup>68</sup>

The essential job of any *waṣī* is to divide up the inheritance. Exactly what are the duties of a *waṣī*? First, the *waṣī* must collect the assets of the testator. Depending on the extent of the estate, it may be as simple as gathering a few items in a poor dwelling to as complicated as marshalling real and personal property in multiple jurisdictions. Second, the *waṣī* must discharge the debts of the decedent. Similarly, he or she also must cover any funeral expenses. Third, the *waṣī* must pay the legacies to the legatees in accordance with the will. Fourth, the *waṣī* must distribute the estate among the legal heirs.<sup>69</sup> In doing so, the *waṣī* applies the Qur'anic shares (*fard*s).

In dividing up an inheritance, a *waṣī* not only is an executor for the estate of a decedent. The *waṣī* also serves as an agent (*wakil*) for any heirs who are minor or absent. As an agent of minor or absent heirs, a *waṣī* must administer their inherited shares on their behalf. As an agent for minors, a *waṣī* has the powers of a guardian who is not the father or grandfather. As an agent for an heir who has

<sup>65</sup> See JOSEPH SCHACHT, AN INTRODUCTION TO ISLAMIC LAW 120, 173 (Oxford, England: Oxford University Press (Clarendon Paperbooks) 1982). [Hereinafter, Schacht.]

<sup>66</sup> See ABDULAZIZ, *supra*, at 116.

<sup>67</sup> See ABDULAZIZ, *supra*, at 116.

<sup>68</sup> See ABDULAZIZ, *supra*, at 145.

<sup>69</sup> See ASAF A.A. FYEE, OUTLINES OF MUHAMMADAN LAW 380 (Mumbai, India: Oxford University Press, 4th ed., 1999). [Hereinafter, FYEE.]

come of age, a *waṣī* is not quite as powerful. The *waṣī* cannot sell real property on behalf of an heir who has come of age.

Given the dual responsibilities of being both a guardian and agent, it necessarily is the case that not anyone can become a *waṣī*. Competence, or *ʿadala*, is a required qualification.<sup>70</sup> The standard is not "world class." It is sufficient for a *waṣī* to have a modest but proven standard of competence.<sup>71</sup> Nevertheless, the weighty responsibilities suggest that, ideally, the executor had better be quite skilled, not to mention honest.

A *waṣī* has "legal cover." The remove the *waṣī* is supervised by an Islamic judge (*qāḍī*). Indeed, in all instances, a *waṣī* operates under supervision of a *qāḍī*. Obviously, voluntary removal of a *waṣī*, i.e., termination of the duties of the *waṣī*, occurs when the *waṣī* fulfills the obligations of the *waṣī*.<sup>72</sup> The *qāḍī* can appoint himself (or herself) as *waṣī*, or remove an unscrupulous or incompetent *waṣī*. More specifically, the *qāḍī* may remove the *waṣī* if the *waṣī* is:<sup>73</sup>

- (1) Incompetent, that is, a poor manager or negligent about the duties assigned by the testator.
- (2) Defiant of the *Shari'a*.
- (3) Dishonest.
- (4) Medically incapacitated.

Note that dismissal from the role of a *waṣī* is the lowest level of punishment for poor management or negligence, or defiance of the *Shari'a*.<sup>74</sup> Additional sanctions are available in these instances and, presumably, in cases of corruption as well.

What liability does a *waṣī* bear in performing his tasks? The answer is it is restricted. For actions of the *waṣī* that are not malicious, but which detrimentally affect the heirs, most losses are borne by the estate.<sup>75</sup> Conversely, the *waṣī* is liable for willfully bad acts committed by him.

Suppose a testator fails to appoint a *waṣī*, and thereafter the courts also fail to make the appointment. Then, the legal heirs themselves become the legal representatives and administrators of the estate.<sup>76</sup> The estate devolves upon the heirs in specific shares at the time of the death of the testator, subject to the payment of debts, in proportion to the portion prescribed in the Qur'an for each heir, and to the payment of legacies.<sup>77</sup>

<sup>70</sup> ABDULAZIZ, *supra*, at 115.

<sup>71</sup> ABDULAZIZ, *supra*, at 115.

<sup>72</sup> See ABDULAZIZ, *supra*, at 128.

<sup>73</sup> See SCHACHT, *supra*, at 173; ABDULAZIZ, *supra*, at 129.

<sup>74</sup> See ABDULAZIZ, *supra*, at 139.

<sup>75</sup> See SCHACHT, *supra*, at 173.

<sup>76</sup> See SCHACHT, *supra*, at 120, 173; ABDULAZIZ, *supra*, at 114-131.

<sup>77</sup> See SCHACHT, *supra*, at 120, 173; ABDULAZIZ, *supra*, at 114-131.

A testator is not limited to one executor. A testator could appoint more than one *waṣī* (the Arabic plural is "*awṣiā*"), in which case they would act jointly and severally. Indeed, there is no restriction on the number of *awṣiā* a testator can assign. Similarly, *Shari'a* courts may appoint a temporary or replacement *waṣī*. They are likely to do so in a case in which a minor is left with no one to take care of her.<sup>78</sup>

## § 41.04 PAYMENT OF COSTS AND DEBTS

Under Islamic Inheritance Law, a prospective heir has an incentive to want as many prospective asset dispositions from the estate of a decedent as possible to be considered legacies, as distinct from debts to creditors of the decedent. Why? Because all debts must be paid off — there is no cap — before heirs take their prescribed shares. (Of course, a legacy is subject to the one-third cap.) Put bluntly, payment of debts from the gross estate reduces the size of the net estate available for distribution to heirs.

Islamic Inheritance Law is concerned directly with granting individual rights, namely, claims to portions of the estate of a decedent. Before any payment out of an estate is made to an heir, two items must be paid. First, the costs of the funeral of the decedent are due immediately at death. The size of these costs varies across families, places, and socio-economic contexts. While Islam forbids cremation of a decedent, and requires burial with the face of the decedent facing Mecca, it does not require surviving relatives to spend a fortune on a funeral, nor does it dictate an elaborate funeral.<sup>79</sup>

Second, any debts of the decedent must be paid. These, too, are due at death. What if the debts consume the entire estate, or worse yet, are larger than the estate? Then, the assets of the decedent are distributed to creditors *pari passu* (in proportion to the claims of the creditors). To what extent do the rights and obligations of a person continue past her death — for example, those associated with a contract? In general, they do not survive the death of the person. Most contracts are terminated by the death of a contracting party. Likewise, death of a partner can be a termination event in a partnership agreement. The surviving relatives of a decedent are not saddled with obligations of the decedent from her participation in a contract or business association.

Is there ever a case in which the debts of a decedent are not fully paid? The answer is "yes." In practice, surviving relatives may be impecunious and, therefore, simply cannot afford to pay off her debts. There is no requirement they bankrupt themselves, or do the impossible, to pay them off. Moreover, it is technically misleading to assert that the debts of the decedent "must" be paid by the heirs. It is not obligatory (*wājib*) for them to do so, in the sense of the Scale of Five Religious and Legal Qualifications. Rather, it is recommended (*mandub* or *mustahabb*) that the heirs cover those debts. In practice, the heirs may feel they are "required" to

<sup>78</sup> See ABDULAZIZ, *supra*, at 119, 126.

<sup>79</sup> A rather grim inference from the fact Muslims are buried facing Mecca is that in investigations about crimes, including war crimes and genocide, it is possible to identify the religion of victims (unless their bodies are callously tossed into mass graves).



do so not because of Islamic Law but rather to preserve their good name, and that of their family, in the community, and do pay due respect to the memory of the decedent.

#### § 41.05 LEGACIES AND ONE-THIRD LIMIT

After (1) costs of the funeral of a decedent, and (2) debts of the decedent are covered, the next item to be paid out of the gross estate of the decedent is a legacy. Under American rules on inheritance, there is no limit on the freedom of a testator to direct the disposition by will of his estate. A testator may direct all, some, or none of her estate to any one, or more, of the beneficiaries she chooses. That is not true under the *Shari'a*. The one-third restriction on the disposal by a testator (*musi*) of her property, plus the related matter of fixed inheritance shares, are poignant differences between the two legal regimes. To be sure, Islamic Inheritance Law does not presume to undermine the general support for freedom of ownership in Islamic Property Law. Rather, while taking that freedom as a starting point, it seeks to protect the interests of legal heirs in a family from possible disadvantage, even impoverishment.

The Arabic term for an "estate" is "*tarikah*." A *tarikah* consists of all the assets of a decedent. The assets are not just monetary, nor just capable of being reduced to money. For example, legal claims are considered assets. A claim to retaliate for a previous wrong, like a claim to blood money, also is part of an estate, and thus can be inherited.

The one-third limit, as the phrase suggests, is a straightforward rule. It applies to a "legacy," which is a disposition of assets through a will. The testator (the person who makes the will) decides how she wants her assets to be distributed upon her death. Subject to the one-third cap rule, a testator is free to direct this distribution through her will. A "legacy" is a particular type of "bequest." In turn, a "bequest" refers to the giving of property by a will, or to the property that is disposed of in a will.<sup>80</sup> The property typically is personal property. In sum, a "legacy" is a "bequest" via a will, and the "bequest" is the act of gifting the property through the will. In common parlance, however, the terms occasionally are used interchangeably.

Succinctly put, the *Shari'a* rule is a legacy cannot exceed one-third the total size of an estate. A testator (*musi*) can direct the disposition upon her death of no more than one-third of her estate (*tarikah*) during her lifetime by way of bequest. As just explained, a "bequest" is a gift, typically made through a will. Thus, of the total assets in an estate, the *musi* is free to direct their disposition, after her death, of up to one-third of them, to a beneficiary, or beneficiaries, he or she chooses.

Note that a distribution by legacy becomes void if the legatee (beneficiary) dies before the legator (testator). That is because the legatee must accept the legacy after the death of the legator. What if the legatee does not pre-decease the legator, but he or she passes away before accepting the legacy? Then, the right in the legacy

<sup>80</sup> See BLACK'S LAW DICTIONARY 179 (St. Paul, Minnesota: West, 9th ed., 2006), Bryan A. Garner, ed.) (entry for "bequest").

transfers automatically, without acceptance, to the heirs of the legatee.

Significantly, not anyone can be a beneficiary of a legacy. There are two notable exclusions from that status. First, a person who causes the death of the testator cannot profit from wrongdoing by being a beneficiary. Second, the class of potential beneficiaries excludes legal heirs. "Legal heirs" refers to close family relatives, both ascendants and descendants. That is, a "legal heir" is one who has a fixed share (*fard*) as designated by the Qur'an, otherwise known as "Qur'anic Heirs." Non-legal heirs essentially are outsiders, i.e., outside of a restricted family circle, such as Agnatic and Uterine Heirs. However, there is an exception: a Qur'anic Heir can be a beneficiary of a legacy if the other heirs consent. The logic here appears to be that the Qur'an already takes care of certain heirs, and unless they agree otherwise, and a testator should not alter their relative shares. Put differently, a testator should not be permitted to contract out of the *surah* 4, *ayat* 11-12 of the Qur'an, unless her affected relatives agree.

The prohibition on designating a legal heir for a bequest of up to one-third of an estate comes from the *Sunnah* of the Prophet. In particular, there is a *hadith* that states:

[T]here shall be no bequest to a legal heir.<sup>81</sup>

Arguably, this *hadith* is incongruous with *surah* 2, *ayat* 179-180 of the Qur'an:

...<sup>179</sup>When death approaches one of you and he leaves wealth,<sup>180</sup>it is prescribed that he should make a proper bequest to parents and close relatives — a duty incumbent on those who are mindful of God.<sup>82</sup>

This Qur'anic passage is an exhortation to a testator (*musi*), near death, to take care of her parents and close relatives. A scholar from the 11th century A.D., Ibn Hazm, goes so far as to read this passage as a mandate.<sup>83</sup> This reading (in effect, a literal interpretation of the word "bequest") is implemented in the 1946 inheritance law of Egypt.<sup>84</sup>

However, the widely accepted understanding of this Qur'anic passage is to the contrary. The duty of a testator (*musi*) is fulfilled by two events. First, she does not squander her estate while living, so there are meaningful assets left for parents and close relatives. Second, two-thirds of her estate is transferred to them upon her death.

<sup>81</sup> MOHAMMAD HASHIM KAMALI, THE RIGHT TO LIFE, SECURITY, PRIVACY AND OWNERSHIP IN ISLAM 293 (Cambridge, England: Islamic Texts Society, 2008). [Hereinafter, RIGHT TO LIFE.] While this *hadith* is widely accepted as authentic, unfortunately Professor Kamali does not provide a citation to any particular compiler.

<sup>82</sup> QUR'AN, *supra*, 2:179-180, at 20.

<sup>83</sup> The full name of Ibn Hazm is Abū Muhammad 'Alī ibn Ahmad ibn Sa'īd ibn Hazm. A jurist, historian, philosopher, and theologian, he was born in 994 A.D. in Córdoba, in Andalusia, in present-day Spain, and died in 1064 (456 A.H.). A leader of the Zāhiri School, he authored roughly 400 works, of which 400 survive. See Ibn Hazm, WIKIPEDIA, posted at [http://en.wikipedia.org/wiki/Ibn\\_Hazm](http://en.wikipedia.org/wiki/Ibn_Hazm).

<sup>84</sup> See RIGHT TO LIFE, *supra*, at 293 (referring to Law Number 71 of 1946). Professor Kamali lists in his bibliography the following work of Ibn Hazm: Muhammad bin 'Alī bin Ahmad bin Sa'īd al-Zāhiri, *Al-Muhallā* (Cairo, Egypt: Matba'ah al-Nahda, 1347 A.H., Ahmad M. Shākir, ed.).

Consequently, the above-quoted *hadith* is understood to mean that, as a corollary to the one-third limitation, a *musi* is not permitted to bequest one-third of her property to a legal heir, unless all heirs agree to that disposition. Note the exception — that the heirs could reach an accord that one of them should receive a special bequest — fits within the general respect of the *Sharī'a* for freedom of contract, ownership, and alienation of property. In brief, the only case in which a *musi* lawfully may direct the disposition of more than one-third of her estate to persons who are not her heirs is when the heirs (both the potential special beneficiary and all others) agree.

Significantly, in *Shī'ite* Islam, the corollary is different than this formulation. A testator can bequest up to one-third of her estate to a legal heir, regardless of the agreement of the other heirs, under either of the conditions. First, if there is "good cause," then a legal heir may be a beneficiary. That phrase, to an American trained lawyer, opens a potentially large loophole. Second, a legal heir may receive a bequest "to overcome a possible rigidity that may result from strict application of the rules of inheritance."

What happens to the remaining two-thirds of the estate? The answer is those assets must go to legal heirs of the decedent. Moreover, the amount each heir receives is strictly fixed according to shares (*farḍ*), which are set out in the Qur'ān (in *surah* 4, *ayah* 11-12). Who are the legal heirs? They are the family, specifically, close relatives, of the testator. Once the testator (*musi*) dies, of course, she is known as the "decedent." Thus, the legal heirs are the surviving close family members of the decedent. They include sons and daughters, the husband, the wife or wives, sisters, parents, and grandparents. They also include some descendants of these relatives. Each person is entitled to inherit a share of the estate of the decedent, the share being fixed in accordance with her status.

That entitlement is realized independently, and regardless of the wishes of, the decedent. It does not matter whether the decedent loved or despised a particular heir. Indeed, the decedent (when alive as testator) is expected not to interfere with the inheritance rights of the heirs, and cannot alter their shares, as the Qur'ān sets them out.

What is the purpose of the one-third limit on legacies? Professor Schacht argues that Inheritance Law is the area of the *Sharī'a* "farthest removed from the action of moral principles."<sup>85</sup>

He uses as his illustration the limitation on legacies to one-third the size of the estate of a decedent. What motivates the rule is a fiscal purpose — garnering revenues if there is no kin to claim the other two-thirds of the assets. This purpose became evident during the *Umayyad* Caliphate (661-750 A.D.), when the *Sharī'a* began to take shape into a more complete and mature legal system, in terms of both jurisprudence and administration.

The argument is that the *Umayyad* Caliphs, hungry for revenue to fund their rapidly expanding empire, did not want decedents to direct the entirety of their estate (*tarika*) to named beneficiaries. Therefore, they were eager to institutionalize

the practice of the one-third limit. By restricting a *musi* to a one-third bequest, the Caliphs could be assured the other two-thirds would be distributed to the legal heirs of the decedent as per the Qur'ānic shares. This distribution would lessen the risk that the heirs would become destitute, and turn to the *Umayyad* government for some kind of public assistance. Put in accounting terms, the heirs would not be a contingent liability on the state. And, what if the decedent did not have any legal heirs? Then, the remainder two-thirds of her estate would go to the public treasury (*bayt al-māl*), conveniently located in the courtyard of the *Umayyad* Mosque in Damascus. (It still can be viewed.) If there is no bequest, then the full estate goes to the treasury ultimately controlled by the *Umayyad* Caliphs.

This argument is perhaps a bit cynical. To be sure, the fact two-thirds of every estate (*tarika*) must be distributed to legal heirs helps prevent those heirs from falling into poverty and dependence on social services provided at government expense. Moreover, government coffers are helped by the one-third limit. Similarly, the public treasury gains from a decedent with no family, or whose family members are unknown. Yet, Islamic Inheritance Law is not motivated simply to safeguard or enrich the official treasury (*bayt al-māl*), nor is it limited to the details of how to disseminate assets of a decedent.

The Qur'ān puts Inheritance Law on a religious footing with two specific goals:

- (1) Protection of the family.
- (2) Diffusion of wealth.

As to the first aim, the share distribution scheme for two-thirds of the estate (*tarika*) envisions a broad number of persons (albeit all in one family) related to the decedent. *Surah* 16, *ayah* 90 of the Qur'ān says:

God commands justice, doing good, and generosity towards relatives and He forbids what is shameful, blameworthy, and oppressive.<sup>86</sup>

Indeed, the Qur'ān allots shares in the estate of a decedent to many family members, some of whom are people whose status entitled them to nothing under pre-Islamic customary law.<sup>87</sup> These legal heirs are guaranteed a share of at least two-thirds of the estate, and cannot be disinherited on the whim of the testator. Their inheritance share is a safety net, however partial, against economic hardship. That is not to say legal heirs all become "trust babies" with no need to generate their own income. The value of their inheritance, and how much of a cushion it is against difficulty, depends from family to family, and on general economic conditions. But, at least the share is something.

Second, the one-third limitation on legacies is a check against excessive concentration of wealth. The Qur'ān, in *surah* 59, *ayah* 7, explains:

Whatever gains God has turned over to His Messenger [the Prophet Muhammad] from the inhabitants of the villages belong to God, the Messenger, kinsfolk, orphans, the needy, the traveler in need — *this is so*

<sup>86</sup> Qur'ān, *supra*, 16:90 at 172.

<sup>87</sup> See Schacht, *supra*, at 14.

<sup>85</sup> Schacht, *supra*, at 14.



*that they do not just circulate among those of you who are rich — so accept whatever the Messenger gives you, and abstain from whatever he forbids you.*<sup>88</sup>

Certainly, this passage is an accreditation of Muhammad, and is not set in the particular context of inheritance (unlike *surah* 4, *ayat* 11-12). Moreover, the one-third restriction hardly is a perfect check against sclerotic circulation, as the monstrous income inequities in many Muslim countries make all too obvious. Still, the passage articulates a concern animating throughout the Qur'an about fairness, and the legal fact is that a rich testator in even the most powerful of families cannot keep the final one-third of her assets in the family. The well-off *musi* may pass them on to other well-to-do interests, which only reinforces an asymmetric *status quo*. But, that choice runs counter to the concern articulated in *surah* 59, *ayah* 7. If she selects the poor or needy for one-third of her estate, possibly by designating an appropriate charitable foundation (*waqf*), then she will have advanced the cause of social justice, which the Qur'an champions.

A follow-up question is whether Islamic Inheritance Law is inefficient in its effects. In particular, does the two-thirds share distribution scheme result in "excessive dismemberment of property," as Professor Kamali puts it?<sup>89</sup> Does the scheme break up plots of arable land and robust family enterprises, when from an efficiency standpoint these ventures could continue to realize economies of scale (namely, declining long-run average costs) if they held together? The answer is "yes and no." It is "yes," in that sub-division of efficient agricultural, manufacturing, and services units occurs, depending on the family in question. But, it is "no" in that it is not the scheme *per se* to blame. It is the family members themselves who prevent continuation of the business successes of the decedent. Islamic Inheritance Law does not bar them from operating their shares as joint owners, and working together as partners. Their human frailties — ennu, incompetence, ego, greed, or some combination thereof — yield inefficient outcomes.

As a final consideration: what would happen if a testator (*musi*) were to flout the one-third restriction and establish a legacy that exceeded one-third of the estate? Simply, the legacy would be reduced to one-third. How would this reduction occur? The obvious means would be to cut the amounts directed to each beneficiary *pro passu*, i.e., in proportion to the size of the amount vis-à-vis the total legacy. (For example, a beneficiary getting 50 percent of the legacy would have his share cut in half, and a beneficiary getting 25 percent of the legacy would have his share cut in one-quarter.) However, that is not the means chosen. Unless the heirs approve of a different methodology, a complicated system is used that is based on the priorities of the beneficiaries.<sup>90</sup>

<sup>88</sup> Qur'an, *supra*, 59:7 at 366 (emphasis added).

<sup>89</sup> RIGHT TO LIFE, *supra*, at 253 (Cambridge, England: Islamic Texts Society, 2008).

<sup>90</sup> See SCHACHT, *supra*, at 174.

## § 41.06 CHARITABLE TRUSTS (WAQFS)

### [A] Origins and Definition of "Waqf"

Frankly put, it is an ignorance or arrogance of American legal scholarship to claim that certain institutions are unique to the non-Muslim western world. One illustration is the declaration by Professor Frederic W. Maitland (1850-1906), a leading British jurist and legal historian. He famously declared:

[The institution of the trust] perhaps forms the most distinctive achievement of English lawyers. It seems to us essential to civilization and yet there is nothing quite like it in foreign law.<sup>91</sup>

This declaration actually is erroneous. Islamic Law invented a nearly identical institution roughly 500 years before the trust appeared in English Law. That invention is the "*waqf*." It may well be that the first treatise ever devoted to the topic, and possibly to any single legal subject, is that of Al-Khaṣṣāf. In the 9th century A.D., he wrote *Ahkām al-Waqf*, which in modern American parlance is about the law of trusts. At a minimum, this treatise shows that the *waqf* long pre-dates the English trust, and more generally that the *Shari'a* was well advanced when English law hardly was not yet in its infancy.<sup>92</sup> Nowadays, the two instruments — the Islamic *waqf* and the English (and by extension, American) trust — are in many respects identical. Both serve as an efficient mechanism to convey property to charitable institutions and surviving family members.

It is a fact recognized in the Qur'an that not all persons are competent to manage assets in prudent manner. To such weak-minded individuals, called "*safahā*," who are prone to profligacy or otherwise cannot be entrusted with property, a property owner ought not to give money. Rather, *surah* 4, *ayah* 5 states:

Do not entrust *your* property to the feeble-minded [*al-safahā*]. God has made it a means of support for *you*: make provision for them from it, clothe them, and address them kindly.<sup>93</sup>

It is important to abjure a pejorative connotation to the adjective "feeble-minded," and rather think in terms of the helpless, or the weak of understanding.

That is, the *Shari'a* envisions smart wealth management on behalf of people who cannot help themselves, either now or ever. *Surah* 4, *ayah* 6 explains:

Test orphans until they reach marriageable age; then, if you find they have sound judgment, hand over their property to them. Do not consume it wastefully before they come of age: if the guardian is well off he should abstain from the orphan's property, and if he is poor he should use only

<sup>91</sup> F.W. Maitland, *Uses and Trusts*, in *EQUITY: A COURSE OF LECTURES* (rev'd. by J. Brunyate) (Cambridge, England: Cambridge University Press, 1996).

<sup>92</sup> See AL-KHAṢṢĀF, *AHKĀM AL-WAQF* (Bloomington, Indiana: Xlibris, 2008) (Gilbert Paul Verbit, trans.).

<sup>93</sup> Emphasis added.

what is fair. When you give them their property, call witnesses in; God takes full account of everything you do.<sup>94</sup>

Manifestly, persons in need of help "now" include orphans, and *surah* 4, *ayah* 10 emphatically defends their interests:

Those who consume the property of orphans unjustly are actually swallowing fire into their own bellies: they will burn in the blazing Flame.<sup>95</sup>

Similarly, widows need help "now," and depending on the circumstance, possibly for the remainder of their lives. Similarly, the New Testament of the Bible exhorts the faithful to defend widows and orphans, stating in *The Letter of James*:

Religion that is pure and undefiled before God and the Father is this: to care for orphans and widows in their affliction and to keep oneself unstained by the world.<sup>96</sup>

In a different (but not always mutually exclusive) category are the mentally incompetent, who need long-term, if not permanent, prudent asset management on their behalf.

Accordingly, legal and even judicial interdiction (*al-hajr*) is permissible to ensure the prudent management of assets. To be sure, those assets are private property, hence the use of the second person possessive ("your") and second person pronoun ("you") in *surah* 4 *ayah* 5 of the Qur'an. But, there are public interests at stake, too, and private ownership must heed to them. First, the feeble need help, so that they are not put out on the streets begging. Second, the community (or society at large) ought not to become ever-more stratified by income inequality.

The quintessential vehicle for prudent management to protect these community interests is a charitable trust, pious foundation, or *mortmain* (from the French, literally, "dead hand," known in Arabic as "*waqf*"). That legal entity can manage donated property wisely, and thereby take care of persons who otherwise would be penurious owing to their fiscal irresponsibility, mental incompetency, or other unfortunate station in life. In the post-9/11 environment, *waqfs* have attracted considerable attention as vehicles for financing terrorism and laundering money. Some charitable trusts have been abused by their sponsors for evil purposes, and any involvement or transactions with such *waqfs* can trigger serious penalties under United States Criminal Law. Yet, the majority of *waqfs* are established and run for good-hearted reasons.

Accordingly, a "*waqf*" is a form of property, or a property law institution, which typically is translated as a "charitable trust." Professor Hussein synthesizes the

<sup>94</sup> Qur'an, *supra*, 4:6 at 50-51.

<sup>95</sup> Qur'an, *supra*, 4:10 at 51.

<sup>96</sup> *The Letter of James*, 1:27, in *THE CATHOLIC STUDY BIBLE* 371 (New York, New York: Oxford University Press, 1990, New American Bible trans.). Likewise, as the commentary on this passage observes:

In the Old Testament, orphans and widows are classical examples of the defenseless and oppressed.

*Id.*, fn. 1, 27, at 371.

definition of the term rendered by Muslim scholars thusly:

[a] *waqf* is the permanent dedication by a Muslim of any property for religious or charitable purposes, or for the benefit of the founder and his descendants, in such a way that the owner's right is extinguished, and the property is considered to belong to God.<sup>97</sup>

However, the rendition into English of "*waqf*" as "trust," when it occurs, is inaccurate. As Professor Hussain observes, there are six key differences between a *waqf* and a trust:

1. A *waqf* should be created for a religious and/or charitable purpose recognized by *Shariah*. A trust may be created for any lawful purpose.
2. The founder of a *waqf* cannot take any benefit for himself (except to some extent according to the *Hanafi* School). The founder of a trust may be a beneficiary.
3. Property in a *waqf* vests in God. Property of a trust vests in the trustee.
4. The *mutawalli* [i.e., administrator of the *waqf*] acts essentially as a supervisor and has fewer powers than a trustee.
5. A *waqf* must be perpetual, irrevocable, and unalienable. It is not essential for a trust to have these characteristics.
6. A *waqf*, unlike a trust, does not result for the benefit of its founder, when its objects are exhausted. It is applied for some purpose which is similar to its original objects.<sup>98</sup>

The third distinction is particularly striking, and easily illustrates the different spirit animating a Sacred versus Secular legal system.

The founder of a *waqf* is called the "*waqif*," and the act of creating one is entirely voluntary. In American legal parlance, the "*waqif*" is the "settlor." As long as the founder is a mentally competent Muslim adult, the founder may be a man or woman. Interestingly, in keeping with the one-third limit on legacies, the size of a *waqf* made by a founder on her deathbed cannot exceed one-third of the gross estate, unless the heirs of the founder consent otherwise.<sup>99</sup>

A *waqif* sets up a *waqf* orally or in writing, and transfers assets to it:

The settlor, or *wakif*, typically transfers property to the analogue of the trustee, the *mutawalli*. Not uncommonly, the *waqf* instrument will name the *mutawalli* and provide for successors, just as in the case of a trust.<sup>100</sup>

<sup>97</sup> JAMILA HUSSAIN, *ISLAMIC LAW AND SOCIETY — AN INTRODUCTION* 114 (Annandale, New South Wales, Australia: The Federation Press, 1999). [Hereinafter, HUSSAIN.]

<sup>98</sup> HUSSAIN, *supra*, at 115.

<sup>99</sup> See HUSSAIN, *supra*, at 115.

<sup>100</sup> Jeffrey Schoenblum, *The Role of Legal Doctrine in the Decline of the Islamic Waqf: A Comparison with the Trust*, 32 *VANDERBILT JOURNAL OF TRANSNATIONAL LAW* 1191, 1194-97 (October 1999). [Hereinafter, Schoenblum.]



The *waqf* can create a *waqf* for any purpose, as long as that purpose is not incompatible with Islam. For example, that the *Haram al-Sharif* in Jerusalem, commonly known as the Dome of the Rock, is administered by a *waqf*.<sup>101</sup> There, the *Al Aqsa* Mosque is located. The compound is called the "Noble Sanctuary." Of course, East Jerusalem was annexed by Israel after the June 1967 War. However, Israel allows a *waqf* to run the Mosque.

The term "*mortmain*" refers to a form of ownership or possession of land or buildings by an ecclesiastical (i.e., church, mosque, or other religious assembly or congregation) corporation.<sup>102</sup> The corporation is not permitted to alienate (sell or transfer) the property. Thus, if property is "*in mortmain*," then it means it is unalienable in respect of ownership or possession. That is true of assets put into a *waqf*. The typical sorts of assets that are placed in a *waqf* are immovable property, such as real estate. However, movable property also can be placed in a *waqf*, such as cash or a school bus. The key requirement simply is that the property exists and is owned by the founder (*waqif*) at the time the *waqf* is established.<sup>103</sup> Note that an undivided share of jointly owned property cannot be turned into a *waqf* if that property is designated for a mosque or cemetery, though it may be valid to do so for other purposes.<sup>104</sup>

The concept of a *waqf* arose from four roots.<sup>105</sup> First, the Prophet Muhammad called upon his followers in Medina for contributions to a holy war (*jihād*) in which they were engaged (e.g., against non-believers). Second, early Muslims established charities and other public benefactions. Third, the successors to the First Islamic Community had a practical need to offset some of the distributional effects of the application of the *Shari'a* rules on succession. Finally, pious foundations, known in Latin as *piae causae*, existed among Eastern (Byzantine) Christian Churches.<sup>106</sup>

Because the *Shari'a* does not contain the concept of a "legal person," a *waqf* is not considered to be such. Rather, a *waqf* is viewed as a foundation through which the property (the "substance," or "*res*" in Latin, or "*ayn*" in Arabic) owned by the founder of the *waqf* is withdrawn from circulation, and the proceeds are spent for a charitable purpose. Exactly who owns the owner of the assets — the "*res*" or "*ayn*" — is a matter of debate among the Four *Sunni* Schools of Law. The proceeds of a *waqf*, that is, funds generated by assets in the charitable trust, are called "*manāfi*" (singular, "*manfa'a*").

<sup>101</sup> See *Palestinians, Jews Clash at Holy Sites*, WASHINGTON TIMES, 30 July 2001, at A1.

<sup>102</sup> The adjective "ecclesiastical" comes from the Greek noun "*ekklesia*" (*ekklesia*), which was the legislative assembly of Ancient Athens.

<sup>103</sup> See HUSSAIN, *supra*, at 114.

<sup>104</sup> See HUSSAIN, *supra*, at 115.

<sup>105</sup> See SCHACHT, *supra*, at 19.

<sup>106</sup> "*Piae causae*" literally means "pious causes," or "devout causes." "*Piae*" is the feminine plural nominative case word meaning "pious," "devout," or "religious." "*Causae*" is the feminine plural nominative case word meaning "cause," "reason," "motive," or "occasion."

## [B] Three Conditions about Purpose

Under *Hanafi* School jurisprudence, an essential feature of any *waqf* concerns its purpose.<sup>107</sup> There are three key conditions. First, a *waqf* must have a purpose. Second, the purpose must be permanent. Third, the purpose must not be incompatible with Islam.

To say that a *waqf* must have a "purpose" means there always must be an identifiable beneficiary. In particular, the original beneficiaries, to whom the proceeds are to be distributed, must exist. In the event the original beneficiaries all die out, there must be subsidiary beneficiaries. Moreover, the purpose must exist before the death of the founder (*waqif*), or at least be capable of being identified with reasonable certainty.<sup>108</sup>

To say the purpose must be "permanent" means what it suggests: once property is put in the *waqf* for the designated purpose, that property cannot be directed to other aims. That is, the purpose is perpetual and absolute. In *Shi'ite* jurisprudence, it is unconditional as well.<sup>109</sup>

Finally, to say the purpose must not be "incompatible with Islam" means the *waqf* cannot be used to fund activities that would be contrary to the *Shari'a*. For example, a charitable trust could not be set up to brew and distribute beer, or raise pigs for pork. It might, therefore, be ventured that a *waqf* set up to funnel support for violent activities, purportedly in the name of a "holy war," but the effect of which is to kill and maim innocent civilians, is antithetical to the *Shari'a*.

To ensure these purposes are satisfied, a *waqf* is administered by a "*mutawali*." The *mutawali* often is the founder (settlor) of the *waqf*, who then may appoint a successor.<sup>110</sup> If no successor is appointed, then an Islamic judge (*qādi*) can appoint the successor. Both women and non-Muslims can serve as a *mutawali*, and the *mutawali* may be compensated for services rendered, presumably from the funds of the *waqf*.

## [C] Types of Waqf

A *waqf* may be public or private. Professor Hussain summarizes the differences between the two types:

- *Waqf al Ahli* — family *waqf*. This kind is created for the benefit of the founder and his relatives to provide for their needs during their lifetime, and after their death, to be used for charitable purposes.
- *Waqf al Khayri*. This kind of *waqf* is created for religious and/or charitable purposes from the outset. It may be for the welfare of poor people or for the establishment and/or upkeep of a mosque, hospital, cemetery, or other

<sup>107</sup> See SCHACHT, *supra*, at 96, 205.

<sup>108</sup> See HUSSAIN, *supra*, at 114-115.

<sup>109</sup> See HUSSAIN, *supra*, at 114.

<sup>110</sup> See HUSSAIN, *supra*, at 114.

public facility.<sup>111</sup>

Accordingly, a public *waqf* also is called a "charitable" *waqf*. In Arabic, the term is "*waqf khayri*," or "*waqf al khayri*." (Thus, transliteration of "*waqfs*" as "charitable trusts" can be ambiguous. The reference may be to public and private *waqfs*, or specifically to public *waqfs*.) The purpose of a public or charitable *waqf* is, as its name suggests, an eleemosynary one involving more than just the family members of the founder.

In contrast, a private *waqf* also is called a "family *waqf*." In Arabic, a family *waqf* is a "*waqf ahli*," "*waqf al ahli*," or "*dhurri*." Even though beneficiaries are not the public at large (except, possibly, as subsidiary beneficiaries), a family *waqf* still is considered in the *Shari'a* to be a charity. So, the same rules apply to public or private *waqfs*.<sup>112</sup>

According to *Hanafi* School jurisprudence, the condition that a family *waqf* have a permanent purpose means there always must be beneficiaries in the family line connected with the founder of the *waqf* (i.e., descendants of the founder). What happens if the family line ends? To safeguard against this possibility, some other permanent purpose must be designated.<sup>113</sup> For example, the poor may be appointed as subsidiary beneficiaries. That is, in the absence of clear beneficiaries not related to the founder, the *waqf* would revert to the poor. The designation of subsidiary beneficiaries may occur in the legal instrument establishing the family *waqf*.

Interestingly, during the days of the British Raj in India, the Privy Council held in a famous 1894 case, *Abul Fata v. Russomay*, that this reversionary interest of the poor was illusory.<sup>114</sup> It further held that Islamic Law forbids a family *waqf* with the poor as subsidiary beneficiaries. The Privy Council reasoned that this family *waqf* was a gift of inalienable life-interests to remote unborn generations of descendants, and the *Shari'a* does not permit such gifts. The Privy Council decision raised howls from the Muslim community in India, because it struck down an Islamic property law institution — the family *waqf* — that was both significant and practical. The decision was reversed through two legislative acts. The first one, the *Mussalman Wakf Validating Act of 1913*, reinstated Islamic jurisprudence on family *waqfs*. But, it was not retroactive, thus in 1922 the Privy Council held that family *waqfs* pre-dating the Act were invalid. The second law, the *Mussalman Wakf Validating Act of 1930*, rendered the first one retroactive.

Today, not every Muslim country has the property law institution of the "public *wakf*." In 1956, Tunisia enacted modernist legislation abolishing public *waqfs*. The assets of all public *waqfs* were transferred to the ownership of the state.<sup>115</sup> Also that year, Tunisia did away with private *waqfs*. Syria in 1949, and Egypt in 1952,

<sup>111</sup> HUBBAIN, *supra*, at 114.

<sup>112</sup> See SCHRAGT, *supra*, fn. 1 at 126.

<sup>113</sup> See SCHRAGT, *supra*, 96-97.

<sup>114</sup> 22 *Law Reports*, Indian Appeals, 76. The case and legislation are discussed in SCHRAGT, *supra*, at 96-97.

<sup>115</sup> See SCHRAGT, *supra*, 108.

abolished private *waqfs*, but not taken the more dramatic step that Tunisia did to terminate public *waqfs*.<sup>116</sup>

## [D] *Shi'ite Distinctions*

There is a distinction between *Sunni* and *Shi'ite* Inheritance Law, relevant to estate planning.<sup>117</sup> This distinction appears to be relevant to a family *waqf* (*waqf ahli*, *waqf al ahli*, or *dhurri*). What happens when no *mutawali* was originally appointed? *Sunni* jurists often view this omission as a fatal defect, undercutting the validity of a *waqf* altogether. *Shi'ite* jurists often consider the beneficiary to be the *mutawali* (presumably, one named subsequently to the creation of the *waqf*).

The *mutawali* generally has power to administer the property held in *waqf*, although only upon the express approval of the court or the creating instrument may he actually sell the property. If sold, the proceeds may have to be reinvested in like-kind property.<sup>118</sup>

That is, it appears the status of a *mutawali* as beneficiary may be linked to the powers of a *mutawali* over the assets.

A second noteworthy distinction between *Sunni* and *Shi'ite* Inheritance Law concerns intestate succession. The difference is not on religious grounds, but stems from historical circumstances relating to the *Sunni* — *Shi'a* schism. One expert explains:

Sunni law is much more generous to the pre-Islamic agnatic [i.e., male line of relatives] tribal heirs than Shi'i law; and intestate succession, where, for example, in Sunni law there may be no bequest in favour of an heir entitled on intestacy, and no bequest in excess of one-third of the net estate to anyone, without the consent of the heirs after the death of the testator — but where in Shi'i law a bequest may be made in favour of an heir, and bequests in excess of one-third may be consented to before or after the testator's death.<sup>119</sup>

The issue is this: suppose a decedent dies intestate and leaves an heir. Is it permissible to give that heir a specific bequest from the net estate? Under *Sunni* law, the answer is no, unless all other heirs consent after the testator dies. Under *Shi'ite* law, the answer is yes. Moreover, consent may be given before or after the death of the testator, and the bequest may exceed the one-third limit.

<sup>116</sup> See SCHRAGT, *supra*, 103, 108.

<sup>117</sup> See Schoenbaum, *supra*, at 1191, 1194-97. This article gives considerable credit to FYZEE, *supra*, 387-467 as the authoritative source on *waqfs*, especially their technicalities and difference between *Sunni* and *Shi'a* rules.

<sup>118</sup> Schoenbaum, *supra*, at 1191, 1194-97.

<sup>119</sup> KEITH HODGKINSON, *MUSLIM FAMILY LAW: A SOURCEBOOK* 8-9 (London: Croom Helm, 1984).



## § 41.07 EUTHANASIA

## [A] Definitions and Categories

"Euthanasia" is originally an Ancient Greek word meaning "a good and honorable death," resulting from the combination of "*eu*" (goodly or well) and "*thanatos*" (death).<sup>120</sup> Modern medical dictionaries tend to alter that meaning, taking out "goodness" and "honor," and refer to "euthanasia" in terms such as "mercy killing" or a "quiet, painless death,"<sup>121</sup> typically induced deliberately by a doctor following persistent requests from a patient who suffers from an incurable, tortuous ailment.<sup>122</sup> Father Hardon elaborates on the evolution in the meaning:

[Euthanasia] [literally] [means] "easy death," the act or practice of putting people to death because they or others decide that continued life would be burdensome. Originally, the term was used for "mercy killing," which meant administration of an easy, painless death to one who was suffering from an incurable and perhaps agonizing disability or disease. Then, as mass genocide was legalized under Communism and Nazism, the term came to be applied to all forms of inflicting death on persons who are, by legal standards, permitted to take their own lives or others are allowed to do so with the full protection of the civil law.<sup>123</sup>

Evidently, the Ancient Greeks thought a good, honorable death would be voluntary (in effect, suicide). Never would such a death be inflicted by another person, for if it were it would not be "good." Thus, what occurred in the 20th century in the worst excesses of Fascism, in Hitler's Germany, and of Communism, in Stalin's Russia and Mao's China, was not just "bad," but evil: the deaths of tens of millions of people, including not only through forced abortions, but also through killing persons deemed of no value to society.

In contemporary times, euthanasia is divided into two types: voluntary or involuntary. "Voluntary" euthanasia occurs when a patient actively expresses her wish to die. Death is brought about by the administration of lethal drugs, in which case the termination of life is called "active euthanasia." Alternatively, death may be caused by the withdrawal of life support treatment, a process known as "passive euthanasia." With active euthanasia, a medical professional is involved in ending the life of the patient. That is, but for the act of the doctor, the patient might not have died. With passive euthanasia, the doctor is aware of the condition of the patient. But, neither the doctor nor any actions by the doctor or other medical professionals are the immediate cause of death. Categorizing an instance of euthanasia as "voluntary," whether it is "active" or "passive," hinges on two key questions. First, is the patient capable of making a sound decision? This question concerns both law and science. Second, is the right to live accompanied by the right to die? This

<sup>120</sup> See SHARIAH LAW, *supra*, at 47-52.

<sup>121</sup> See, e.g., <http://medical-dictionary.thefreedictionary.com/euthanasia> (definition of "euthanasia").

<sup>122</sup> See, e.g., [www.medterms.com/script/main/art.asp?articlekey=7365](http://www.medterms.com/script/main/art.asp?articlekey=7365) (definition of "euthanasia").

<sup>123</sup> JOHN A. HARDON, S.J., MODERN CATHOLIC DICTIONARY 196-197 (Doubleday: Garden City, New York, 1980) (entry for "euthanasia"). [Hereinafter, CATHOLIC DICTIONARY.]

question involves law, religion, and morality. Opposition to voluntary euthanasia revolves around these two questions.

"Involuntary" euthanasia is an act that accelerates death and originates from the wishes of the legal guardian of the patient. Typically, the patient is comatose or in a vegetative state. Opposition to involuntary euthanasia is based on the proposition that neither a legal guardian nor doctor may interfere with the inalienable right to life to which any patient is entitled. Opponents argue by analogy to a right to property. A right to property is incomplete unless the owner has full control over property, and thereby can destroy it. Likewise, the right to life is incomplete unless a person has full control over her life, including the right to die. This rationale supports organ donation: the right of ownership over one's body justifies the ability to donate organs from one's body.

These arguments are not invulnerable. First, the property analogy can be questioned: there are limits to the right to ownership. Legally, a property owner may be restricted from using her property in a manner that adversely affects others. Religiously and morally, it would be wrong for a factory owner to burn down her plant if the result is to render unemployed all of the workers. Second, asserting an inalienable right to life omits a salient point for religious adherents: God is the author of life, which means that as only He can create life, only He has — or should have — the power to destroy it. For a legal guardian or doctor to cause the death of a patient is to trespass on the province of God. This point holds equally true for voluntary euthanasia.

[B] View of *Shari'a*

The Qur'an clearly opposes the infliction of harm to another or death to oneself. *Surah* 4, *ayah* 29 states:

. . . Do not kill each other, for God is merciful to you.<sup>124</sup>

Similarly, *surah* 2, *ayah* 195 provides:

Spend in God's cause: do not contribute to your destruction with your own hands, but do good, for God loves those who do good.<sup>125</sup>

This opposition is reinforced by the *Sunnah* of the Prophet. Sahih Bukhari narrates a *hadith* regarding suicide, as transmitted by Abū Hurairah:

The Prophet . . . said, "He who commits suicide by throttling shall keep on throttling himself in the Hell-Fire and he who commits suicide by stabbing himself shall keep on stabbing himself in the Hell-fire."<sup>126</sup>

Based on the Qur'an and *hadith*, the rule, as it were, is unambiguous: the *Shari'a* forbids suicide or self-inflicted harm, and the killing of another. Hardship is never a legitimate justification for losing faith or hope in the mercy of Allāh to alleviate

<sup>124</sup> Qur'an, *supra*, 4:29 at 53.

<sup>125</sup> Qur'an, *supra*, 2:195 at 22.

<sup>126</sup> THE TRANSLATION OF THE MEANINGS OF SAHIH AL-BUKHARI, ARABIC-ENGLISH by Dr. Muhammad Muhsin Khan, vol. II, p. 253, *hadith* no. 446 (Dar Ahya Us-Sunnah, Al Nabawiya, March 1978).

pain. Indeed, the Islamic theme of performing good deeds until the last breath is heavily emphasized, as is patience with hardship. Put succinctly, euthanasia is not simply *makrūh* (reprehensible), it is very nearly always *ḥarām* (forbidden).

Does the same rule apply to passive euthanasia? Sheikh Yusuf Al-Qaradawi speaks of passive euthanasia in an example in which he attempts to examine what would occur in their natural course.<sup>127</sup> Omar, a hypothetical terminal cancer patient, will die if his treatment is discontinued, although there is no hope for cure of his condition. Discontinuing his treatment only will speed up his death, but which would thereby end his suffering. Without continuing the treatment, the natural course of events continues, and the law of causation, *i.e.*, natural cause-and-effect, operates.

Is it, then, religiously and morally correct for a person to seek treatment for her illness? Conversely, is discontinuation of medical treatment appropriate from the perspective of the *Sharī'a*? Among Islamic legal scholars, the following positions exist:

- (1) Some scholars argue that treatment is only *mubāh* (permissible), but not required.
- (2) Other scholars, in the *Shāfi'i* and *Ḥanbalī* Schools, regard treatment as *mustahabb* (recommended).
- (3) Still other scholars weigh whether the desires of a patient, or treatment of sickness, is more important under the *Sharī'a*. However, Al-Ghazali, in his chapter on *tawakkul* (trust in God (Allāh)), refutes the idea of balancing these two interests. That is, he disagrees with the proposition that rejection of medication is recommended. To the contrary, administering treatment is recommended.
- (4) Still another group of scholars regard seeking treatment as *wājib* (obligatory).
- (5) Sheikh Al-Qaradawi concludes that seeking treatment is either *wājib* or *mustahabb*, with possible exceptions in individual circumstances.

There is yet another, and primary, source for discerning what is religiously and morally acceptable in respect of euthanasia: the *Sunnah* of the Prophet.

From that *sirah* (way of life), there is evidence of Muhammad encouraging treatment for illness, but only in hopeful cases where an ill person is likely to survive. In instances of no hope for recovery, apparently he considered treatment of the patient neither *wājib* nor *mustahabb*. In other words, the attitude of "letting nature take its course" is neither *ḥarām* nor *makrūh*. Why? The rationale seems to be pragmatic. By keeping a terminally ill patient in a vegetative condition, running on life support, the consequences are adverse: depletion of the financial resources of the family; inflicting pain on the family if not the patient, too; and prolonging an inevitable outcome. However, suppose a doctor takes affirmative steps, such as injecting poison or a drug with the intention of killing the patient, while the possibility of improvement exists for the patient. Such an action clearly is *ḥarām*. It

<sup>127</sup> See discussion on euthanasia found in *SHARIAH LAW*, *supra*, at 47-52.

constitutes murder, even if the physician acted with the intention of ceasing the pain of the patient.

In sum, while there is debate as to active intervention via medical treatment, euthanasia almost always is *ḥarām* under the *Sharī'a*. It runs counter to the general (albeit not invariable) bar against destruction of life, whether self-inflicted or inflicted by a third party, and whether voluntary or involuntary. Only in rare cases, in which there is no chance of survival, may euthanasia (mostly in a passive form) be allowed. Those cases typically involve a patient who is brain dead or in a permanent vegetative form.

### [C] SYNOPSIS of American Law and Catholic Christian Teaching

In 1976, the United States Supreme Court confronted the question of euthanasia in the celebrated case of *In re Quinlan*.<sup>128</sup> The Supreme Court held that it was permissible for doctors to remove a comatose patient from life support, a judgment that favored the parents of a woman (Karen Ann Quinlan) who had been kept alive via artificial ventilation and who petitioned for removal of this support. The patient, 21-year old Karen Ann Quinlan, passed out and stopped breathing for two periods of 15 minutes each after ingesting alcohol and tranquilizers. Doctors determined she was in a persistent vegetative state, but her primary physician and the hospital at which she was treated refused the request of her father to remove her from an artificial ventilator. The New Jersey Supreme Court agreed that the father could order the cessation of ventilation,<sup>129</sup> as did the United States Supreme Court, which he did. Yet, Karen continued to breathe on her own for several years, ultimately succumbing to pneumonia. An autopsy revealed she had suffered extensive brain damage (specifically to the bilateral thalamus).

In another case, a California court held that any assistance to die is limited to passive euthanasia.<sup>130</sup> Thus far, case law in the United States articulates that a terminally ill patient in a vegetative state, who is unlikely to return to normal life, may claim a right to death.<sup>131</sup> Conversely, a competent patient cannot compel an unwilling doctor to remove the life support systems for the patient. Further, the American Medical Association (AMA) condemns active participation by a doctor in ending the life of any patient, and holds such action as synonymous with intentional killing.<sup>132</sup>

For the time being, there is greater consistency between Catholic Christian teaching and American law in respect of euthanasia than in the matters of abortion or contraception. This teaching begins with the proposition that any person whose life is diminished or weakened deserves special respect, and a sick or handicapped

<sup>128</sup> See 422 U.S. 922 (1976).

<sup>129</sup> See 70 N.J. 10, 355 A.2d 647 (N.J. 1976).

<sup>130</sup> See *SHARIAH LAW*, *supra*, at 49.

<sup>131</sup> See *id.*

<sup>132</sup> See *id.*



person ought to be assisted to lead as normal a life as possible.<sup>133</sup> The *Catechism of the Catholic Church* identifies "direct" euthanasia (redolent of "direct" abortion) as:

putting an end to the lives of handicapped, sick, or dying persons.<sup>134</sup>

Regardless of "its motives or means," direct euthanasia "is morally unacceptable."

It follows that no utilitarian calculation as to the value of a person, or her inability to contribute productively, to a society, is entertained:

The Holy See was asked, "Is it permissible upon the mandate of public authority, directly to kill those who, although they have committed no crime deserving of death, are yet, because of psychic or physical defects, unable to be useful to the nation, but rather are considered a burden to its vigor and strength?" The reply was No, and the reason given was that "it is contrary to the natural and the Divine positive law."<sup>135</sup>

Notably, Pope Pius XII issued this Decree in December 1940, when Hitler ruled Nazi Germany, Stalin reigned in the Soviet Union, and Mao led a Communist insurgency in China.

Simply put, direct euthanasia is "murder," which as the above-quoted Decree indicates, is an affront to human dignity and the Creator.

[A]n act or omission which, of itself or by intention, causes death in order to eliminate suffering constitutes a murder gravely contrary to the dignity of the human persons and to the respect due to the living God, his Creator. The error of judgment into which one can fall in good faith does not change the nature of this murderous act, which must always be forbidden and excluded.<sup>136</sup>

Father Hardon explains further:

The Catholic Church reprobates euthanasia because it is a usurpation of God's lordship over human life. As creatures of God, to whom human beings owe every element of their existence, they are entrusted only with the stewardship of their earthly lives. They are bound to accept the life that God gave them, with its limitations and powers; to preserve this life as the first condition of their dependence on the Creator; and not deliberately

curtail their time of probation on earth, during which they are to work out and thereby merit the happiness of their final destiny.<sup>137</sup>

Is the reprobation prophylactic? That is, does this rule and rationale mean that termination of medical procedures is wrong in all cases?

Certainly not, is the answer provided by the *Catechism*:

Discontinuing medical procedures that are burdensome, dangerous, extraordinary, or disproportionate to the expected outcome can be legitimate; it is the refusal of "over-zealous" treatment. Here one does not will to cause death; one's inability to impede it is merely accepted.<sup>138</sup>

In other words, intervention that is excessive relative to the likely outcome is unnecessary. There is no religious or moral duty to provide every kind of treatment known to medical science in every case. In deciding against some, or any, treatment, the question is intent: is there a will to kill, or is there an acceptance of the reality of death?

Conversely, "ordinary care" that is owed to a sick person "cannot be legitimately interrupted."<sup>139</sup> That is true "[e]ven if death is thought imminent."<sup>140</sup> "Ordinary care" is undefined, but surely includes standard medical treatment (e.g., basic food, water, and respiration) that does not place excessive physical, psychological, spiritual, or financial burdens on the patient or her family.<sup>141</sup> As for painkillers:

to alleviate the sufferings of the dying, even at the risk of shortening their days, can be morally in conformity with human dignity if death is not willed as either an end or means, but only foreseen and tolerated as inevitable.<sup>142</sup>

Accordingly, palliative care — that is, painkillers — "should be encouraged" as "a special form of disinterested charity."<sup>143</sup> Again, the principle of human dignity provides the fundamental rationale for the teaching.

Who should make those decisions? Ideally, the patient should make the choice, assuming she has the competence and ability to do so. Otherwise, a person legally authorized to act for the patient becomes the decision-maker, but must act in accordance with the "reasonable will and legitimate interests" of the patient.<sup>144</sup> Perhaps there is no better example of putting end-of-life principles into practice than the behavior and decisions of Pope John Paul II, in the last weeks of his earthly life. By one account:

<sup>133</sup> See *CATECHISM OF THE CATHOLIC CHURCH* § 2276 at 549 (United States Catholic Conference, Inc., Washington, D.C.: Libreria Editrice Vaticana, 2th ed. 1997). [Hereinafter, *CATECHISM*.]

<sup>134</sup> *CATECHISM*, *supra*, § 2277 at 549.

For more further treatments of Catholic teaching on euthanasia, see, e.g., LEO J. TERSE, *THE FAITH EXPLAINED* 214-215 (Manila, Philippines: Sinag-Tala Publishers, Inc. 1965, 6th Philippine printing, 1991, updated by Father Robert Bucciarelli), JOHN A. HARDON, S.J., *THE CATHOLIC CATECHISM — A CONTEMPORARY CATECHISM OF THE TEACHINGS OF THE CATHOLIC CHURCH* 329-334 (New York, New York: Doubleday, 1981), and DAVID BOHR, *CATHOLIC MORAL TRADITION* 309-323 (Huntington, Indiana: Our Sunday Visitor, rev'd ed., 1999). [Hereinafter, *BOHR*.]

<sup>135</sup> *CATHOLIC DICTIONARY*, *supra*, at 197 (entry for "euthanasia") (quoting Pius XII, *Decree of the Holy Office*, December 1940).

<sup>136</sup> See *CATECHISM*, *supra*, § 2277 at 549 (emphasis added). See also *id.*, § 2324 at 558.

<sup>137</sup> *CATHOLIC DICTIONARY*, *supra*, at 197 (entry for "euthanasia").

<sup>138</sup> *CATECHISM*, *supra*, § 2278 at 550 (emphasis added).

<sup>139</sup> *CATECHISM*, *supra*, § 2279 at 550 (emphasis added).

<sup>140</sup> *CATECHISM*, *supra*, § 2279 at 550.

<sup>141</sup> See *BOHR*, *supra*, at 311-312. The distinction between "ordinary" and "extraordinary" means of preserving life dates in Catholic teaching dates as far back as the 16th century A.D. See *id.*, 312.

<sup>142</sup> *CATECHISM*, *supra*, § 2279 at 550 (emphasis added).

<sup>143</sup> *CATECHISM*, *supra*, § 2279 at 550.

<sup>144</sup> *CATECHISM*, *supra*, § 2278 at 550.

Conscious and alert the day before his death, he was able to concelebrate Mass in his papal apartment, the Vatican said. The pope began slipping in and out of consciousness the morning of April 2, [2005] and died that night, it said.

The 84-year-old Polish pontiff had been hospitalized twice in recent weeks for spasms of the larynx, and in late February he underwent a tracheotomy to make breathing less difficult. Doctors inserted a nasogastric feeding tube to aid nutrition March 30. The evening of March 31, the pope's infection caused a high fever and septic shock, which brought on heart failure. He was treated immediately with antibiotics and respiratory equipment that had been installed in the papal apartment, and his condition stabilized temporarily. But in his statement early April 1, [Vatican spokesman Joaquin] Navarro-Valls made it clear the pope's condition was deteriorating.

On the evening of March 31, the pope received the "holy viaticum," a reference to the Eucharist given when a person is approaching death, the Vatican said. It was the pope himself who decided to be treated at the Vatican instead of being taken to the hospital, said . . . Navarro-Valls. Cardinal Mario Francesco Pompedda, who visited the dying pope, described the scene in the pope's bedroom: Assisted by several doctors and his personal staff, the pontiff lay serenely on a bed in the middle of his room, comforted by cushions, occasionally opening his eyes in greeting to the handful of visitors allowed inside.

At his last, poignant public appearance at his apartment window March 30, the pope greeted pilgrims in St. Peter's Square and tried in vain to speak to them. After four minutes, he was wheeled from view, and the curtains of his apartment window were drawn for the last time.

For more than a decade, the pope suffered from a neurological disorder believed to be Parkinson's disease. As the pope's health failed in recent months, many of his close aides said his physical decline, never hidden from public view, offered a remarkable Christian witness of suffering.<sup>145</sup>

Thus ended a 26-year pontificate (1978-2005), the second-longest in Church history (following Pius IX, who was Pope from 1846-1878).<sup>146</sup>

<sup>145</sup> Pope John Paul II's Final Days, American Catholic Org., posted at [www.americancatholic.org/news/pope/popehospitalized/](http://www.americancatholic.org/news/pope/popehospitalized/).

<sup>146</sup> If Saint Peter is considered "Pope" from the time when Jesus bestowed the office of leading the Church upon him, then he is the longest-serving Pope (approximately 34 years, from roughly 30 A.D. to Saint Peter's death, which occurred in 64 or 67). If the criterion for measurement is his time in Rome, then he is the fourth-longest serving Pontiff, at 25 years.

## Chapter 42

### LAW OF SUCCESSION

What! did my brother Henry spend his youth,  
His valor, coin and people, in the wars?  
Did he so often lodge in open field,  
In winter's cold and summer's parching heat,  
To conquer France, his true inheritance?

William Shakespeare (1564-1616),  
*Henry VI, Part Two* (1596-98), Act I, Scene I (Gloucester)

#### SYNOPSIS

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[A] Three Principle Classes of Heirs

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[A] Differential Treatment in Two of Four Basic Classes

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##### § 42.01 BASICS

##### [A] Three Principle Classes of Heirs

Islamic Inheritance Law lays out in comprehensive detail how property in the estate (*tarika*) of a Muslim must be distributed. Three conditions define whether property qualifies for inclusion in an estate:<sup>1</sup>

<sup>1</sup> Attique Tahir, *The Requisites Of A Valid Will — A Comparative Study Of Shariah & Law*, At. Aowa 35, 42 (Lahore, Pakistan: Al-Adwa, Sheikh Zayed Islamic Centre, University of the Punjab, 2009), posted at [www.pu.edu.pk/szic/journal/currentissue\\_pdf/E-2%20Atiq%20Tahir.pdf](http://www.pu.edu.pk/szic/journal/currentissue_pdf/E-2%20Atiq%20Tahir.pdf). [Hereinafter, Tahir.] The au-



- (1) The property must be capable of being transferred.
- (2) The testator must be the owner of the property.
- (3) The property must be in existence at the time of the death of the testator.

Notably, intangible property, including intellectual property (IP), is eligible for inclusion, and thus can be the subject of a will. Ownership of assets in the estate of a decedent is transferred automatically from the decedent to each heir, as appropriate, at the moment of death of the decedent.

The details about distribution are voluminous, and are the subject of entire courses in Faculties of *Shari'a* and Law in Islamic countries. The discussion below draws mainly on *Hanafi* School jurisprudence. This *fiqh* is the majority view accepted in the Muslim world. Yet, depending on the specific issue, there may be pertinent variations among the *Māliki*, *Shāfi'i*, and *Hanbali* Schools. The rules on succession establish the rights of various heirs with mathematical precision. In itself, this precision is a major technical achievement of Muslim legal scholarship.<sup>2</sup>

As a general principle, in the Islamic Law of Succession, the universe of heirs is based on the following categories of relationship to the decedent:

- (1) Blood tie (consanguinity).
- (2) Marriage.
- (3) Clientship.

As a practical matter, the first two categories are the most important.

The Arabic term for "heir" is "*warith*." The *Hanafi* School jurists divide heirs into three principal classes:<sup>3</sup>

• **Qur'anic heirs (*Dhawū'l furāḍ*):<sup>4</sup>**

With a few notable exceptions, Qur'anic heirs consist mainly of females. The adjective "Qur'anic" bespeaks the fact that these heirs are identified in the Qur'an.

• **Agnatic heirs (*Aṣabāt*):<sup>5</sup>**

The noun "agnate," and its adjectival form, "agnatic," refer to:

descended [especially] by male line from the same male ancestor, . . . descended from the same forefather; of the same clan or nation, [or] one who is descended, [especially] by male line, from the same male ancestor.<sup>6</sup>

In other words, an "agnate" is a male in a line of relatives, which includes ascendants (father, grandfather, and so on backward in time) and descendants (son, grandson, and so on forward in time). So, in Islamic Law of Succession, an "Agnate heir" is a near male relative, such as the son, father, brother, paternal uncle, or nephew of a testator. More technically, an Agnatic heir is one whose "relation to the deceased is traced without intervention of female links."<sup>7</sup>

• **Uterine heirs (*Dhawū'l arḥām*):<sup>8</sup>**

The adjective "uterine" means:

of or relating to the uterus . . . born of the same mother but not the same father.<sup>9</sup>

As used in the Islamic succession rules, a "uterine heir" refers to distant kindred person, and includes every relation who is neither a Qur'anic heir nor an Agnatic heir. Observe, therefore, that there is not the same degree of similarity of meaning between "uterine" and "uterine heirs" as there is between "agnatic" and "agnatic heirs."

There are further classes, beyond these three. However, in most cases, the full amount of an estate is distributed before reaching any of the additional classes.

Also as a general principle, the share of a nearer relative to a decedent excludes any inheritance right of a more remote relative. That is, the closer the tie of a relative to the decedent, the stronger the inheritance claim of that relative. The *Shari'a* rules focus especially on closeness of a consanguine relationship to the decedent. In contrast, no one can claim a share of the net estate of the decedent as a result of a relationship to the decedent that is through an heir. The relationship must be directly with the decedent, not indirectly through an heir. For instance, a male descendant or ascendant of the decedent can claim a share. But, a claim of a brother or sister of an heir is excluded.

<sup>6</sup> THE OXFORD AMERICAN DICTIONARY AND THESAURUS 30 (New York, New York: Oxford University Press, 2003) (entry for "agnate"). [Hereinafter, OXFORD AMERICAN DICTIONARY.] Likewise, *Black's Law Dictionary* defines "agnate" as:

[r]elated or akin through male descent or on the father's side.

And as:

[a] blood relative whose connection is through the male line. . . . [or] a relative on the father's side, whether or not traced exclusively through the male line.

BRYAN A. GARNER, ED., *BLACK'S LAW DICTIONARY* 77 (St. Paul, Minnesota: West, 9th ed., 2009) (entries for "agnate").

<sup>7</sup> Zainab Chaudhry, *The Myth of Misogyny: A Reanalysis of Women's Inheritance in Islamic Law*, 61 ALBANY LAW REVIEW 511, 530 (1997) [Hereinafter, Chaudhry.]

<sup>8</sup> See FYEKE, *supra*, at 400. The old-fashioned term for "Uterine heir" is "Distant Kindred." See *id.*

<sup>9</sup> OXFORD AMERICAN DICTIONARY, *supra*, at 1698.

thor is a Lecturer, Faculty of Shariah & Law, International Islamic University, Islamabad, Pakistan. The journal *Al Aden* is unnumbered and undated.

<sup>2</sup> See MUHAMMAD ZAHID ABDULAZIZ, *THE ISLAMIC LAW OF BEQUEST* 171 (London, England: Scorpion Publishing Ltd., (1986)). [Hereinafter, ABDULAZIZ.] Professor Abdulaziz is a prominent Saudi scholar and member of the *Hanbali* School, and his book is widely cited on Islamic Inheritance Law.

<sup>3</sup> See ASAF A.A. FYEKE, *OUTLINES OF MUHAMMADIAN LAW* 57 at 397 (Mumbai, India: Oxford University Press, 4th ed., 1999). [Hereinafter, FYEKE.]

<sup>4</sup> See FYEKE, *supra*, at 399.

<sup>5</sup> See FYEKE, *supra*, at 399.

### [B] Four Key Rules

Islamic Law of Succession is replete with rules, but four of them are particularly salient. First, in the absence of Qur'anic and/or Agnatic heirs of a decedent, property in the estate of the decedent is distributed to the Uterine heirs.<sup>10</sup> However, distribution to Uterine heirs is subject to the Qur'anic rights of husbands and wives, *i.e.*, to the right of the surviving spouse (husband or wife) of the decedent.<sup>11</sup> Consequently, Uterine heirs receive any property in the estate of the decedent left over after distribution to the first two classes. Succinctly put, the interest of Uterine heirs is truly a residual one.

What if there are no persons in these three principal classes of heirs, *i.e.*, a decedent has no Qur'anic, Agnatic, or Uterine heirs? This situation occurs if no such heirs survive, or none can be found. In such a case, the succession rules look to subsidiary classes of heirs, including successors by contract or the state.

A second basic rule is that not all possible heirs always inherit. For instance, the estate size simply may not be large enough for each heir to receive a portion. As a corollary to this rule, some heirs within a class may exclude others within the same class.<sup>12</sup> However, a key restriction is the surviving spouse, parents, and children of the decedent cannot be excluded.<sup>13</sup>

The third basic rule is that Qur'anic heirs are allotted a specific fractional share, or "*fard*," of the estate of the decedent. There are 12 Qur'anic heirs as follows:

- Husband
- Wife
- Father
- True grandfather
- Mother

<sup>10</sup> Under the *Shari'a*, there is no institution of an heir, nor any universal succession. In Roman Law on Inheritance, both concepts existed: *heredis institutio*, and *successio in universum ius*. See JOSEPH SCHACHT, AN INTRODUCTION TO ISLAMIC LAW 169 (Oxford, England: Oxford University Press (Clarendon Paperbooks) 1982). (Hereinafter, Schacht.)

"*Heredis institutio*" refers to an arrangement of an heir or heiress, *i.e.*, a will or last testament decreeing who an inheritor should be. "*Heredis*" is the feminine, singular, genitive (possessive) case word for "heir or heiress." "*Institutio*" is the feminine, singular, nominative case word for "arrangement." In essence, this phrase refers to a general will, probably in written form, which specifies who gets what.

"*Successio in universum ius*" means "the succession of the whole in law," or more generally refers to conveyance of property as a whole entity, without mention of specific things. "*Successio*" is the feminine, singular, nominative case word for "taking the place of another," or "a succession." "*In*" is a preposition meaning "in" or "on." "*Universum*" is the neutral, singular, genitive (possessive) case word for "combined in one, whole, entire." "*Ius*" is the neutral, singular, nominative case word meaning "law." In essence, this phrase is the root of universal succession, where one or two inheritors receive everything in an estate, and the estate is not otherwise broken into different pieces.

<sup>11</sup> See FYEE, *supra*, at 401.

<sup>12</sup> See Chaudhry, *supra*, at 529.

<sup>13</sup> See Chaudhry, *supra*, at 530.

- True grandmother
- Daughter
- Son's daughter
- Full sister
- Half sister (*i.e.*, born of the same father but a different mother).
- Uterine brother (*i.e.*, brother born of the same mother but a different father).
- Uterine sister (*i.e.*, sister born of the same mother but a different father).<sup>14</sup>

The *fard* for each Qur'anic heir cannot be changed, precisely because the figure is set in *surah* 4, *ayat* 11-12 of the Qur'an.<sup>15</sup> There are certain cases in which a particular share may be increased or decreased. But, as a general proposition, the shares are invariable.

The fourth basic rule on succession is Qur'anic heirs are first in line, before any other class of heirs. That is, the class of Qur'anic heirs takes precedence over all others classes, and is the first to take its share. Once Qur'anic heirs receive their shares, the next right is of Agnatic heirs. Following Agnatic heirs are Uterine heirs. Thus, some Islamic legal texts refer to Qur'anic, Agnatic, and Uterine heirs as "Class I," "Class II," and "Class III" heirs, respectively.<sup>16</sup>

Thus, the fixed Qur'anic shares (*fards*) must be honored. Islamic Inheritance Law, like all of the *Shari'a*, is concerned with subjective rights and duties of individuals based on the will of God (Allāh). This body of law is not a grass-roots inspired set of commands aimed at social reform, such as inhibiting the development or perpetuation of an aristocracy (a goal of estate taxes in some countries). The *fards* take priority over all other claims, including those by the next of kin to the residue of an estate, except for:

- (1) costs of the funeral of the testator — decedent,
- (2) debts of the testator — decedent, and
- (3) legacy (of up to one-third of the estate) created by the testator — decedent, *i.e.*, dispositions by will.

Given these three significant exceptions, it is technically precise to refer to the distribution of the "net" estate of a decedent. The "gross" estate includes all assets, before paying funeral costs, debts, and the legacy (if any). Following those disbursements, what is left is the net estate.

In turn, if the allocation of fixed shares as dictated by the Qur'an to Qur'anic beneficiaries exhausts a net estate, so there is no residue, then the next of kin of the decedent get nothing. (To be sure, many fixed shares are for next of kin.) If

<sup>14</sup> See Chaudhry, *supra*, at 530.

<sup>15</sup> See Chaudhry, *supra*, at 530.

<sup>16</sup> See, e.g., FYEE, *supra*, at 397-401. Subsidiary heirs thus are enumerated in *seriatim*, following Class III. See *id.*, 401-402.



there are no assets in an estate after paying out the first two claims, then neither the legacy is paid nor is any distribution made to heirs of any class. Also, if a person dies intestate, there is no legacy, so any remaining assets in the net estate are paid directly to heirs in proportion with their fixed shares.

Interestingly, most Islamic texts and internet sources that treat Inheritance Law explain the distribution to Agnatic heirs first, before they discuss the Qur'anic heir *fards*. That is because Agnatic heirs tend to end up with the bulk of the estate of the decedent. It also so happens that most Agnatic heirs are male. However, in actual practice, distribution occurs to the Qur'anic heirs first, before distribution to the Agnatic heirs. Most Qur'anic heirs are women. It should be cautioned that these texts and sources are not uniform in their approach. Indeed, there are considerable variations, and even inconsistencies, among them. What is presented below is a simplified synthesis of what are the most salient rules accepted by the largest number of texts and sources.

#### § 42.02 PRINCIPLES OF 'AWL (INCREASE) AND RADD (RETURN)

What happens if the aggregation of the fractional shares (*fards*) for distribution to Qur'anic heirs of the net estate of a decedent does not sum to unity (1)? Note the technical precision in speaking of a "net" estate: any distribution occurs after payment of debts and funeral costs of the decedent. This question is an important practical one.

It also is a threshold question. Before any distribution can be made, it is essential to identify all surviving heirs of the decedent, and organize them into appropriate classes (Qur'anic, Agnatic, or Uterine). That way, it is possible to see if the respective fractional claims of each heir sum up to unity, or a number greater or less than one. Assuming they do not sum to one, then the principles of '*awl* (increase) and *radd* (return) are applied, whereby the fractional shares are adjusted so that they do add up to unity. In brief, the threshold matter in any Islamic Inheritance Law problem is not about priority of claims, but rather about making sure the extant claims add up to unity. Only then is it assured that the entirety of the net estate will be consumed, with no overage or deficiency.

To be sure, the easy case occurs when the *fards* do aggregate to unity (1). Professor Fysee offers the two examples, using the shares allotted by the Qur'an:

The surviving relations are father, mother, and 2 daughters. Therefore, f. [father] = 1/6, m. [mother] = 1/6, 2d [two daughters] = 2/3, and these fractions amount exactly to unity. . . . Or, to take another example, father, father's father, mother, mother's mother, 2 daughters, son's daughter. Here —

f.	=	1/6 (as Koranic Heir, because there are two daughters)
ff. [father's father]	—	excluded by f.
m.	=	1/6 (as there are daughters)
mm. [mother's mother]	—	excluded by m.

2d	=	2/3 (as Koranic Heirs)
Sd. [son's daughter]	=	excluded by two daughters . . . <sup>17</sup>

So, if the net estate of the decedent is worth U.S. \$1 million, then under either scenario, the father and mother each obtain property worth \$166,666.67. The two daughters together receive \$666,666.67. That is, the parents of the decedent get \$333,333.33, and the two daughters of the decedent the balance, thus consuming the full net estate.

However, there are two other possible scenarios, which are more common than the easy case: the shares exceed unity (1), or are less than one. Suppose the total sum of the *fards* exceeds unity (1). Then, the already allotted shares are readjusted through a procedure whereby all shares are reduced proportionately. This readjustment is called the principle of '*awl*, which literally means "increase." Professor Fysee offers this example:

A real anomaly arises . . . when the factions allotted to the Koranic Heirs amount to more than unity. To take a simple example, husband = 1/2; 2 full sisters = 2/3. The total of these fractions, reducing them to a common denominator, [is] 3/6 + 4/6 = 7/6. This is an anomaly and has to be resolved. The solution is (a) *increase* the denominator to make it equal to the sum of the numerators, and (b) allow the individual numerators to remain, thus proportionately decreasing the share of each heir. The artificial inflation of the denominator is called '*awl*, literally, "increase," but its real effect is the *proportionate reduction of the share*.

Applying this rule we have — h. = 1/2 = 3/6; and 2s. [sisters] = 2/3 = 4/6. Therefore, reduce [these shares] to 3/7 and 4/7, respectively.<sup>18</sup>

That is, converted to common denominators, the respective shares of the husband and sister are 3/6 and 4/6, which sums to 7/6. The numerator in this sum, 7, is used as the denominator in each converted fractional shares. Hence, those shares are cut from 3/6 to 3/7, and from 4/6 to 4/7. The husband gets 3/7, and the two sisters split equally 4/7. All told, the net estate is exhausted, as the distribution sums to 7/7, or 1.

Continuing this example, suppose the net estate of the decedent is worth U.S. \$1 million. Without applying '*awl*, no outcome is possible. It is mathematically impossible for the husband of the decedent to take one-half (1/2) a share (\$500,000), and also for the two full sisters of the decedent to take two-thirds (2/3), of the net estate (\$666,666.67). The sum of the fractions (and the property value) exceeds one (and \$1 million). Applying '*awl*, however, distribution to the Qur'anic heirs is possible. The share of the husband is reduced from one-half (1/2) to three-sevenths (3/7), which yields him \$428,571.43. The share of the two full sisters is cut from two-thirds (2/3) to four-sevenths (4/7), which amounts to \$571,428.57. The entirety of the \$1 million corpus is distributed. Note in most cases, the need for readjustment

<sup>17</sup> FYSEE, *supra*, at 416. The Qur'anic shares of the father, mother, and two daughters are explained in *id.* at 406-407, 409.

<sup>18</sup> FYSEE, *supra*, at 416-417 (emphasis original). The Qur'anic shares of the husband and two sisters are explained in *id.* at 410-411.

using 'awl arises only when daughters or sisters exist.<sup>19</sup>

Conversely, suppose the total sum of the fractional shares allotted to the Qur'anic heirs is less than unity (1), and there are no Agnatic heirs to receive the residue of the net estate. In such a case, the *fards* are readjusted in proportion to the shares already allocated to the Qur'anic heirs. This readjustment is called the principle of *radd*, which means "return." Professor Fysee explains:

The three rules of the doctrine of *radd* are:

- (1) The residue returns in proportion to the share.
- (2) The husband or the wife is not entitled to the return so long as there is a Koranic Heir (Class I) or a Uterine Heir (Class III).
- (3) If there is no other surviving heir, the residue returns to the husband or the wife in India; this rule is, however, contrary to the strict letter of the *Shari'at*, whereby the residue would escheat [revert] to the State, the spouse being entitled only to the Koranic Share. . . .<sup>20</sup>

He offers an illustration of each of these rules:

As to [rule] (1), mother and daughter.

m. [mother] = 1/6, d. [daughter] = 1/2; 1/6 + 3/6 = 2/3; there remains 1/3 which "returns."

The rule in such a case is to reduce the fractional shares to a common denominator, and to decrease the denominator of these shares to make it equal to the sum of the numerators. In the present illustration the original shares, reduced to a common denominator, are 1/6 and 3/6. The total of the numerators is 1 + 3 = 4. The ultimate shares will therefore be 1/4 and 3/4, respectively.<sup>21</sup>

<sup>19</sup> Professor Schacht identifies a case in which the nearest male relative (full brother) of a woman who dies is excluded, where the decedent woman is survived by a husband, mother, and half-brothers on her mother's side. In this case, the Qur'anic shares of the heirs add up to unity (1): the husband gets one-half (1/2), which is an increase from his usual share of one-quarter (1/4), because the decedent leaves no children; the mother gets one-sixth (1/6); and the half-brothers, as Uterine brothers, get one-third (1/3). See SCHACHT, *supra*, at 172. In this example, note that arguably the share of the mother should be increased to one-third (1/3), for the same reason the share of the father is increased — the decedent leaves no children. If that were to occur, then the shares would sum to more than one, and the principle of 'awl would be applied.

In any event, it is possible the sum total of the shares exceeds 1. If so, then using 'awl, the shares are reduced in proportion to the inheritance claims of the heirs. Professor Schacht gives the same hypothetical case as Professor Fysee above, i.e., a woman passes away, leaving behind her husband plus two full sisters. The husband is entitled to a one-half (1/2) share. The two consanguine sisters are entitled to split equally a share of two-thirds (2/3). The total is seven-sixths (7/6). Thus, 'awl must be used, whereby the shares of the husband and the sisters are reduced by sevenths. See SCHACHT, *supra*, at 172.

<sup>20</sup> FYZEE, *supra*, at 417. Professor Fysee points out in a footnote that in a case in which the husband is the sole surviving heir, and also is a Uterine Heir, then the husband would take the property of the wife in both capacities, i.e., as the sole surviving heir and as a Uterine Heir. See *id.*, fn. (yy) at 417.

<sup>21</sup> FYZEE, *supra*, at 418. The Qur'anic shares of the mother and daughter are explained in *id.* at 407-409.

Consequently, if the net estate in question were worth \$1 million, then before *radd* is applied, the mother would receive \$166,666.67 (one-sixth (1/6) of \$1 million), and the daughter would get \$500,000 (one-half (1/2) of one million). But, this distribution would leave \$333,333.33, with no Agnatic heir claimants. When *radd* is applied, the share of the mother rises to one-quarter (1/4), and that of the daughter to three-quarters (3/4), yielding them \$250,000 and \$750,000, respectively, and consuming the net estate.

Professor Fysee illustrates the second *radd* rule as follows:

As to [rule] (2),

husband	=	1/4
daughter	=	3/4 (1/2 as sharer, 1/4 by return)

Or

sister (f. [full] or c. [consanguine])	=	3/4 (1/2 as sharer, 1/4 by return).
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In these cases, the husband or the wife does not take the return.

Similarly, husband	=	1/2
daughter's son	=	1/2

The daughter's son belongs to Class III, Uterine Heir, and yet prevents the husband from taking the return.<sup>22</sup>

To elaborate, focusing on the case of a surviving husband and daughter, i.e., the wife — mother is the decedent, the Qur'anic shares of the husband and daughter are one-quarter (1/4) and one-half (1/2), respectively.<sup>23</sup> If the second rule of *radd* did not exist, then the normal application of the *radd* principle would mean the following:

- (1) Convert the 1/4 and 1/2 Qur'anic shares to a common denominator, which would be 1/4 and 2/4.
- (2) Calculate the residue to be returned, which would be 1/4, because 1/4 goes to the husband, and 2/4 goes to the daughter (i.e., 1 - (1/4 + 2/4) = 1/4).
- (3) Add the numerators of the Qur'anic shares with common denominators, which is 3 (because 1 + 2 = 3).
- (4) Substitute the sum of the numerators, 3, in place of the existing common denominators, 4, and thereby adjust the Qur'anic from 1/4 to 1/3 for the husband, and from 2/4 to 2/3 for the daughter.

While the above steps are technically correct, they are conceptually misapplied in this case. They ignore operation of rule (2) of the *radd* principle. The daughter is a Qur'anic heir. This key fact means the husband cannot receive any of the residual amount. Rather, the entire residue, the full one-quarter (1/4) of the estate, is returned to the daughter. Thus, the daughter takes one-half (1/2) as a Qur'anic heir, and one-quarter (1/4) by return. Observe how rule (2) operates to protect the daughter, a female relative of the decedent.

<sup>22</sup> FYZEE, *supra*, at 418.

<sup>23</sup> See FYZEE, *supra*, at 405, 409.



Similarly, in the alternative case Professor Fyzee constructs, in which the husband is the decedent and the wife survives, her *fard* is one-quarter ( $\frac{1}{4}$ ) of the net estate (a fraction that assumes there are no surviving children).<sup>24</sup> Also surviving is a sister of the husband (either a full sister or a consanguine sister). Like the wife, she is a Qur'anic heir, and her share is one-half ( $\frac{1}{2}$ ) of the net estate.<sup>25</sup> As a Qur'anic heir, she negates the possibility of the surviving wife sharing in any residue. With the wife getting  $\frac{1}{4}$ , and sister getting one-half ( $\frac{1}{2}$ ), the residue is one-quarter ( $\frac{1}{4}$ ) of the net estate. This residue goes to the sister, who thereby garners a three-quarters ( $\frac{3}{4}$ ) share. Note how rule (2) in this instance operates to protect the female relatives (namely, the sister) of the decedent.

What about the case of a decedent wife-mother survived by her husband, where a daughter's son exists, which Professor Fyzee mentions? The wife has died leaving no children, but a grandson survives. (Presumably, the daughter passed away.) Here, the Qur'anic share of the husband rises from one-quarter ( $\frac{1}{4}$ ) to one-half ( $\frac{1}{2}$ ).<sup>26</sup> The grandson, i.e., the son of the daughter, is a Uterine heir, which is a key fact. As a Uterine heir, he negates the entitlement of the husband to any return under rule (2). Why is the share of the daughter's son one-half ( $\frac{1}{2}$ ) of the estate? Professor Fyzee answers:

The rules [concerning Uterine heirs] may be briefly stated as follows: (i) where there are no Koranic or Agnatic Heirs, the estate is divided among Uterine Heirs; (ii) where there is a husband or wife and Uterine Heirs, the surviving spouse will take his or her Koranic share, and the residue of the estate will be divided among Uterine Heirs.<sup>27</sup>

In this hypothetical example, rule (i) is inapplicable, as there is a Qur'anic heir, namely, the surviving husband. Rule (ii) is relevant. Under it, the husband takes his *fard*, which is one-half ( $\frac{1}{2}$ ) of the estate. The remainder is divided among the Uterine heirs, of which there is just one — the daughter's son. So, he gets the remaining one-half ( $\frac{1}{2}$ ).

Thus, for example, again assume a \$1 million net estate. The husband receives a one-quarter ( $\frac{1}{4}$ ) share in the \$1 million (\$250,000), and the daughter receives a one-half ( $\frac{1}{2}$ ) share (\$500,000), according to the Qur'an. That leaves a residue of one-quarter ( $\frac{1}{4}$ ) of the net estate (\$250,000). The wife cannot get the residue, as she is the decedent. But for the presence of the daughter's son, the husband would get it. Instead, the daughter's son is the ultimate beneficiary of the one-quarter ( $\frac{1}{4}$ ) share. Apparently, he receives it not directly, but through his mother (the daughter), who obtains the one-quarter ( $\frac{1}{4}$ ) by return, as Professor Fyzee states above. Note from this example how application of *radd* operates to protect relatives through the mother's side, i.e., women and their offspring.

Concerning the third rule of *radd*, Professor Fyzee explains:

<sup>24</sup> See FYZEE, *supra*, at 405.

<sup>25</sup> See FYZEE, *supra*, at 411.

<sup>26</sup> See FYZEE, *supra*, at 405.

<sup>27</sup> FYZEE, *supra*, at 429. For more information on how the residue would be distributed in the event of multiple Uterine heirs, see *id.* at 429-438.

As to [rule] (3), a Muslim dies leaving a widow as his sole heir. She takes  $\frac{1}{4}$  as her Koranic share and the residue  $\frac{3}{4}$  by return; the residue does not escheat to the State in India. *A fortiori*, the husband would be similarly entitled.<sup>28</sup>

Manifestly, the fact the widow, and not the Indian government, gets the residue, is of benefit to her. Finally, note again that the use of *radd* typically arises in the absence of Agnatic heirs. If Agnatic heirs are present, then following the distribution to Qur'anic heirs, the payout to the Agnatic heirs often consumes the net estate, leaving no residue.

## § 42.03 DISTRIBUTION OF NET ESTATE

### [A] Agnatic Heirs ('Aṣabāt)

The *Shari'a* contains clear rules about distribution to Agnatic heirs ('*aṣabāt*), the male ascendant and descendant relatives of a decedent. Three such rules are significant. First, Agnatic heirs receive a share of the net estate of a decedent only if there are no Qur'anic heirs, or if after assigning the prescribed shares to Qur'anic heirs, there is a residue (i.e., a remainder of the net estate). That is, Agnatic heirs are paid only if, after all claims are paid regarding (1) costs of the funeral, (2) debts of the decedent, (3) legacy, and (4) Qur'anic succession chain, there are still assets left over in the net estate.

Second, there is an order of priority among Agnatic heirs.<sup>29</sup> The order of right of Agnatic heirs to a portion of the net estate of a decedent, i.e., the sequence in which they would be paid part of any residue, is as follows:

- 1<sup>st</sup>: Son of the decedent and his male descendants (e.g., grandson or grandsons of the decedent).<sup>30</sup> In other words, male descendants of the decedent.
- 2<sup>nd</sup>: Father of the decedent and his male ascendants (e.g., grandfather and great grandfather of the decedent), provided that the father inherits before an uncle or uncles (i.e., a brother or brothers of the father) of the decedent. In other words, male ascendants of the decedent.
- 3<sup>rd</sup>: Other male descendants of the father of the decedent, including another son of the father (i.e., a brother or half-brother of the decedent), and his respective descendants (e.g., a nephew of the decedent).
- 4<sup>th</sup>: Still other male descendants of the father of the decedent, namely, a half brother of the father and his respective descendants.

<sup>28</sup> FYZEE, *supra*, at 418.

<sup>29</sup> FYZEE, *supra*, at 421-428; SCHACHT, *supra*, at 170-172.

<sup>30</sup> Like Family Law, Inheritance Law also contains conditions that must be realized in order for a legal right to ripen. Until the condition occurs, the legal right is in suspense, or abeyance ("*uṣūl*"). An example suggested is the share of a child in an inheritance from a deceased person, where the child is not yet born. That share is set aside until the child is born. See SCHACHT, *supra*, at 119.

5<sup>th</sup>: Descendants of the paternal grandfather of the decedent, specifically, the full son of the paternal grandfather and his male descendants. That is, male descendants of the grandfather of the decedent on the father's side (the father's father), such as a son of the grandfather who is not the father of the decedent (*i.e.*, an uncle of the decedent).

6<sup>th</sup>: Descendants of the paternal great grandfather of the decedent, specifically, the half-son of the paternal grandfather and his male descendants.

Interestingly, regarding this order of Agnatic succession, Professor Fyze says the son(s), grandson(s), father, and grandfather have "a limitless number of blood relations who are *all male agnates*," and "in reality, these are the *tribal heirs of pre-Islamic Arabia*."<sup>31</sup>

Third, there are specific rules about distribution to Agnatic heirs. The so-called "Rule of Al Jabari" summarizes these rules by stating that preference is given first to the order, second to the degree, and lastly to the strength of the blood tie.<sup>32</sup> Accordingly, a group of higher priority Agnatic heirs excludes one of lower priority, with one exception. The exception is that the brother(s) of the decedent is (are) not excluded by a grandfather. Also, among the same priority group, the nearest in degree excludes the more remote. For instance, a son is excluded the grandson of the decedent.<sup>33</sup>

In particular cases, there may be a concurrence of several shares, *i.e.*, entitlement through the status of being both a Qur'anic and Agnatic heir. Would that ever lead to the exclusion of male relatives near to the decedent? "No," says Professor Schacht, not with respect to the male descendants and ascendants of the decedent.<sup>34</sup> These heirs receive something, assuming there is something left in the net estate after funeral costs, debts, and any legacy. But, exclusion could happen to horizontal male relatives of the decedent — the full brother (or full brothers, if more than one).

Under *Hanafi* School doctrine, it is possible for the full brother (or brothers) of the decedent to receive nothing. Professor Schacht gives the following illustration of such a case.<sup>35</sup> Suppose a woman is the decedent, and leaves behind her husband, mother, and two half-brothers on her mother's side. She also leaves full brothers. The share her surviving husband takes is one-half ( $\frac{1}{2}$ ). Her surviving mother gets one-sixth ( $\frac{1}{6}$ ). The decedent's half-brothers on her mother's side, who are her Uterine brothers, get one-third ( $\frac{1}{3}$ ). The sum total is unity (1). There is nothing left in the net estate for the decedent's full brothers. However, the *Māliki* and *Shāfi'i* Schools modify this result. They ensure the full brothers get something. Under the

doctrines of those Schools, the full brothers divide the one-third share ( $\frac{1}{3}$ ) of the half brothers in equal portions.<sup>36</sup>

An obvious question about Agnatic succession order is: what about women? Simply put, they are not explicitly protected in this order. However, of critical importance is the legal fact the *Shari'a* expands the definition of "agnate" ("*asabah*") to include any female relative who is entitled to a share of one-half ( $\frac{1}{2}$ ) under the rules concerning Qur'anic heirs. Such a woman is deemed to become an agnate through her brother (or brothers). There are three such women: the daughter, full sister, and consanguine sister of the decedent. The daughter of the decedent is entitled to one-half ( $\frac{1}{2}$ ) of the portion to which her brother is entitled. In addition, the full sister or half-sister on the father's side is entitled to a share in the net estate as an Agnate. Here, then, is an example of where ignorance of Islamic Law of Succession can lead to an unfocused criticism that this Law is unfair to women. On the one hand, certain women, who are Qur'anic heirs and close relatives to the decedent, are protected by their being deemed to be Agnatic heirs. On the other hand, their share is 50 percent that of their counterpart male.

Suppose after payment of costs, debts, and legacy, and distribution to Qur'anic heirs and Agnatic heirs, there still is property in the net estate of the decedent. Then, under the principle of *rudd* (discussed below) the heirs in the Qur'anic line of succession have their shares increased in proportion so as to cover the net estate. Depending on the facts of the case, disbursements may be made to:

- (1) Cognates (*i.e.*, certain relatives of the decedent).
- (2) The patron of a client-decedent, where the decedent is a convert to Islam, chosen by the decedent upon conversion (*i.e.*, a client relationship).
- (3) An adopted relative, *i.e.*, a relative acknowledged as such by the decedent without evidence of consanguinity.
- (4) Beneficiaries of a legacy, without regard to the one-third cap.

If, after all such persons have received their appropriate payment there still is a positive balance in the net estate, the remainder goes to the public treasury.

## [B] Shares (*Farḍs*) to Qur'anic Heirs (*Aṣḥāb Al-Farā'id*)

There are 12 types of *farḍs*, in the sense of there being 12 persons related to a decedent identified by the Qur'an in *surah* 4, *ayat* 11-12 as recipients of a share in the net estate of the decedent:

- (1) Husband
- (2) Wife
- (3) Father
- (4) True Grandfather
- (5) Mother

<sup>31</sup> FYZEE, *supra*, at 420 (emphasis added).

<sup>32</sup> For a detailed explanation with illustrations of this rule, see FYZEE, *supra*, at 423-428.

<sup>33</sup> Bogue A. Ergene & Ali Berker, *Inheritance and Intergenerational Wealth Transmission in the Ottoman Kastaḥna: An Empirical Investigation*, 34 JOURNAL OF FAMILY HISTORY 27 (2009), posted at <http://jfh.sagepub.com/cgi/content/abstract/34/1/25>. [Hereinafter, Ergene & Berker.]

<sup>34</sup> See SCHACHT, *supra*, at 172.

<sup>35</sup> See SCHACHT, *supra*, at 172.

<sup>36</sup> See SCHACHT, *supra*, fn. 1 at 172.



- (6) True Grandmother
- (7) Daughter
- (8) Son's Daughter
- (9) Full Sister
- (10) Consanguine Sister
- (11) Uterine Brother
- (12) Uterine Sister

These persons are, of course, in relation to the testator — decedent. Of these 12 relations, 8 are women.<sup>37</sup> The obvious implication is the Qur'ān explicitly singles out them for inheritance protection. It should be remembered if there are no Agnates and the Qur'ānic heirs do not exhaust the estate, then the remainder of a net estate is proportionately distributed among Qur'ānic heirs under the principle of reversion or *radd*.<sup>38</sup>

Given that there are 12 Qur'ānic heirs, the distribution of a net estate to Qur'ānic heirs is calculated according to the following 12 rules, or sets of rules.<sup>39</sup> They are summarized in Table 42-1.<sup>40</sup> Note again these rules are from the *Hanafi* School. Observe that of the 12 relations, 5 of them are primary Qur'ānic heirs — the husband, wife, father, mother, and daughter of the decedent. Their shares cannot be excluded or reduced by the presence of other claimants. Further, of these 5 primary heirs, 3 of them are women, again bespeaking the extent of favor from the Qur'ān.

<sup>37</sup> See Fysee, *supra*, at 403.

<sup>38</sup> For example, if the deceased is survived by his mother and a daughter, their respective shares are one-sixth (1/6) and one-half (1/2) of the estate.

<sup>39</sup> Fysee, *supra*, at 404-413; Ergene & Berker, *supra*, at 27-28; Schacht, *supra*, at 170-173.

<sup>40</sup> This Table is an adapted, simplified version of the *Table of Koranic Heirs, Class I, Sunni* (Hanafi) Law in Fysee, *supra*, at 404-405.

Table 42-1:  
Summary of Qur'ānic Heirs and Shares (*Fard*s)

Heir (in Relation to Decedent)	Qur'ānic Share ( <i>Fard</i> s) Of Net Estate of Decedent		Relatives who Entirely Exclude Inheritance of Heir	Exceptions: Any Scenario Affecting Inheritance of Heir?	Way in Which Inheritance is Affected?
	Share If There is One Such Heir	Collective Share If There Are Two or More Such Heirs			
(1) Husband	1/4	Not possible	None, primary heir	Decedent leaves no Children, and no Grandchildren (through Son)	<i>Fard</i> increased to 1/2
(2) Wife	1/8	1/8	None, primary heir	Decedent leaves no Children, and no Grandchildren (through Son)	<i>Fard</i> increased to 1/4
(3) Father	1/6	Not possible	None, primary heir	Decedent leaves no Children, and no Grandchildren (through Son)	Becomes Agnatic Heir
(4) True Grandfather	1/6	Not possible	Father	Decedent leaves no Children, and no Grandchildren (through Son)	Becomes Agnatic Heir
(5) Mother	1/6	Not possible	None, primary heir	4 Scenarios — #1: Decedent leaves no Children	<i>Fard</i> increased to 1/2 in Scenarios #1, #2, and #3.

Heir (in Relation to Decedent)	Qur'anic Share (Fards) Of Net Estate of Decedent		Relatives who Entirely Exclude Inheritance of Heir	Exceptions: Any Scenario Affecting Inheritance of Heir?	Way in Which Inheritance is Affected?
	Share If There is One Such Heir	Collective Share If There Are Two or More Such Heirs			
				#2: Decedent leaves no Grandchildren (through Son) #3: Decedent leaves one Brother or Sister #4: Husband or Wife of the decedent co-exist with the Father of the decedent	In scenario #4, <i>fard</i> changed to 1/5 of residue after share of husband or wife is deducted.
(6) Grandmother (Maternal or Paternal)	1/6	Not possible	Mother	No	
(7) Daughter	1/2	1/3	None, primary heir	Decedent leaves a Son	Becomes Agnatic heir
(8) Son's Daughter (i.e., Granddaughter through Son)	1/2	2/3	Son, More than One Daughter	Decedent leaves one Daughter	<i>Fard</i> reduced to 1/6
(9) Full Sister	1/2	2/3	Son, Father, True Grandfather	Decedent leaves one or more Full Brothers	Becomes Agnatic heir

Heir (in Relation to Decedent)	Qur'anic Share (Fards) Of Net Estate of Decedent		Relatives who Entirely Exclude Inheritance of Heir	Exceptions: Any Scenario Affecting Inheritance of Heir?	Way in Which Inheritance is Affected?
	Share If There is One Such Heir	Collective Share If There Are Two or More Such Heirs			
(10) Consanguine Sister	1/2	2/3	Son, Father, True Grandfather, Full Brother, More than One Sister	2 Scenarios: #1: Decedent leaves one Full Sister #2: Decedent leaves Consanguine Brother	<i>Fard</i> reduced to 1/6 in Scenario #1  Becomes Agnatic heir in Scenario #2
(11) Uterine Brother	1/6	1/3	Child, Child of Son, Father, True Grandfather	No	
(12)	Uterine Sister	1/6	1/3	Child, Child of Son, Father, True Grandfather	No

#### (1) Husband:

The surviving spouse of the decedent invariably inherits a portion of the net estate. Accordingly, as a primary heir, no relation of the decedent ever can exclude the husband from his Qur'anic *fard*. Thus, the Qur'an never leaves a widower without a share. Professor Fyzee observes:

The surviving spouse *always* inherits, and the husband or wife is the only heir by affinity [as distinct from blood] which is made a primary heir by the Koran. In pre-Islamic times, they were entirely excluded.<sup>41</sup>

In particular, if the decedent has left a descendent (e.g., a son or daughter), then the husband receives one-quarter (1/4) of the net estate. Otherwise, if there is no such descendent, then the husband gets one-half (1/2) of the estate.

<sup>41</sup> FYZEE, *supra*, at 420 (emphasis original).



(2) **Wife:**

Here again, no relation of the decedent ever can exclude the wife from her Qur'anic *fard*. She is a primary heir. Thus, the Qur'an never leaves a widow without a share. Specifically, the wife inherits one-half ( $\frac{1}{2}$ ) of what the husband would receive under the same circumstances as above. Thus, if there are children, then the wife would receive  $\frac{1}{4}$  of the net estate, and would get  $\frac{1}{4}$  if there are no children.

The fact she gets half of what the husband would obtain is the subject of considerable criticism, namely, that Islamic Inheritance Law is unfair to women because of their one-half portion in relation to men. The point offered by Professor Fyzee — that in pre-Islamic times, widows had no entitlement — is sometimes made in defense of the rule. Yet, this defense falls into the trap of the Orientalist fallacy, and judging the rights of contemporary women according to a standard set before the advent of Islam on the Arabian Peninsula hardly is satisfying.

A better defense of the rule is that the accuracy of this criticism hinges on the details of a particular case. For example, if the wife of the decedent is the only surviving heir, then she receives the entirety of the net estate, just as the husband of the decedent would if he were the only surviving heir. In other words, where the only heir is the surviving spouse — wife or husband — that spouse is entitled to 100 percent of the net estate. As another example, suppose the wife survives, and there are children. The wife receives  $\frac{1}{4}$  of the net estate, but the remaining  $\frac{3}{4}$  of it goes to the children as Agnatic heirs. Thus, the rules of distribution to Qur'anic and Agnatic heirs are intertwined. They can operate to ensure a widow is not left with a tiny share to support multiple children.

(3) **Father:**

The father always inherits a fraction of the net estate. As a primary heir, no relation of the decedent ever can exclude the father from receiving his Qur'anic *fard*. There are four possible scenarios, with his share depending on which scenario is in play.

1<sup>st</sup>: *Decedent leaves a child or children —*

Assuming the decedent is survived by a child or children, then the fractional share of the father is one-sixth ( $\frac{1}{6}$ ) of the net estate. The remaining five-sixths ( $\frac{5}{6}$ ) goes to the children, with sons taking a share that is double that given to daughters.<sup>42</sup> The full amount of the net estate is thereby consumed.

2<sup>nd</sup>: *Decedent leaves no child —*

What happens if the decedent leaves no children (and there are no Agnatic descendants)? Then, the father is treated as an Agnatic heir.

3<sup>rd</sup>: *Only the father and mother survive the decedent —*

If both the father and mother of the decedent survive, then they consume

the full amount of the net estate. The mother receives a one-third ( $\frac{1}{3}$ ) share, and the father receives double that share, namely, two-thirds ( $\frac{2}{3}$ ).

4<sup>th</sup>: *Father and daughter survive the decedent —*

When the father and daughter of the decedent remain, they are entitled to the full amount of the net estate. The daughter receives a one-half ( $\frac{1}{2}$ ) share, as a Qur'anic heir. The father receives a one-sixth ( $\frac{1}{6}$ ) *fard*, as a Qur'anic heir, plus an additional one-third ( $\frac{1}{3}$ ) share as an Agnatic heir. Because he inherits simultaneously in two different capacities, as both a Qur'anic and Agnatic heir, the father gets the other one-half ( $\frac{1}{2}$ ) of the net estate. Note that a daughter (or a sister) cannot inherit in more than one capacity simultaneously: she takes either as a Qur'anic heir, or an Agnatic heir. Note also the same result would occur if the decedent left behind only his father and a daughter or daughters of his son.

Observe that the father of the decedent (or, indeed, any nearer male ascendant in the male line) excludes all female ascendants on the father's side from any inheritance.<sup>43</sup> This point is a manifestation of the general principle of the Islamic Law of Succession that a nearer relative excludes a more remote relative.

(4) **True (i.e., Full) Grandfather:**

An implication of the preceding rule is that whenever the decedent is survived by his or her father, the full father inherits a portion of the net estate, and thereby excludes the grandfather of the decedent. Suppose the father is dead, but the grandfather remains? In this case, the grandfather inherits as would the father: the grandfather receives the share the father would have, had the father been alive. In effect, the grandfather steps into the shoes of his son, who is the father of the decedent. Thus, for example, the grandfather receives one-sixth ( $\frac{1}{6}$ ) of the net estate if his son is not alive.

There is one exception to this rule, namely, if the mother of the decedent is alive. Rather, he is treated as co-existing with her, and in consequence does not reduce the share of the mother from one-third of the net estate to a lesser amount (namely, one-third ( $\frac{1}{3}$ ) of the residue left after the share of the husband or wife of the decedent is deducted).

(5) **Mother**

If the mother of the decedent survives her child, then she invariably inherits a portion of the net estate. The mother of the decedent is a primary heir under the Qur'an, hence no one can exclude her from an inheritance. There are six possible scenarios:

1<sup>st</sup>: *Decedent leaves a child or children —*

If the decedent passes away but leaves behind a child or children, then the *fard* of the mother is one-sixth ( $\frac{1}{6}$ ) of the net estate. The child or children consume the remaining five-sixths ( $\frac{5}{6}$ ) as Agnatic heirs. For example, if

<sup>42</sup> Unless the child has male descendants, a father also receives any residuum of the estate after distribution to the Qur'anic heirs.

<sup>43</sup> See SCHACHT, *supra*, at 173.

there are two sons and one daughter surviving, then the sons each would receive two-thirds ( $2/6$ , i.e.,  $1/3$ ) of the estate and the daughter would receive one-sixth ( $1/6$ ) of it.

2<sup>nd</sup>: *Decedent leaves no child —*

With no surviving children, the share of the mother rises to one-third ( $1/3$ ) of the net estate. Note that if the decedent is survived by a brother, then the share of the mother still is one-third ( $1/3$ ) of the net estate, which she takes as a Qur'anic heir, but the share of the brother, as an Agnatic heir, would be two-thirds ( $2/3$ ).

3<sup>rd</sup>: *Only the father and mother survive the decedent —*

This scenario is the same one as the third scenario discussed above in respect of the father. The mother takes a one-third ( $1/3$ ) share in the net estate, and the father a two-thirds ( $2/3$ ) share.

4<sup>th</sup>: *Mother and two or more brothers or sisters survive the decedent —*

Suppose not only the mother remains, but also siblings of the decedent survive. In particular, assume there are two or more brothers, or two or more sisters. In these cases, the share of the mother in the net estate is one-sixth ( $1/6$ ). The remaining five-sixths ( $5/6$ ) of the estate are divided among the brothers and sisters as Agnatic heirs, with brothers getting twice the portion as sisters.

5<sup>th</sup>: *Mother, one brother, and one sister survive the decedent —*

If the decedent is survived by his or her mother, and by one brother and one sister, then the share of the mother is one-third ( $1/3$ ). The remaining two-thirds ( $2/3$ ) of the net estate is divided among the brother and sister, with the brother getting an allotment double to that of the sister (i.e.,  $4/9$  and  $2/9$ , respectively).

6<sup>th</sup>: *Mother, father, and husband or wife survive the decedent —*

Suppose the decedent leaves behind both his or her mother and father, and his or her spouse. There are no surviving children of the decedent. Then, there are four possible permutations.

- First, consider the case in which the surviving spouse is a husband (i.e., the decedent is the wife), the husband obtains a one-half ( $1/2$ ) share of the net estate. The mother receives a one-sixth ( $1/6$ ), and the father receives double that, as an Agnatic heir, which is a one-third ( $1/3$ ) share.

This permutation is interesting because the decedent leaves behind no children, which (as per the second scenario above) would mean the mother ought to receive a one-third ( $1/3$ ) share. But, if she did, then her portion would be greater than that of the father. Professor Fysee explains:

The father is both a Koranic as well as a tribal heir; his rights have to be respected. He is also a male. Therefore, the Koranic ordinance of the  $1/2$  share is applied to the *residue*, after deducting the husband's share, and not to the whole estate.<sup>44</sup>

The residue, after deducting the husband's one-half ( $1/2$ ) share, is one-half ( $1/2$ ) of the net estate. Applying the mother's Qur'anic *fard* to that remaining one-half ( $1/2$ ) means multiplying one-half ( $1/2$ ) by one-third ( $1/3$ ), which yields one-sixth ( $1/6$ ) of the net estate. Notably, this resolution was decided upon by the second of the Four Rightly Guided Caliphs (*Rashidun*), Omar, and the *Shi'ites* have not accepted it.

- A second permutation also was resolved by the Caliph Omar. The case is where the surviving spouse is a wife (i.e., the decedent is the husband). The wife obtains a one-quarter ( $1/4$ ) share of the net estate, which is one-half ( $1/2$ ) that of the one-half ( $1/2$ ) share to which a surviving husband is entitled under the first permutation. The father again receives double of what the mother receives, namely, the father gets a one-half ( $1/2$ ) share as an Agnatic heir, and the mother gets a one-quarter ( $1/4$ ) share. The fraction of one-quarter ( $1/4$ ) is calculated using the same resolution as that in the first scenario: the residue of the net estate, after deducting the wife's portion, is three-quarters ( $3/4$ ); the mother's Qur'anic *fard* of one-third ( $1/3$ ) is applied to the residue of three-quarters ( $3/4$ ), and the result is one-quarter ( $1/4$ ) of the net estate.
- A third permutation is where the decedent is survived by her husband, mother, and father's father (i.e., her grandfather). The husband takes one-half ( $1/2$ ) of the net estate, and the mother one-third ( $1/3$ ) of it. The grandfather of the decedent takes one-sixth ( $1/6$ ) as an Agnatic heir, and his share does not cause any reduction in the share of the mother.
- The fourth permutation is similar to the third one, the only difference being that the husband, not the wife, is the decedent. That is, the decedent is survived by his wife, now a widow, and his mother and father's father (i.e., his grandfather). The widow receives a one-quarter ( $1/4$ ) share of the net estate, which is one-half of the allotment the widower received in the previous permutation. The mother still gets a one-third ( $1/3$ ) share, which remains unaffected by the presence of the grandfather. The grandfather gets a five-twelfths ( $5/12$ ) as an Agnatic heir, which is different and larger than in the previous permutation, apparently because he is an Agnatic ascendant on the male side.

In sum, in all instances the mother of a decedent has a right to no less than one-sixth ( $1/6$ ) of the net estate. That is her Qur'anic *fard* if the decedent leaves children (or, for that matter, if the son of the decedent leaves children), leaves two

<sup>44</sup> FYSEE, *supra*, at 420 (emphasis original).



or more brothers or sisters, or leaves behind a father and husband. Otherwise, where there are no children, or no more than one brother and one sister of the deceased, the mother is entitled to a one-third ( $\frac{1}{3}$ ) share of the net estate.<sup>45</sup> Depending on the exact circumstances, the mother gets one-sixth ( $\frac{1}{6}$ ) or one-third ( $\frac{1}{3}$ ), where she survives along with the father of the decedent and a surviving spouse. The bottom-line point is that the Qur'anic *fard* assists in protecting the mother of the decedent in her old age. Finally, note that the mother of the decedent excludes all female ascendants from any inheritance.<sup>46</sup> This point is another manifestation of the general principle of that a nearer relative excludes a more remote relative.

#### (6) True (i.e., Full) Grandmother:

If the grandmother of the decedent remains, then whether she inherits a portion of the net estate depends on the circumstances. If the mother of the decedent survives, then the maternal true grandmother does not receive anything, i.e., the mother excludes her from an inheritance. Likewise, if the father of the decedent survives, then he excludes the paternal true grandmother. Otherwise, the Qur'anic *fard* of the grandmother is one-sixth ( $\frac{1}{6}$ ) of the net estate.

#### (7) Daughter:

The daughter always inherits a fraction of the net estate. No relation of the decedent ever can exclude the daughter from receiving her Qur'anic *fard*. She not only is a primary heir under the Qur'an, but also she can inherit as an Agnatic heir, depending on circumstances. That is, a single daughter (or multiple daughters) inherits as a Qur'anic heir, assuming she (or they) does not have a son or sons. If the daughter (or daughters) survive and have one or more sons, then she (or they) inherits as an Agnatic heir.

The general rule is a single daughter takes one-half ( $\frac{1}{2}$ ) of a net estate. If there are two or more daughters, then they take two-thirds ( $\frac{2}{3}$ ). Thus, suppose a decedent is survived by his father, mother, and two daughters. Their respective Qur'anic *fards* are one-sixth ( $\frac{1}{6}$ ), one-sixth ( $\frac{1}{6}$ ), and two-thirds ( $\frac{2}{3}$ ), which the daughters split, one-third ( $\frac{1}{3}$ ) each.

What happens if a decedent leaves not only a daughter (or daughters), but also a son (or sons)? Then the daughter (or daughters) is treated as an Agnatic heir. For instance, if there are two sons and three daughters, then the sons would get a four-sevenths share ( $\frac{4}{7}$ ) of the net estate, splitting that fraction between them, two-sevenths ( $\frac{2}{7}$ ) each. The daughters would receive the remaining three-sevenths ( $\frac{3}{7}$ ), and split it equally, one-seventh ( $\frac{1}{7}$ ) each. This example again illustrates how women, while protected, receive one-half ( $\frac{1}{2}$ ) the allotment of men.

Another possibility is where a decedent is survived by one daughter and one sister. The daughter has precedence. That is, the daughter would get her Qur'anic *fard* of one-half ( $\frac{1}{2}$ ) of the net estate. The sister would take the other one-half ( $\frac{1}{2}$ )

<sup>45</sup> See Chaudhry, *supra*, at 533.

<sup>46</sup> See Schacht, *supra*, at 173.

as an Agnatic heir. If two daughters and one sister survive, then the daughters would take two-thirds ( $\frac{2}{3}$ ), one-third ( $\frac{1}{3}$ ) each. The sister would get the remaining one-half ( $\frac{1}{2}$ ).<sup>47</sup>

Still another variation is where the daughter and father of the decedent survive. The daughter again receives her Qur'anic *fard* of one-half ( $\frac{1}{2}$ ) of the net estate. The father receives one-sixth ( $\frac{1}{6}$ ) as a Qur'anic heir, plus one-third ( $\frac{1}{3}$ ) as an Agnatic heir, for a total of one-half ( $\frac{1}{2}$ ) of the net estate. In this instance, the woman receives the same portion as the man, though they are at unequal levels, i.e., a daughter *vis-à-vis* a father.

Note the basic implication of the rule for one or more daughters: far from being left out of an inheritance, the Qur'an entitles them to a sizeable chunk, one-half ( $\frac{1}{2}$ ) for a single daughter and two-thirds ( $\frac{2}{3}$ ) for two or more daughters. But, these allotments are affected if the daughter or daughters have to compete with a male sibling or siblings.

#### (8) Son's daughter (Granddaughter):

The daughter of the son of the decedent, i.e., the granddaughter, is entitled to a portion of the net estate. However, that entitlement only materializes if there is no daughter in the picture.

For example, the son's daughter receives a one-half ( $\frac{1}{2}$ ) share in the net estate, assuming there is no surviving son or daughter of the decedent. If the son of the decedent has more than one daughter surviving, i.e., multiple granddaughters, and the son himself is dead, and the decedent has no surviving daughter, then the granddaughters receive a two-thirds ( $\frac{2}{3}$ ) share in the net estate. In effect, a granddaughter steps into the shoes of a daughter, as the Qur'anic *fard* is one-half ( $\frac{1}{2}$ ), and two or more granddaughters step into the shoes of two or more daughters, as the portion they split equally is two-thirds ( $\frac{2}{3}$ ). Manifestly, these fractional shares serve to protect female children and grandchildren.<sup>48</sup>

To illustrate how the Qur'anic *fard* rule operates for a daughter and granddaughter, consider the following cases:

- Decedent is survived by father, mother, and 3 son's daughters (3 granddaughters):

The father receives his one-sixth ( $\frac{1}{6}$ ) Qur'anic *fard*, and the mother gets her one-sixth Qur'anic *fard*. The remainder of the net estate is two-thirds ( $\frac{2}{3}$ ), all of which goes to the three granddaughters, who split it equally, two-ninths

<sup>47</sup> Put differently, suppose the decedent is survived only by his or her daughter and his or her sister. Then, the aunt (the sister of the decedent) and her niece (the daughter of the decedent) consume the net estate. The niece gets her Qur'anic share of one-half ( $\frac{1}{2}$ ), and the aunt getting the other one-half ( $\frac{1}{2}$ ) share as an Agnatic heir. If there are two or more daughters, i.e., two or more nieces, then they take a two-thirds ( $\frac{2}{3}$ ) share as Qur'anic heirs, split equally among them, and the remainder goes to the sister. Note that if the decedent leaves more than one granddaughter, then none of them has a right to the share of the aunt in the net estate. See FYSEE, *supra*, at 408-409.

<sup>48</sup> Indeed, even great granddaughters are protected. If the decedent is survived by a son's daughter (granddaughter) and son's son's daughter (great granddaughter), then the former gets her one-half ( $\frac{1}{2}$ ) Qur'anic share, and the latter gets a one-sixth ( $\frac{1}{6}$ ) share. See FYSEE, *supra*, at 409 (Case 560).

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(2/3) each. In this instance, the father does not get any portion as an Agnatic heir.

- Decedent is survived by father, mother, daughter, and 4 son's daughters (4 granddaughters):

Once again, the father and mother each take a one-sixth ( $\frac{1}{6}$ ) share of the net estate as Qur'anic heirs. The daughter receives her Qur'anic *fard* of one-half ( $\frac{1}{2}$ ). The father, mother, and daughter thus consume five-sixths ( $\frac{5}{6}$ ) of the estate, and the remaining one-sixth ( $\frac{1}{6}$ ) is split equally among the 4 granddaughters, with each one taking a one-twenty-fourth ( $\frac{1}{24}$ ) share.

- Decedent is survived by father, mother, 2 son's daughters (2 granddaughters), and a son's son's daughter (great granddaughter)

Here, too, the father and mother each take a one-sixth ( $\frac{1}{6}$ ) share of the net estate as Qur'anic heirs. The remaining two-thirds ( $\frac{2}{3}$ ) is consumed entirely by the 2 granddaughters. Interestingly, two granddaughters exclude the great granddaughter. However, if there is only one grand daughter, then she would not exclude the great granddaughters.

- Decedent is survived by father, mother, son's daughter (granddaughter), and son's son's daughter (great grand daughter)

The father and mother each take a one-sixth ( $\frac{1}{6}$ ) share of the net estate as Qur'anic heirs. The remaining two-thirds ( $\frac{2}{3}$ ) is consumed by the grand daughter and great granddaughter, with their respective Qur'anic *fards* being one-half ( $\frac{1}{2}$ ) and one-sixth ( $\frac{1}{6}$ ). The granddaughter and great granddaughter are treated like a case in which the decedent is survived by two or more daughters. As explained earlier, two or more daughters are entitled to a two-thirds ( $\frac{2}{3}$ ) share. However, there is a slight difference: two or more daughters would split the two-thirds ( $\frac{2}{3}$ ) equally, whereas a grand daughter takes a larger portion ( $\frac{1}{2}$ ) than the great granddaughter ( $\frac{1}{6}$ ).

A generic inference from these illustrations is that the Qur'anic *fards* help protect female descendants of the decedent, but the precise extent to which the do so depends on their distance in the lineage, and whether competing claimants exist.

#### (9) Full Sister:

Because a full sister of the decedent is not a primary Qur'anic heir, the presence of certain surviving relatives excludes the *fard* otherwise due to her. Specifically, if the son, son's son (i.e., grandson), father, or true grandfather of a decedent survives, then the sister of the decedent does not receive a share in the net estate. Professor Fyzee observes:

[M]ale agnates in the descending and ascending lines exclude her [the full sister of the decedent] as a collateral. With the full brother, and, in certain cases, with the daughter, she becomes a residuary.<sup>49</sup>

<sup>49</sup> FYZEE, *supra*, at 411. Likewise, a half-sister on the father's side receives the same share as a full sister, but both are excluded from inheritance in the presence of a son, a son's son, father, or grandfather of the decedent.

Put differently, before a full sibling can inherit, the decedent should not be survived by any male children or grandchildren, or by his or her father or grandfather. The son(s), grandson(s), father, and grandfather of the decedent are preferred over the siblings of that decedent. This exclusionary rule, in the sense of certain male relatives excluding a sister from inheritance, is one reason for the criticism Islamic Inheritance Law sometimes works to the disadvantage of women.

Assuming none of the excluding relatives exists, the normal Qur'anic share of a full sister is one-half ( $\frac{1}{2}$ ) of the net estate. If there are two or more full sisters, then the share is two-thirds ( $\frac{2}{3}$ ). Note that these fractions are the same as those for one or more daughters. These figures assume the decedent is not survived by any brother.

For example, if the decedent is the wife, and is survived by her husband and sister, then the husband takes a one-half ( $\frac{1}{2}$ ) share in the net estate, and the sister gets the other one-half share, both as Qur'anic heirs. Thereby, they would consume the estate. If the decedent is survived by her husband and two sisters, then the Qur'anic shares are one-half ( $\frac{1}{2}$ ) for the husband and two-thirds ( $\frac{2}{3}$ ) for the two sisters. Of course, these shares sum to greater than unity (1). Hence, the principle of *'aul* must be applied. Here, the result would be to reduce the husband's share to  $\frac{3}{7}$ , and the sisters' share to  $\frac{4}{7}$ .

What happens to the inheritance of a sister if the decedent is survived not only by her, but also by one or more brothers? Simply put, the sister of the decedent inherits one-half ( $\frac{1}{2}$ ) of what is allotted to the brother of the decedent. That is, if there is a full brother, then the sister inherits one-half ( $\frac{1}{2}$ ) of what is allotted to their brother.<sup>50</sup> If there are multiple sisters, then they would split equally the share apportioned to them. The fact that in the presence of a full brother of a decedent the sister of that decedent receives a share that is one-half ( $\frac{1}{2}$ ) the portion of the brother is another basis for the above-mentioned criticism about the effect of Islamic Inheritance Law on women.

As another possible case, suppose the decedent is survived by one full sister and one daughter. The daughter takes precedence over the sister. She inherits as a Qur'anic heir, and the sister as an Agnatic heir. Yet, each gets a one-half ( $\frac{1}{2}$ ) portion of the net estate. If there are two surviving daughters, and one full sister, then the two daughters would take two-thirds ( $\frac{2}{3}$ ) of the net estate, and the sister's Agnatic share would be reduced to one-third ( $\frac{1}{3}$ ). If there is one daughter, and two sisters, then the daughter again gets a one-half ( $\frac{1}{2}$ ) Qur'anic *fard*. The two sisters split the Agnatic portion of one-half ( $\frac{1}{2}$ ), thereby getting one-quarter ( $\frac{1}{4}$ ) each.

#### (10) Consanguine Sister:

The inheritance share of a consanguine sister (e.g., one who shares one parent with the decedent) is excluded by a full brother or two full sisters of the decedent. It also is excluded by the same four relatives that exclude the share of a full sister, namely, the son, grandson, father, or true grandfather of the decedent. Assuming none of the excluding relatives exists, the normal Qur'anic share of a consanguine sister is one-half ( $\frac{1}{2}$ ) of the net estate. If there are two or more consanguine sisters,

<sup>50</sup> FYZEE, *supra*, at 411.



then the share is two-thirds ( $\frac{2}{3}$ ). Note these fractions are the same as those for one or more daughters, and for one or more full sisters. Setting aside the possibility of exclusion, the fractions provide some protection to full and consanguine sisters of a decedent.

Suppose, then, the decedent is survived by one full sister and one consanguine sister. The Qur'anic *fard* of the full sister is one-half ( $\frac{1}{2}$ ) of the net estate, and that of the consanguine sister is one-sixth ( $\frac{1}{6}$ ). The latter figure means the two Qur'anic heirs consume two-thirds ( $\frac{2}{3}$ ) of the net estate, which also is the case if the decedent were survived by a son's daughter (granddaughter) and son's son's daughter (great granddaughter).<sup>51</sup> Note, however, two full sisters exclude the consanguine sister from any inheritance.

#### (11) Uterine Brother:

A uterine brother of a decedent is not a primary heir. The adjective "uterine" connotes the brother and decedent were born to the same mother, but had different fathers. This situation can arise when one father dies or is divorced from the mother. A uterine brother is excluded from an inheritance if the decedent leaves behind a child (male or female) or a child of a son (i.e., a grandson or granddaughter through a son). Likewise, a uterine brother is excluded if a decedent leaves behind his or her father, or true grandfather. Yet, neither the full brother nor full sister of the decedent excludes the uterine brother.

Assuming none of these excluding persons exists, then the uterine brother takes a one-sixth ( $\frac{1}{6}$ ) Qur'anic share. Note that this is the same fraction as that for a uterine sister, suggesting a modicum of gender neutrality. Suppose there are two uterine brothers, or a uterine brother and a uterine sister. Then, they split a one-third ( $\frac{1}{3}$ ) *fard*. They do so equally, further suggesting some equality between females and males in this context.

#### (12) Uterine Sister:

The Qur'anic inheritance share rules for a uterine sister closely resemble those for a uterine brother. A uterine sister of a decedent is not a primary heir. The adjective "uterine" connotes the sister and decedent were born to the same mother, but had different fathers. This situation can arise when one father dies or is divorced from the mother. Like a uterine brother, a uterine sister is excluded from an inheritance if the decedent leaves behind a child (male or female) or a child of a son (i.e., a grandson or granddaughter through a son). Also like a uterine brother, a uterine sister is excluded if the decedent leaves behind his or her father, or true grandfather. Yet, neither the full brother nor full sister of the decedent excludes a uterine sister, just as they do not exclude a uterine brother.

Assuming no excluding persons exists, then the uterine sister takes a one-sixth ( $\frac{1}{6}$ ) Qur'anic share. That is the same fraction as for a uterine sister. If there are two uterine sisters (just like two uterine brothers), or a uterine brother and a

<sup>51</sup> In contrast, suppose the decedent leaves behind one full sister and one consanguine sister, but also is survived by a full brother and his consanguine sister. Then, all of them inherit as Agnatic heirs, and the brother gets a share that is twice that of the sisters. See FYZES, *supra*, at 411 Case 3.

uterine sister, then they split a one-third ( $\frac{1}{3}$ ) *fard*, and they do so equally. To sum up in different terms, a maternal half brother (i.e., a uterine brother) and maternal half sister (i.e., a uterine sister) each receive one-sixth ( $\frac{1}{6}$ ). Two or more maternal half-siblings share thirds among them, however, they are then excluded by descendants and male ascendants.

By way of illustration, suppose a decedent is survived by two full sisters and two uterine sisters. The two full sisters are entitled to their *fard* of two-thirds ( $\frac{2}{3}$ ) of the net estate, which they split equally, one-third ( $\frac{1}{3}$ ) each. The two uterine sisters get their share of one-third ( $\frac{1}{3}$ ), which they divide equally between them, one-sixth ( $\frac{1}{6}$ ) each. Note the same result occurs if the decedent is survived by two consanguine, rather than two full, sisters. And, the same result occurs if the decedent leaves behind two uterine brothers instead of two uterine sisters. Thus, the presence of full or consanguine sisters does not affect the share owed to uterine sisters or uterine brothers.

As another case, suppose a decedent has a full sister, two consanguine sisters, plus one uterine brother and one uterine sister. The full sister gets her Qur'anic *fard* of one-half ( $\frac{1}{2}$ ) of the net estate. The two consanguine sisters get their share of one-sixth ( $\frac{1}{6}$ ), which they split equally, one-twelfth ( $\frac{1}{12}$ ) each. The uterine brother and uterine sister get their one-third ( $\frac{1}{3}$ ) *fard*, which they divide equally, one-sixth ( $\frac{1}{6}$ ) each. Here, too, the presence of full and consanguine sisters does not affect the share for uterine siblings.

Would the Qur'anic *fard* to a uterine sibling of the decedent be affected if the decedent pre-deceases his or her mother? The answer is "no." Suppose the decedent leaves behind two full sisters, a consanguine sister, a uterine sister or brother — plus the mother of the decedent. The two full sisters get their share of two-thirds ( $\frac{2}{3}$ ), splitting it one-third ( $\frac{1}{3}$ ) each. The two full sisters exclude the consanguine sister from getting any share. The uterine sister or brother receives the usual share of one-sixth ( $\frac{1}{6}$ ). And, the mother of the decedent gets her normal share of one-sixth ( $\frac{1}{6}$ ) of the net estate.

This last example nicely illustrates the fundamental point that Qur'anic *fards* indeed are fixed shares. After all, they are set by God (Allāh). It also illustrates the practical point that in any Islamic Inheritance Law problem, not only is it necessary at the outset to identify classes of heirs (Qur'anic, Agnatic, and Uterine), but also it is essential to see if there are any excluding persons. In the above case, the two full sisters entirely exclude the consanguine sister.

Evidently, the above-listed rules are complex. Consequently, calculations of inheritance under the *Shari'a* can be complex. Therefore, it is common practice to use inheritance calculators to divide the estate.<sup>52</sup> That is, as there are inheritance lawyers in the United States, there are *Shari'a* lawyers who specialize in understanding, interpreting, and applying these 12 rules to actual cases.

<sup>52</sup> There also are a variety of software programs, many of which are web-based, available to calculate inheritance shares under the *Shari'a*. To try out various scenarios, see Islamic Inheritance Programs, available at [www.islamicsoftware.org/irth/irth.html](http://www.islamicsoftware.org/irth/irth.html).

### [C] Examples

The examples below illustrate the application of some of the above-mentioned Islamic rules of succession, particularly the distribution of Qur'anic shares (*fard*s). The examples assume funeral costs and debts of the decedent have been paid, and thus focus on distribution of a net, not gross, estate. The examples also assume issues of valuation of assets in the net estate are resolved. That is, all assets have a market value that can be expressed as a sum in U.S. dollars. Finally, the first three examples also assume it is not necessary to apply the principles of *'awl* (increase) or *radd* (return), because the Qur'anic shares either sum to unity (1), or there is a sole Agnatic heir entitled to the residue.

#### Example #1:<sup>53</sup>

Ayesha dies, leaving no children or Agnatic grandchildren. Her only survivors are her husband, and one full sister. Both of them are Qur'anic heirs, with her husband being a primary heir. In the distribution of Ayesha's net estate, which is worth \$1,000,000, is as follows:

- Husband takes a one-half ( $\frac{1}{2}$ ), worth \$500,000. Normally, his *fard* is one-quarter ( $\frac{1}{4}$ ), but because Ayesha leaves no children or Agnatic grandchildren, the figure is raised to one-half ( $\frac{1}{2}$ ).
- Full sister also takes a one-half ( $\frac{1}{2}$ ) share, worth \$500,000. That is the normal *fard* for one full sister.

The Qur'anic shares aggregate to unity (1). Observe that in this Example, the net estate of the decedent is divided equally between a man and a woman.

#### Example #2:<sup>54</sup>

Fatima dies leaving only her husband, one daughter, and one full brother. In parceling out her \$1,000,000 net estate, her husband and daughter are primary Qur'anic heirs, entitled to shares of one-quarter ( $\frac{1}{4}$ ) and one-half ( $\frac{1}{2}$ ), respectively. The full brother (the uncle of the daughter) is the only Agnatic heir, who may receive a distribution of any remainder. Therefore:

- Husband,  $\frac{1}{4}$  Qur'anic share = \$250,000
- Daughter,  $\frac{1}{2}$  Qur'anic share = \$500,000
- Full Brother, as the only Agnatic heir, the full amount of the residue = \$250,000

Here, while the Qur'anic shares do not sum up to unity (1), there is an Agnatic heir who is entitled to the residue. Note that in this case, a woman receives twice the share of both her father and her uncle.

#### Example #3:<sup>55</sup>

A decedent, Ali, passes away, leaving behind his wife and mother, plus one male child. The net estate is worth \$1,000,000. The wife and mother are primary Qur'anic heirs, with *fard*s of  $\frac{1}{4}$  and  $\frac{1}{6}$ , respectively. The son is an Agnatic heir. Accordingly, the \$1 million is divided as follows:

- Wife,  $\frac{1}{4}$  Qur'anic share = \$125,000
- Mother,  $\frac{1}{6}$  Qur'anic share = \$166,667.67
- Son, as the only Agnatic heir, the full amount of the residue = \$708,333.33

Conceptually, the net estate is divided into 24 parts, with 3 parts ( $\frac{3}{24}$ , or  $\frac{1}{8}$ ) distributed to the wife, 4 parts ( $\frac{4}{24}$ , or  $\frac{1}{6}$ ) to the mother, and 17 parts ( $\frac{17}{24}$ ) to the son.

A variation on this example is if Ali passes away leaving behind a wife, one son, and one daughter (but no mother). The daughter is a primary Qur'anic heir entitled to a one-half ( $\frac{1}{2}$ ) share. But, the existence of the son makes her an Agnatic heir, and she receives one-half ( $\frac{1}{2}$ ) of what the son gets. Consequently, the net estate is divided as follows:

- Wife,  $\frac{1}{4}$  Qur'anic share = \$125,000
- Son, as Agnatic heir = \$583,333
- Daughter, who becomes an Agnatic heir with a claim equal to one-half ( $\frac{1}{2}$ ) that of the son = \$291,667

Observe the calculation of the amounts owed to the son and daughter is made by subtracting the wife's entitlement of \$125,000 from the amount of the net estate, \$1 million, which leaves \$875,000. This balance then is divided between the son and daughter so that the son receives double the amount of the daughter. The result is, as under the first scenario, that the estate is divided into 24 parts, with  $\frac{3}{24}$  (i.e.,  $\frac{1}{8}$ ) going to the mother,  $\frac{14}{24}$  to the son, and  $\frac{7}{24}$  to the daughter.

In each scenario, while the Qur'anic *fard*s do not sum up to unity (1), there is an Agnatic heir entitled to the residue. Also, both scenarios illustrate the utility of converting the Qur'anic shares to a common denominator that reflects the number of claimants.

#### Example #4:<sup>56</sup>

Mariam dies. She is survived by her husband, father, and mother, plus one daughter. All four of these relatives are primary Qur'anic heirs. The net estate Mariam leaves is worth \$1,000,000. The distribution based on the normal Qur'anic *fard*s would be one-quarter ( $\frac{1}{4}$ ) for the husband, one-sixth ( $\frac{1}{6}$ ) for the father, one-sixth ( $\frac{1}{6}$ ) for the mother, and one-half ( $\frac{1}{2}$ ) for the daughter. However, if distribution occurred on this basis, then more than the net estate would be consumed: The shares sum to unity (1). Thus:

- Husband,  $\frac{1}{4}$  Qur'anic share = \$250,000
- Father,  $\frac{1}{6}$  Qur'anic share = \$166,667.67
- Mother,  $\frac{1}{6}$  Qur'anic share = \$166,667.67

<sup>53</sup> See Chaudhry, *supra*, at 535.

<sup>54</sup> See Chaudhry, *supra*, at 536.

<sup>55</sup> See Chaudhry, *supra*, at 535.

<sup>56</sup> See Chaudhry, *supra*, at 536.



• Daughter, $\frac{1}{2}$ Qur'anic share	=	\$500,000
		<hr/>
		\$1,083,335.34

In other words, the Qur'anic shares sum to a figure greater than unity (1), thus more than \$1 million is accounted for.

Consequently, it is necessary to apply the principle of *'aue*l (increase). Recall that this principle requires setting the normal Qur'anic *fard*s to a common denominator, increasing the denominator in those *fard*s to make it equal to the sum of the numerators (that results with a common denominator), and retaining the individual numerators (that results with a common denominator). Thus:

*Step 1 —*

The respective Qur'anic shares of the husband, father, mother, and daughter are  $\frac{1}{4}$ ,  $\frac{1}{6}$ ,  $\frac{1}{6}$ , and  $\frac{1}{2}$ . The lowest common denominator among these fractions is 12.

*Step 2 —*

The Qur'anic shares are translated into a common denominator and become  $\frac{3}{12}$ ,  $\frac{2}{12}$ ,  $\frac{2}{12}$ , and  $\frac{6}{12}$  of the husband, father, mother, and daughter, respectively.

*Step 3 —*

The sum of the numerators of the translated shares is 13 ( $3+2+2+6$ ).

*Step 4 —*

The sum of the numerators of the translated shares, 13, becomes the denominator of the translated shares, but the numerators remain the same. Consequently, the shares of the husband, father, mother, and daughter, respectively, become  $\frac{3}{13}$ ,  $\frac{2}{13}$ ,  $\frac{2}{13}$ , and  $\frac{6}{13}$ .

*Step 5 —*

Using the readjusted shares, the distribution is made as follows:

• Husband, share decreased from $\frac{1}{4}$ ( $\frac{3}{12}$ ) to $\frac{3}{13}$	=	\$230,769.23
• Father, share decreased from $\frac{1}{6}$ ( $\frac{2}{12}$ ) to $\frac{2}{13}$	=	\$153,846.15
• Mother, share decreased from $\frac{1}{6}$ ( $\frac{2}{12}$ ) to $\frac{2}{13}$	=	\$153,846.15
• Daughter, share decreased from $\frac{1}{2}$ ( $\frac{6}{12}$ ) to $\frac{6}{13}$	=	\$461,538.46

The total funds distributed are worth \$1 million, the amount of the net estate. Here, a woman receives twice the share of her father, i.e., the husband of the decedent and father of the daughter gets \$230,769.23, but the daughter gets \$461,538.46. And, a woman receives thrice the share of her grandfather, i.e., the father of the decedent and grandfather of the daughter get \$153,846.15, yet the daughter gets three times that figure.

**Example #5:<sup>57</sup>**

Omar dies leaving his wife and one daughter, no male Agnate heirs, and a net estate valued at \$1 million. The wife and daughter are primary Qur'anic heirs, and their respective *fard*s are one-eighth ( $\frac{1}{8}$ ) and one-half ( $\frac{1}{2}$ ). If the distribution were made based on these shares, it would be as follows:

• Wife, $\frac{1}{8}$ Qur'anic share	=	\$125,000
• Daughter, $\frac{1}{2}$ Qur'anic share	=	\$500,000
		<hr/>
		\$625,000

Manifestly, the entirety of the net estate is not consumed. There are no Agnatic heirs to take up the residue of \$375,000. Therefore, it is necessary to apply the principle of *radd* (return) and thereby increase the allotments to the wife and daughter.

In particular, the first rule of *radd* is relevant, namely, that the residue returns in proportion to the Qur'anic shares. Applying this rule means converting the usual Qur'anic shares to a common denominator, computing the sum of the numerators (that results with a common denominator), using that sum of the numerators as the denominator of the shares, and retaining the same numerators of the shares (that results with a common denominator). Accordingly:

*Step 1 —*

The respective Qur'anic shares of the wife and daughter are  $\frac{1}{8}$  and  $\frac{1}{2}$ . The lowest common denominator among these fractions is 16.

*Step 2 —*

The Qur'anic shares are translated into a common denominator and become  $\frac{2}{16}$  and  $\frac{8}{16}$  of the wife and daughter, respectively.

*Step 3 —*

The sum of the numerators of the translated shares is 10 ( $2+8$ ).

*Step 4 —*

The sum of the numerators of the translated shares, 10, becomes the denominator of the translated shares, but the numerators remain the same. Consequently, the shares of the wife and daughter respectively, become  $\frac{2}{10}$  and  $\frac{8}{10}$ .

<sup>57</sup> See Chaudhry, *supra*, at 536.

## Step 5 —

Using the readjusted shares, the distribution is made as follows:

- Wife, share increased from 1/8 = \$200,000  
(2/16) to 2/10
- Daughter, share increased from 1/2 = \$800,000  
(8/16) to 8/10

\$1,000,000

The above calculation is technically correct. However, it does not produce the right answer in this particular case.

That is because the calculation ignores a key point: the second rule of *radd* is relevant. Under the second rule, the wife of the decedent is not entitled to a return if there is a Qur'anic heir present. There is such an heir, the daughter. (The third rule of *radd* is inapplicable, given the presence of a surviving heir, the daughter.) Therefore, the entire amount of the residue, \$375,000, which would result from a distribution based on usual Qur'anic *fards*, goes to the daughter. The correct answer is thus:

- Wife, 1/4 Qur'anic share = \$125,000
- Daughter, 1/2 Qur'anic share = \$875,000  
(\$500,000), plus 1/4 share as residue  
(\$375,000)

\$1,000,000

In this example, females take the entire net estate, and applying *radd* clearly assists the daughter of the decedent.

## § 42.04 DISINHERITANCE

Islamic Law of Succession contains rules not only on inheritance entitlements and shares, but also on disinheritance. Among them, three are particularly salient. First, it is not possible for a husband to disinherit his wife by repudiating the marriage contract on his deathbed. Suppose a husband, near death, were to repudiate the marriage. The *Shari'a* protects the ex-wife by ensuring her right to inherit continues through the *'idda* (the mandatory waiting period for re-marriage after the termination of a marriage). In other words, if the husband dies during the *'idda*, then the wife still has a right to inherit. Of course, he can disinherit her through divorce while he is in a normal, healthy state, as is possible under American law. Under the *Shari'a*, the converse also is true.<sup>59</sup> Suppose a wife causes the dissolution of the marriage during an illness that results in her death. Suppose further that she dies during the *'idda*. Then, the husband has the inheritance right, which she cannot affect despite a near-death effort to do so.

The second disinheritance rule actually is a cluster of circumstances under which disinheritance occurs. It is possible to be disinherited by any of the following conditions:

<sup>59</sup> See SCHACHT, *supra*, at 168.

- (1) Difference of religion, *i.e.*, the prospective heir is not Muslim. This condition is particularly grievous, and the subject of criticism. Essentially, it means that a prospective non-Muslim heir lacks inheritance rights in respect of the net estate of a decedent Muslim, for no reason other than his or her religious affiliation. The heinous effects of this rule include discouraging inter-faith marriages, and drumming up communal resentment by overtly discriminating against non-Muslims.
- (2) Difference of domicile, *i.e.*, the prospective heir lives in a non-Muslim country. This condition also is unfortunate, particularly in the modern age of globalization. It discourages Muslims from exercising opportunities to migrate to places of their choice, based on factors such as educational and job opportunities, without regard to religion.
- (3) Causing the death of the decedent. This condition is sensible enough. It is founded on a general principle not only of Islamic Law, but also in any system of justice: one should not profit from one's wrongful act. However, no one who otherwise would be an heir is excluded merely because of his relationship to a wrongdoer. Thus, for instance, the sons of a person who killed the decedent would not be excluded.<sup>60</sup> In effect, the sin of the wrongdoer is not visited on his or her offspring.
- (4) Being a slave. This condition is of little contemporary relevance.

These conditions, while not necessarily exhaustive, are the most common grounds for disinheritance (particularly the first three).

The third rule concerns the relative timing of death of an heir and the testator-decedent. If a prospective heir dies before the decedent, and thereby becomes what is called a "pre-deceased heir," then the inheritance right dies to. The descendants of the pre-deceased heir do not inherit the claim.

## § 42.05 SHĪTE VARIATIONS

In many legal subject areas, *Sunni* and *Shīte* rules tend to be similar, if not the same. However, to some degree, *Sunni* Inheritance Law differs from that of Twelver *Shīte* Inheritance Law. The variances are necessitated by the different doctrines of the *Sunni* and *Shīte* communities. *Sunnis* take a literal view of *Surah Al-Nisa'* (*Surah* 4). *Shītes* do not take as restrictive a view as *Sunnis* of the key verses, *ayat* 11-12, of this *surah*. Instead, *Shītes* have developed general rules, which they say underlie the principles laid out in the Qur'an. The biggest difference between the *Sunni* and the *Shīte* approach is that in the latter instance, the principle of Agnatic heirs is destroyed, and Cognates and Agnates are placed on the same footing as each other.<sup>60</sup>

Consequently, in the *Shīte* Law of Succession, heirs appear in three categories:

<sup>59</sup> See SCHACHT, *supra*, at 173.

<sup>60</sup> See MUHAMMAD MUSTAFA KHAN, *ISLAMIC LAW OF INHERITANCE: A NEW APPROACH*, 143 (New Delhi, India: Kitab Bhavan, 1989). [Hereinafter, MUHAMMAD KHAN]. Blood relations include: parents and lineal descendants; ascendants and siblings and their children; uncles and aunts and their descendants.



- (1) The first category includes the parents and lineal descendants of the decedent.
- (2) The second includes descendants and siblings and siblings' issue in relation to the decedent.
- (3) The third category includes uncles and aunts, and their descendants, of the decedent.<sup>61</sup>

Manifestly, these heirs encompass the father, mother, daughter, daughter's descendants, sisters and their descendants, and brothers by the same mother and their descendants. Each of these heirs has a set share. All other heirs are residuary.<sup>62</sup>

If there are survivors in the first category, then they share the net estate to the exclusion of those in the second and third categories.<sup>63</sup> Likewise, survivors in the second category preempt the takers in the third category. Within each category, the closer relative excludes the more distant one.<sup>64</sup>

Also, significantly, within each category, there is little or no distinction between males and females.<sup>65</sup> Further, the survival of an agnatic descendant or ancestor has no effect on the prescribed share of a named taker. Thus, in the *Shī'a* system, females may end up inheriting a greater amount than their male counterparts.<sup>66</sup> For example, suppose a decedent is survived by a paternal grandfather, his wife, and his daughter. *Sunni* Law of Succession divides the net estate as follows:

- Three-eighths (3/8) to the grandfather
- One-eighth (1/8) to the wife
- One-half (1/2) to the daughter.

But, under the *Shī'a* system, the wife and daughter, as the closer relatives to the decedent, would share the net estate equally, one-half (1/2) each, to the exclusion of the grandfather.<sup>67</sup>

Notably, in June 2004, Iran passed an amendment to its inheritance laws. Under the change, a wife of a decedent may receive the entirety of the net estate. Before the change, a wife could receive as a maximum only her share, one-quarter (1/4), as provided in the Qur'an when her husband has no other children or grandchildren, with the rest going to the state treasury.

<sup>61</sup> Mary F. Radford, *The Inheritance Rights of Women under Jewish and Islamic Law*, 23 BOSTON COLLEGE INTERNATIONAL AND COMPARATIVE LAW REVIEW 135, 167 (2000). [Hereinafter, Radford.]

<sup>62</sup> See Radford, *supra*, at 167.

<sup>63</sup> See Radford, *supra*, at 167.

<sup>64</sup> See Radford, *supra*, at 167.

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<sup>67</sup> See Radford, *supra*, at 168.

## § 42.06 WOMEN AND INHERITANCE

### [A] Differential Treatment in Two of Four Basic Classes

A recurrent criticism of the *Shari'a* is encapsulated in the phrase "women inherit half as much as men." As seen through the above examples, the criticism Islamic Inheritance Law operates in an unjust manner toward women is itself unfair. It is too broad an opprobrium, and based on misunderstanding if not prejudice. A more accurate, lawyer-like assessment is captured by the simple phrase with which lawyers are familiar: "it depends." Sometimes women get half as much as men. But, this inequality does not occur in every case. In any event, there is a colorable conventional Islamic legal defense for differential treatment in certain instances.

Whether women are discriminated against *vis-à-vis* men in a *Shari'a* inheritance case depends on the facts of that case. Often overlooked by critics is a key issue: which relatives survive the decedent? There are four basic classes of relations to a decedent:

- Children
- Siblings
- Parents
- Grandparents

When women and men survive and are in the same class, women inherit equally with men of that class in two of the four classes. The cases in which a woman inherits unequally, taking one-half (1/2) the share of her male counterpart, are that of a decedent survived by a son and daughter, and a decedent survived by a full brother and sister.<sup>68</sup> In respect of the other two basic classes of relations to a decedent, women get as much as men. The father and mother of a decedent, who obviously are in the same class of relatives, take an equal Qur'anic *farḍ*: one-sixth (1/6). Likewise, the grandfather and grandmother of the decedent take a one-sixth (1/6) share.

To be sure, in practice, the scenarios for inheritance cases are infinite. In each scenario, the fair treatment of women also depends on honest, transparent dealings by all parties, especially persons in possession of assets in the net estate, accountants responsible for asset valuation, and lawyers charged with the task of calculating shares. It is all too easy in poor, unsophisticated, male-dominated environments to ride roughshod over the inheritance rights of women, who may not even be aware of their rights.

This risk is particularly acute in contemporary times. From an historical vantage point, the rights of Muslim women under the Islamic Law of Succession foreshadow the rights of modern non-Muslim western women to inherit property or demand support from the net estate of a decedent.<sup>69</sup> Non-Muslim western

<sup>68</sup> See Chaudhry, *supra*, at 536.

<sup>69</sup> See Radford, *supra*, at 187.

- (1) The first category includes the parents and lineal descendants of the decedent.
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<sup>68</sup> See Chaudhry, *supra*, at 536.

<sup>69</sup> See Radford, *supra*, at 187.



cultures that, in the past, abused the inheritance rights of women now are coming closer to achieving gender equality in their legal systems. In contrast, Islamic law is encountering a resurgence of religious extremism. Consequently, a challenge for Muslim women today is to ensure that the equality granted to them by Islam, and their inheritance rights under the Law of Succession, are manifest in the law and practice of Islamic countries.<sup>70</sup>

### [B] Three-Pronged Conventional Defense

What is the conventional defense, from an Islamic legal perspective, of differential and lesser inheritance distribution to a woman? The defense is three-pronged. First, the differences that arise are in cases where the role of a man is that of a bread-winner, provider, and protector. Traditionally, men are given duties not just in regard to their own families, but also towards society.<sup>71</sup> In contrast, women are excused from duties such as service to a holy war (*jihad*), maintenance and support of relations, payment of expiatory fines, and the like.<sup>72</sup> Thus, the principle of double share, whereby a man receives twice the inheritance share of a woman, is based on based on an equitable consideration, rather than gender discrimination. That is, the inequality of the women in inheritance is matched by the corresponding increase in the economic burden of men.<sup>73</sup> In turn, the two sexes are said to be equal in regards to their overall economic position.

Perhaps this rationale ought to be dubbed "pragmatic," as well as "equitable." More generally, it is argued that this kind of balance, or imbalance, is necessary. One of the most fundamental pillars of Islamic legal theory is that the *Shari'a* serve the well-being of humanity,<sup>74</sup> or what in Catholic Christianity is stylized as the "common good." Distributing inheritance shares differentially to reflect the dissimilar but complimentary responsibilities serves the common good. Yet, what about a modern society, in which women are the primary bread-winners in some families? (This inquiry begs another question: are not women playing that role in certain traditional societies?) Arguably, rules on succession that favor men may not, or should not be, applied.

The second prong of the traditional defense is the repetition of the quotidian contention that although God (Allāh) creates men and women equally, their substantively equal importance does not substantiate perfectly identical treatment in all respects.<sup>75</sup> An Islamic society is a "dual-sex" one. Each gender maintains certain distinct but inter-dependent duties and responsibilities in order to yield a harmonious family and society.<sup>76</sup> Unfortunately, the second sentence of *surah 2, ayah 228* sometimes is cited to support the proposition that endemic to Islam is the superiority of men to women. This passage says:

<sup>70</sup> See Radford, *supra*, at 187.

<sup>71</sup> See MOHAMMED KHAN, *supra*, at 143.

<sup>72</sup> See MOHAMMED KHAN, *supra*, at 143.

<sup>73</sup> See MOHAMMED KHAN, *supra*, at 143.

<sup>74</sup> See Chaudhry, *supra*, at 539.

<sup>75</sup> See Chaudhry, *supra*, at 539.

<sup>76</sup> See Chaudhry, *supra*, at 541.

... Wives have [rights] similar to their [obligations], according to what is recognized to be fair, and *husbands have a degree [of right] over them: [both should remember that] God is almighty and wise.*<sup>77</sup>

Yet, that proposition is too broad an inference to draw from this verse. The verse must be set in the context of other provisions of the *Shari'a*. The number of verses in the Qur'an stressing the equality of women in creation and spirituality is not inconsiderable.<sup>78</sup>

Moreover, the second sentence of *surah 2, ayah 228* must be appreciated in the context of the practical realities of daily life. It is argued that men are allotted the economic burden of supporting the family, and by extension society. By doing so, says Professor Chaudhry, Islamic law is not "legislating the superiority of men over women, or some inherent excellence of men."<sup>79</sup> Rather, she states, "the distribution of authority and responsibility is a dimension of the division of labor," not an affirmation of gender discrimination.<sup>80</sup> In sum, distribution of inheritance shares in a two-to-one ratio, which is limited to two classes of relatives of a decedent, reflects the role of the two sexes in Muslim society, and is designed to ensure fairness.<sup>81</sup>

<sup>77</sup> THE QUR'AN — A New Translation by M.A.S. Abdel Haleem, 2:228 at 26 (Oxford, England: Oxford University Press (2004)) (emphasis added).

<sup>78</sup> Regarding the equality of men and women in creation, see, e.g., the following *sūrat* and *āyat*: 4:1, 7:189, 16:72, 42:11, and 49:13. Regarding spiritual equality, see, e.g., 4:124, 16:97, 33:35, and 74:38, 16:97.

<sup>79</sup> Chaudhry, *supra*, at 542.

<sup>80</sup> Chaudhry, *supra*, at 542.

<sup>81</sup> See Chaudhry, *supra*, at 543.

Chapter 11

KEY CONCEPTS

Chapter 11 covers the following topics: ...

PART TWELVE  
CRIMINAL LAW ('UQUBĀT)

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## Chapter 43

### KEY CONCEPTS

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When you think of the long and gloomy history of man, you will find more hideous crimes have been committed in the name of obedience than have ever been committed in the name of rebellion.

C.P. Snow (1905-1980)

English Scientist and Novelist

#### SYNOPSIS

##### § 43.01 UNDERLYING THEORY

- [A] Prohibitions Matter More Than Sanctions
- [B] "Missing" Features
- [C] Proportionality and Orientalist Fallacy

##### § 43.02 FOUNDATIONAL DISTINCTION

- [A] Claims of God (*Haqq Allāh*) and *Māliki* School Treatment of Rebellion (*Baghi*)
- [B] Meaning of "Ḥadd"
- [C] Claims of Man (*Haqq Ā damī*)
- [D] Orientalist Fallacy Again

##### § 43.03 RESTRICTIONS ON IMPOSING ḤADD PUNISHMENTS

- [A] Narrow Definitions
- [B] Strict Evidentiary Requirements
- [C] Resemblance (*Shubha*)
- [D] No Cumulation
- [E] Limitations Period
- [F] Incapacity: Age and Mental Deficiency
- [G] Necessity (*Ḍarūrāh*)
- [H] Duress (*Ikrāh*)

##### § 43.04 CONFESSION AND REPENTANCE

- [A] Schacht's Illustrations
- [B] Opinions of the Four *Sunnite* Schools
- [C] Retraction of Confession

##### § 43.05 ADDITIONAL CONSIDERATIONS ABOUT IMPOSING ḤADD PUNISHMENTS

- [A] Good Faith?

[B] Self-Defense?

[C] Mixed Legal Systems

#### § 43.06 PRACTICAL POINTS

[A] Prosecution and *Muhtasib*

[B] Applying *Hadd* Punishments and *Imām*

#### § 43.01 UNDERLYING THEORY

##### [A] Prohibitions Matter More Than Sanctions

If there are three unflattering impressions — or, perhaps more accurately, incomplete or wrong-headed impressions — about Islam common in the non-Muslim World, then surely cruel punishments for criminal law violators is one of them, the other two being the oppressively conservative dress imposed on women, and the association with terrorism. The first topic is fueled by a considerable degree of mainstream media attention in the United States and Western Europe on episodic cases in which the harshest of punishments are applied by a rather zealous lot. Never mind that the number of such instances is fairly small, although tragically when they arise women are often the ones hideously punished. Never mind, also, that these instances tend to occur in a handful of countries — most notoriously, Iran, Saudi Arabia, Northern Nigeria, Somalia, and Sudan — not in most of the other 52 countries that make up the 57-nation Organization of Islamic Conference (OIC).<sup>1</sup> Never mind, too, that little if any media coverage is given to the many instances in which a convict is pardoned by an authority or forgiven by a victim.

The stereotype, then, is that Islamic Criminal Law, traditionally known as “Penal Law,” is a system long on revenge and short on compassion. As a matter of terminology, which provides some insight, it is important to pause and consider the rubric “Penal Law.” The analogous term in Arabic is “*uqūbāt*.” This refers to both kinds of wrongs — crimes, and civil wrongs, or torts. That is, “*uqūbāt*” covers what American Law distinguishes as Criminal Law and Tort Law. Criminal Law proper, and Tort Law, both in the American sense, fall under the rubric of Islamic Penal Law, or “*uqūbāt*.”

Essential to deconstructing any stereotype is to separate fact from fiction, which in respect of the *Sharīʿa* requires appreciation of the theory underlying Islamic Penal Law. It is impossible to deny that by modern-day standards — those standards being set not only in secular legal systems like American and Civil Law, but also through International Human Rights Law — the conventional punishments in the *Sharīʿa* are harsh, even inhumane. Yet, from an Islamic perspective, those punishments do not bespeak a concept of a God that emphasizes brutal judgment over loving mercy. In Criminal Law, as in other fields, the *Sharīʿa* contains moral norms for behavior. Once again, religion and law are inextricably intertwined. Qurʾānic sanctions for criminal transgressions are based on a moral

construct. Yes, they are punitive, or in American terms the justifications for them are revenge, specific deterrence, and general deterrence. (Rehabilitation is a minor or non-existent motive.) But, there is a fundamental distinction in Islamic Criminal Law between claims of Allāh and claims of man. The harshest of punishments may be imposed only for a transgression against Allāh. This fact does not exclude private claims, for which the punishments involve discretion and lesser severity.

The theoretical point, then, is that from the vantage of Islamic Criminal Law, what is even more important than the sanction for a transgression is the prohibition itself that has been violated. What is prohibited is prohibited because Allāh, speaking through the Archangels to the Prophet Muhammad, has revealed His Will. Consequently, the punishment is important for the officials of an Islamic state, especially if they are maintain their self-proclaimed legitimacy as faithful adherents to the *Sharīʿa*, and for the victim and his or her kin if the transgression calls for retaliatory justice. What matters is trying to improve one’s understanding and ability to follow the Will of God.

The elevation in the Islamic Penal Law to primacy of the prohibition contrasts with American legal thought, where a great deal of emphasis is placed on (and whole courses developed around the subject of) remedies. The adage “a right without a remedy is no right at all” is well known to lawyers trained in American jurisprudence. Perhaps that adage makes better sense in a system of law that makes no pretense to being sacred. The violations in that system are not against God, but against the state (or, the state acting on behalf of the people). Hence, it is the state that does the punishing. To the Islamic legal mind, the offense taken by the state, the victim, or the victim’s kin is secondary. What matters is failure to adhere to the Will of God on an important obligation.

##### [B] “Missing” Features

The Qurʾān is quite specific in the area of Criminal Law. It contains many technical, almost “black letter,” legal statements about what a Muslim should or should not do. Moreover, unlike Contract Law and Family Law, the Qurʾān also attaches legal consequences for failure to conform to the prescribed behavior. That is, on many acts (or omissions) covered by the Penal Law, the Qurʾān spells out the legal consequences.

At the same time, the Qurʾān is not a Penal Code. There are dimensions of criminal jurisprudence familiar to American Common Law, which are not found in the Qurʾān. For example, the *Qurʾān* does not discuss:

- Attempts.
- Complicity.
- Mitigating circumstances (though necessity, or *ḍarūrāh*, is a defense).

Moreover, the theory underlying responsibility for criminal behavior, and for guilt, is not well-developed in the Qurʾān itself.

These points are not intended as criticisms of the Qurʾān. Rather, they are reminders of what the Qurʾān is and is not. It is the word of Allāh. It is not a Model

<sup>1</sup> See Organization of The Islamic Conference, [www.oic-oci.org](http://www.oic-oci.org).



Penal Code produced by a group of law professors, nor is it a criminal law debated and enacted by a modern, democratically elected, legislature.

### [C] Proportionality and Orientalist Fallacy

At the risk of committing the Orientalist Fallacy, an historical point is worth adding about the theory of Islamic Criminal Law. Qur'anic legislation on penal matters — as a Muslim would view the rules and punishments — are an improvement from pre-Islamic Arabian times. In those times, under the customary law of the Bedouins, private vengeance and retaliation would spiral into blood feuds between tribes, and gambling, drinking, taking interest (*ribā*), and lax sexual behavior — resulting in weak marital ties, with a foggy distinction between marriage and concubinage — were accepted. In contrast, the Qur'ān clearly lays out a rule of proportionality.

Consider *surah* 2, *ayat* 178-179 of the Qur'ān, followed by the explanation of the translator, Professor Abdel Haleem:

<sup>178</sup>You who believe, *fair retribution* is prescribed for you in cases of murder: *the free man for the free man, the slave for the slave, the female for the female*. [Translator's footnote omitted, and reproduced below.] But if the guilty is pardoned by his aggrieved brother, this shall be adhered to fairly, and the culprit shall pay what is due in a good way. This is an alleviation from your Lord and an act of mercy. If anyone then exceeds these limits, grievous suffering awaits him. <sup>179</sup>Fair retribution saves life for you, people of understanding, so that you may guard yourselves against what is wrong.<sup>2</sup>

This passage is nothing short of a key limitation on criminal liability. It bars excessive punishment and over-retaliation. In the lingo of American Law, it is the Proportionality Principle. The translator elaborates:

*Before Islam*, the Arabs did not observe equality in retribution, but a stronger tribe would demand more, e.g., a man for a woman, a free man for a slave, or several men for one man, likewise for financial compensation. The intention of this verse is to insist on equality.<sup>3</sup>

In brief, the Qur'ān specifically, as well as other sources of the *Shari'a*, do more than demarcate morally acceptable behavior (e.g., no gambling, no drinking, no *ribā*, and no unchaste relations). They also circumscribe, via the Proportionality (or Fair Retribution) Principle, the punishments that can be imposed for transgressions, and thus are a check against arbitrary and capricious punishment, not to mention blood feuds.

There is an irony in the above-quoted elaboration. On the one hand, some Muslim observers criticize non-Muslim scholars for committing the Orientalist fallacy. As the word of God (Allāh), the Qur'ān does not need extrinsic justifications, such as to

<sup>2</sup> THE QUR'AN — *A New Translation* by M.A.S. Abdel Haleem 2:178-179, at 20 (Oxford, England: Oxford University Press, 2004) (emphasis added). [Hereinafter, QUR'AN.]

<sup>3</sup> QUR'AN, *supra*, fn. a at 20.

cultural, economic, legal, political, or social circumstances before Islam. On the other hand, to rationalize certain passages in the Qur'ān, some Muslim interpreters indeed fall into the same trap — perhaps, depending on the scholar, deliberately so.

Note another feature of the elaboration. The italicized first sentence of *surah* 2, *ayah* 178, read in isolation, appears to condone eye-for-an-eye justice, the kind of justice that Mahatma Gandhi warned makes the whole world blind. The justification amounts to saying “as brutal as some aspects of Islamic Penal Law may be, they are better than the *status quo ante*, i.e., the state of affairs on the Arabian Peninsula as of 609 A.D., the year before the Prophet Muhammad began receiving revelations.” This reasoning is easily rebutted with a simple, irrefutable point: “that was roughly 1,500 years ago.”

In the intervening centuries, remarkable progress has been made in virtually all other legal systems as to the theory and practice of Criminal Law. Justifying a Penal Law prohibition or punishment in the *Shari'a* using such an outdated historical point of reference is little else than a rationalization for *stasis*. As long as that reference point is used, how can the *Shari'a* import modern developments — including standards about cruel and unusual punishment — without losing its central features? This question is a central challenge facing not just Islamic Penal Law, but the entire *Shari'a*.

## § 43.02 FOUNDATIONAL DISTINCTION

### [A] Claims of God (*Haqq Allāh*) and *Mālikī* School Treatment of Rebellion (*Baghī*)

Table 43-1 summarizes key concepts, offenses, and sanctions in Islamic Penal Law. All aspects of Islamic Criminal Law are based, directly or indirectly, on a fundamental threshold distinction. That distinction is between:

#### (1) *Haqq Allāh* —

A crime against religion, i.e., against Islam, which is to say an act that is forbidden, or sanctioned by a punishment set forth in the Qur'ān.

#### (2) *Haqq Ādami* —

A private claim of vengeance.

The first category concerns acts forbidden because God said so. The words of *Allāh* as revealed in the Qur'ān spell out the transgression. In almost all such instances, God also prescribes in the Qur'ān a specific punishment for committing the transgression. Therefore, the first category is known as “*haqq Allāh*,” which means “claims of God.” (“*Haqq*” is the Arabic term for “claim,” hence a claim of *Allāh* is “*haqq Allāh*.”)

The associated punishments are known as “*ḥadd*” punishments, with the term “*ḥadd*” meaning “limit.” The “limit” is one set by God in the Qur'ān, that is, the transgression that He admonished Muslims not to commit. A Muslim who nevertheless does so has crossed a limit set by the Almighty. On that account alone, a transgressor is deserving of the severest of sanctions — the *ḥadd* punishments,

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which for the most part also are in the Qur'an. The superlative adjective "severest" is not hyperbole. The *ḥadd* punishments include death or the amputation of a limb, depending on the crime, both of which are irreversible. They also include flogging (i.e., whipping), which (depending on how the method of administration) can be permanently scarring.

Significantly, three of the Four Schools agree on the offenses in the categories.<sup>4</sup> That is, the *Hanafi*, *Shāfi'i*, and *Hanbali* Schools agree there are six *ḥaqq Allāh* crimes, and agree on the identity of those six offenses. Note that some *Hanafi* School texts identify drunkenness (*sukr*) that is caused by drinking any intoxicant as a separate offense from drinking itself (*shurb al khamr*).

The *Māliki* School agrees as to the standard six offenses. But, the *Māliki* School adds a seventh offense, which is rebellion against a government, or a transgression by one group of a population against another (which covers civil war) — in Arabic, "*baghi*."<sup>5</sup> Indeed, the *Māliki* School lists *baghi* as the first of the *ḥaqq Allāh* crimes, on the theory that it is the most grievous, and potentially causes the greatest loss of life and property. In some *Shāfi'i* School texts, the word "*ḥadd*" is used in relation to *baghi*. However, that School does not explicitly list rebellion or civil insurrection as a *ḥaqq Allāh* crime, but rather treats it as a distinct matter. Likewise, the *Hanafi* and *Hanbali* Schools devote separate attention to *baghi*. All three of the Schools — *Hanafi*, *Shāfi'i*, and *Hanbali* Schools — discuss the kind of war to launch against rebels, or "*bughāt*."<sup>6</sup>

Conceptually, it makes sense to treat *baghi* as a separate topic from the conventionally-listed six *ḥaqq Allāh* crimes.<sup>7</sup> Those crimes each can (and typically are) committed by one wrongdoer (or two in the case of unlawful sexual intercourse aside from rape). Rebellion or civil unrest — while often lead by a ringleader or a small group of confederates — is the action of a collective group. That is, *baghi* involves a sizeable group going against the government, or one significant group fighting against another one.

<sup>4</sup> See MUHAMMAD 'ATA ALSID SIDAHMAD, THE HUBUD — THE HUBUD ARE THE SEVEN SPECIFIC CRIMES IN ISLAMIC CRIMINAL LAW AND THEIR MANDATORY PUNISHMENTS ch. 2, 36-40 (Petaling Jaya, Malaysia: Muhammad 'Ata Al Sid Sid Ahmad 1996). (Hereinafter, SIDAHMAD.)

Interestingly, one renowned scholar, Ibn Hazm al Zahiri, includes the standard six crimes, plus a seventh — not *baghi* (rebellion), but *ghad al 'ariyyah*, which refers to malicious denial of borrowed property — as a *ḥaqq Allāh* offense subject to a *ḥadd* punishment. He does so in his treatise, *Al Muhalla'* (volume 8, p. 358), because:

Ibn Hazm relied on a version of the famous *ḥadith* about a woman from Bani Makhzum [one of the three leading clans of the Quraish tribe during the time of the Caliph Abū Bakr (632-634 A.D.), along with the Bani Abdullāh and Bani Hashim, and the clan that was primarily responsible for matters of war] whose hand was cut in the time of the Prophet. In that version, it was narrated that she was in the habit of borrowing valuables and intentionally denying having them. It was due to this that her hand was cut.

SIDAHMAD, ch. 2 fn. 60 at 40. However, none of the Four Schools includes *ghad al 'ariyyah* as a *ḥaqq Allāh* crime. See *id.* at 40. An alternative explanation is that the case referenced in the above quote essentially is one of theft (*sarika*), which already is listed as a *ḥaqq Allāh* offense.

<sup>5</sup> See SIDAHMAD, *supra*, ch. 2 at 37.

<sup>6</sup> See SIDAHMAD, *supra*, ch. 2 at 40.

<sup>7</sup> See SIDAHMAD, *supra*, ch. 2 at 39.

Table 43-1:  
Summary of Key Concepts, Offenses, and Sanctions in Islamic Criminal Law

Transgression	<i>Ḥaqq Allāh</i> Offense?  <i>Ḥadd</i> Punishment?	<i>Ḥaqq Ādami</i> Offense i.e., <i>Jinayā</i> (Tort)?  <i>Ta'zīr</i> (Discretionary) Punishment?
Unlawful Sexual Intercourse ( <i>Zinā</i> )	Yes, a <i>ḥaqq Allāh</i> offense. Death by stoning for adultery. 100 lashes for fornication between two unmarried persons. Death by stoning or 100 lashes for rape (imposed only on rapist). 100 lashes (possibly fewer) for homosexuality.	No, not a <i>ḥaqq ādami</i> offense.  Possible <i>ta'zīr</i> punishment, for rape or homosexuality.
False Accusation of Unlawful Sexual Intercourse ( <i>Kadhif</i> )	Yes, a <i>ḥaqq Allāh</i> offense.  80 lashes.	No, not a <i>ḥaqq ādami</i> offense.
Consuming Alcohol ( <i>Shurb Al-Khamr</i> )	Yes, a <i>ḥaqq Allāh</i> offense.  80 lashes.	No, not a <i>ḥaqq ādami</i> offense.
Theft ( <i>Sarika</i> )	Yes, a <i>ḥaqq Allāh</i> offense. Amputation of hand (1 <sup>st</sup> offense), and foot (2 <sup>nd</sup> offense). Thereafter, imprisonment.	No, not a <i>ḥaqq ādami</i> offense.
Highway Robbery ( <i>Kat' Al-Tarīk</i> or <i>Hirabah</i> )	Yes, a <i>ḥaqq Allāh</i> offense. Death (if the robber has killed but has not got away with the stolen property). Crucifixion (where the robber has killed and got away with stolen property). Cutting off the hand and foot on opposite sides (for robbery with violence where the robber does not kill the victim). Exile (where the robber frightens the victim but does not kill or get away with the stolen property).	No, not a <i>ḥaqq ādami</i> offense.

Transgression	<i>Haqq Allāh</i> Offense? <i>Hadd</i> Punishment?	<i>Haqq Ādami</i> Offense i.e., <i>Jinayā</i> (Tort)? <i>Ta'zīr</i> (Discretionary) Punishment?
Apostasy ( <i>Riddah</i> )	Yes, a <i>haqq Allāh</i> offense. Death by crucifixion (or beheading) for a male apostate. Imprisonment coupled with beatings every 3 days for a female apostate until she recants her apostasy.	No, not a <i>haqq ādami</i> offense.
Rebellion ( <i>Baghī</i> )	Only according to the <i>Mālikī</i> School is <i>baghī</i> a <i>haqq Allāh</i> offense.	For the <i>Hanafi</i> , <i>Shāfi'i</i> , and <i>Hanbali</i> Schools, a distinct offense, and possibly a <i>haqq ādami</i> offense.
Homicide ( <i>Katl</i> ) with Deliberate Intent (' <i>Amd</i> )	No, not a <i>haqq Allāh</i> offense.	Yes, a <i>haqq ādami</i> offense. Retaliation. If waived, blood money.
Homicide ( <i>Katl</i> ) with Quasi-Deliberate Intent ( <i>Shibh al-'Amd</i> )	No, not a <i>haqq Allāh</i> offense.	Yes, a <i>haqq ādami</i> offense. Retaliation. If waived, blood money.
Homicide ( <i>Katl</i> ) by Mistake ( <i>Khata'</i> )	No, not a <i>haqq Allāh</i> offense.	Yes, a <i>haqq ādami</i> offense. No retaliation. Blood money.
Indirect Homicide ( <i>Katl bi-Sabab</i> )	No, not a <i>haqq Allāh</i> offense.	Yes, a <i>haqq ādami</i> offense. No retaliation. Blood money.
Suicide	No, not a <i>haqq Allāh</i> offense.	No.
Bodily Harm Not Involving Death	No, not a <i>haqq Allāh</i> offense.	Yes, a <i>haqq ādami</i> offense. Retaliation in the form of eye-for-an-eye. Or, blood money.
Property Damage	No, not a <i>haqq Allāh</i> offense.	Yes, a <i>haqq ādami</i> offense. <i>Ta'zīr</i> punishment based on facts of case.
Perjury	No, not a <i>haqq Allāh</i> offense.	Yes, a <i>haqq ādami</i> offense. Public exposure ("ta'rīf") of the perjured testimony (or other false evidence). Liability for any damage resulting from judgment based on perjury. Possible imprisonment and beating of the perjurer.

## [B] Meaning of "Hadd"

Sanctions laid out in the Qur'ān are called "*ḥadd*" punishments. Some of these sanctions are specified not in the Qur'ān, but rather developed through the *Sunna* of the Prophet Muhammad. They, too, fall within the ambit of "*ḥadd*" punishments. In other words, a "*ḥadd*" punishment is a fixed punishment for a crime, namely, fixed by the Qur'ān, or in a few instances via the *Sunna*. All "*ḥadd*" punishments are distinct from, and indeed mutually exclusive with, civil law sanctions (including "*ta'zīr*" punishments).

The term "*ḥadd*" literally means "limit," and connotes a God-ordained "limit" referenced in the Qur'ān. (The plural, "limits," is "*ḥudūd*.".) Clearly, the concept of a claim of God (*haqq Allāh*) is integrally linked to the harshness of punishment. It is not a matter of severity for the sake of severity. It is a matter of administering a God-ordained sanction for violating a God-ordained prohibition. A severe sanction is called for because a guilty party has crossed a limit Allāh set in His Revelation, or by the authoritative guide to that Revelation, the lifestyle of the Prophet. As Professor Schacht says:

*ḥadd* is a right or claim of Allāh (*haqq Allāh*), therefore no pardon or amicable settlement is possible.\*

Likewise, Dr. El-Awa writes:

In the penal context, a punishment which is classified as *haqq Allāh* embodies three main aspects. The first is that this punishment is prescribed in the public interest; the second is that it cannot be lightened nor made heavier; and the third is that, after being reported to the judge, it is not to be pardoned either by him, by the political authority, or by the victim of the offense. The unchangeability of the *ḥadd* punishment is supported by the interpretation of the Qur'ānic verse, "These are the limits of Allāh. Do not transgress them." [Surah 2, *ayah* 229.] The third feature of the *ḥadd* punishment is based on a *ḥadīth* reported by [Imāms] Bukhari and Muslim. . . .

The punishment for theft is prescribed in the Qur'ānic verse, "As for thieves, both male and female, cut off their hands. It is the recompense of their own deeds, an exemplary punishment from Allāh. . . ." [Surah 5, *ayah* 38.]

As reported in [the *ḥadīth* compilations by Imāms] Bukhari and Muslim, this punishment was practiced by the Prophet himself. He cut off the thief's hand and also ordered the amputation of a female thief's hand. [Dr. El-Awa cites to Bukhari, vol. 12, p. 90, and Muslim, vol. 5, pp. 114-115.] In the same tradition, the Prophet prohibited any mediation in executing the *ḥudūd* [i.e., the plural of *ḥadd*. Dr. El-Awa cites to the work of Ibn Taymiyya.]. From this latter report jurists have deduced the rule that no *ḥadd*

\* JOSEPH SCHACHT, AN INTRODUCTION TO ISLAMIC LAW 176 (Oxford, England: Oxford University Press (Clarendon Paperbacks) 1982). [Hereinafter, SCHACHT.]



punishment is remissible, a rule which characterizes this category of punishment and distinguishes it from both *ta'zir* or discretionary punishments, for both *ta'zir* and *qisās* [retribution authorized by law] may be remitted even after being reported to the judge.<sup>9</sup>

Yet, as Professor Schacht also says, the "religious character" of *hadd* punishments also includes "active repentance," known as "*tawba*."<sup>10</sup> Timely and *bona fide* repentance can result in the cancellation of a *hadd* punishment.

Anecdotally, there are plenty of stories — for example from the United Arab Emirates (UAE) — of persons who have been convicted of a *haqq Allāh* crime wanting to have the *hadd* punishments administered on them. That is because of an overwhelming sense of guilt, in Catholic Christian terms, of committing a grave sin, and sincerely seeking with a penitent heart a cleansing of their soul, as far as that is possible on this plane of existence. To be sure, corporal punishment — which is the essence of every *hadd* sanction — has long since ceased to be a penance for the commission of sin in the Christian world. But, from an Islamic perspective, it is thought by some Muslims found guilty of a *haqq Allāh* crime that they would fare better in the eyes of God on the Day of Judgment if they willingly accepted their *hadd* punishment while on earth.

What exactly are the *hadd* punishments? The answer depends on the crime, however, the categories of such punishments are:

- Death by stoning, for unlawful sexual intercourse.
- Death by sword (*i.e.*, beheading), for highway robbery where a killing occurs, and for apostasy committed by a man.
- Flogging (*i.e.*, whipping), with both the number and the intensity of the lashes being set depending on the crime and circumstances, for false accusation of unlawful intercourse, and for drinking alcohol.
- Cutting off of a hand and/or foot, for theft, and for highway robbery where there is no killing.
- Beating and imprisonment, for apostasy committed by a woman.

This list is a simplification of a more complex reality.

First, for some crimes, the *hadd* punishment is death by crucifixion. But, that is no longer applied. Beheading may be used instead. Second, not all of these punishments are specified in the Qur'ān. For example, stoning to death for adultery actually is a punishment borrowed from the Law of Moses. Indeed, during the lifetime of the Prophet, and in the era of the Four Rightly Guided Caliphs

<sup>9</sup> MUHAMMAD SALIM EL-AWA, *PUNISHMENT IN ISLAMIC LAW: A COMPARATIVE STUDY* 1-2 (Indianapolis, Indiana: American Trust Publications, 1981).

Dr. El-Awa served as Legal Advisor, Arab Bureau of Education for the Gulf States, and as Associate Professor of Law, University of Riyadh, Kingdom of Saudi Arabia. His book originally was his doctoral thesis at the University of London supervised by the renowned Professor N.J. Coulson.

<sup>10</sup> SCHACHT, *supra*, at 176.

(*Rashidun*), borrowing from Jewish Law became established.<sup>11</sup> As another instance, the sanctions for apostasy are said to be based on *hadiths*, which themselves are controversial. Third, and most importantly, every effort is made to minimize the scope of applicability of the *hadd* punishments.

### [C] Claims of Man (*Haqq Ādamī*)

As for the foundational distinction in Islamic Penal Law, what about the second category, private claims of vengeance? This category is called "*haqq ādamī*," meaning "claims of man." No transgression in this category is explicitly forbidden by Allāh in the Qur'ān. But, that does not mean the behavior is morally or religiously acceptable, or even unobjectionable. Commission of these offenses certainly is unacceptable, and the Qur'ān suggests punishments for certain of them, notably, murder.<sup>12</sup> To the contrary, many of the offenses are serious — murder, manslaughter, and perjury among them. It is wrongly thought by some non-Muslims the *Shari'a* does not take such offenses seriously, because there is no prescribed *hadd* punishment for them. (Ironically, some of the same critics castigate the *Shari'a* for the barbarity of *hadd* sanctions.)

In fact, the offenses represent objectionable behavior. They are incompatible with the norms of the Islamic community (*umma*), or to put it differently, the behaviors are not how God wants Muslims to live together with one another. Note, however, that a substantively different criticism is that some Muslim countries do not enforce vigorously the rules on *haqq ādamī* crimes if the claimant is a non-Muslim, or regardless of religious affiliation, if the claimant is a woman. This critique does have some basis in fact, as the reports of many human rights organizations attest.

In any event, sanctions for commission of *haqq ādamī* crimes are discretionary. Depending on the specific offense, this enforcement discretion lies with one of two parties. In turn, depending on the enforcer, the nature of the punishment differs:

- (1) With an Islamic Judge (*Qāḍī*):

#### *Ta'zir* Punishments —

The Arabic term for "discretionary" is "*ta'zir*." Hence, punishments attendant to these crimes are called "*ta'zir* punishments." For this group of *haqq ādamī* crimes, discretion lies with a judicial authority, namely, the Islamic judge (*qāḍī*) who hears the case. Conceivably, the judge can order imposition of a *hadd* punishment, though doing so does not turn the offense into a *haqq Allāh* crime. In most cases, the *ta'zir* punishment ordered by a *qāḍī* is imprisonment, a fine, or a combination thereof.

- (2) With the Victim or Family of the Victim:

#### Legal Retaliation (*Qisās*) and Blood Money (*Diya*) Punishments —

For certain *haqq ādamī* crimes, enforcement depends on the discretion of

<sup>11</sup> See SCHACHT, *supra*, at 15-16.

<sup>12</sup> See QUR'AN, *supra*, 2:178-179 (concerning murder, fair retribution, proportionality, and mercy), and 4:92 (also concerning fair retribution).

the victim or the family of the victim. Such crimes would properly be called "Torts" (civil wrongs) in the American legal system. However, the remedies are rather different in the two paradigms. Under American Tort Law, the remedy typically is a monetary judgment for damages, which may cover not only actual and other damages, but also punitive damages. Under the *Shari'a*, the remedy may take the form of authorized retribution, known as "*qisās*," or blood money, called "*diya*."

In no Muslim country does the discretion rest with a jury of peers. Jury trials are not used in any case, criminal or civil, under the *Shari'a*.<sup>13</sup> This fact should be contrasted with the trend in Japan and Korea to make use of juries in criminal cases.

Notably, women are permitted to serve as *qādis* in all cases, criminal or civil, except ones involving the possibility of a *ḥadd* punishment. Thus, discretion to impose a *ta'zīr* sanction can rest with a woman judge. In some Muslim countries, including Egypt since at least 2005, there is a government-led effort to increase the number of women judges.

As for the nature of a *ta'zīr* sanction, it may take one of three forms. It can involve imprisonment, corporal punishment, or monetary fine. A combination of forms also is possible. As in any legal system, under Islamic Law, a *qādi* weighs the facts and circumstances of a case in deciding what *ta'zīr* punishment is appropriate. The discretion can vary from one Muslim country to another, and one *qādi* to another. However, there are some general parameters for certain kinds of *haqq ādamī* cases that a *qādi* is supposed to follow. They can be reasonably detailed, perhaps loosely akin to the United States Federal Sentencing Guidelines.

In sum, in the *Shari'a* there is a distinction between the rights of *Allāh*, and the rights of a human being. Only the former — the rights of *Allāh* — are enforced by a penal sanction, in the narrow, technical sense of the term. The core of Islamic Penal Law is about these claims, and how they are enforced. Because the *Shari'a* is Sacred Law, it is not surprising these claims are the core of the Penal Law. The latter claims — rights of a human — are enforced through what in the American Common Law context would be considered a tort mechanism (though the exact remedies in the two systems are quite different). Indeed, it is sometimes said that *haqq ādamī* crimes, and the attendant *ta'zīr* punishments, are at least loosely akin to Tort Law.

Specifically, *haqq ādamī* are claims enforced by private rights of action, such as retaliation and blood money. There are links to the Qur'ān, which contains Criminal Law provisions on retaliation and blood money. A critical link is the Principle of Fair Retribution, or Proportionality, explicit in *surah* 2, *ayat* 178-179. Another illustration is *surah* 4, *ayah* 92:

<sup>12</sup>Never should a believer kill another believer, except by mistake. If anyone kills a believer by mistake, he must free one Muslim slave and pay compensation to the victim's relatives, unless they charitably forgo it; if the

victim belonged to a people at war with you but is a believer, then the compensation is only to free a believing slave; if he belonged to a people with whom you have a treaty, then compensation should be handed over to his relatives, and a believing slave set free. Anyone who lacks the means to do this must fast for two consecutive months by way of repentance to God: God is all knowing, all wise.<sup>14</sup>

By way of comment, this passage is intriguing for two reasons beyond its service as an example of the Proportionality Principle that disciplines the enforcement of *haqq ādamī* claims. First, the prohibition is against killing another Muslim. But for rules (elsewhere in the Qur'ān) about taking the lives of non-Muslims, it could be (wrongly) inferred from this passage that such killing is blithely unobjectionable. Second, even read in isolation, the passage plainly forbids the commission of terrorist acts that cost the lives of Muslims.

In any event, when retaliation is the sanction, who is the target? The answer is, of course, the perpetrator. If the perpetrator is dead, then the next of kin of the perpetrator may be the target. Who holds the right of retaliation? The answer is the victim. If the victim is dead, then the right to undertake retaliation is with the next of kin of the victim. As for blood money, who is liable for its payment? The answer generally is not the perpetrator. Rather, it is his patrons. Broadly defined, they are the male members of his tribe, his fellow workers, or similar group. So, liability is sort of a communal one, with the community defined in terms of a clear relationship to the perpetrator.

The Arabic term for this group of liable persons is "*ākila*." The concept of communal liability pre-dates Islam. On the Arabian Peninsula in pre-Islamic times, Bedouin Customary Law sought to prevent a wrongdoer from suffering retaliation by coughing up blood money on his behalf. The *Shari'a* incorporated this concept, but modified it. The group no longer refers to members of the tribe of the guilty party, or related tribes if the numbers are insufficient (the pre-Islamic meaning). It covers persons on the *dhicān* (Islamic court records), those persons being workers associated with a person liable for a *haqq ādamī* offense. Such persons could be held liable for payment of blood money. But, urbanization in Islamic countries rendered this adaptation ineffectual.

It is worth pausing to consider how different this way of thinking is from the American Criminal Law. In the *Shari'a* rules on Penal Law, the link to God is direct, and the support for private vengeance (which pre-dates Islam) is open. In the American tradition, bitter experience has led to concern about vigilante justice. Accordingly, it is the state that has a monopoly on the use of force against an individual wrongdoer.

## [D] Orientalist Fallacy Again

Beyond the Qur'ān, as complemented and supplemented by the *Sunnah*, is there a further explanation as to why certain claims fall into one category, and others into the other category? The answer, which again strides the Orientalist

<sup>13</sup> See generally John Makdisi, *The Islamic Origins of the Common Law*, 77 NORTH CAROLINA LAW REVIEW 1635-1739 (1999) (discussing, *inter alia*, the *Shari'a* and jury system).

<sup>14</sup> QUR'AN, *supra*, 4:92 at 59 (emphasis added).



fallacy, is "yes," namely, to some degree pre-Islamic Customary Law in Arabia may be a factor. That Law was oriented to private rights and wrongs and their enforcement. There was little in the way of institutional development, much less a formalized system for public prosecution. Consequently, there was at best an ill-developed theory of criminal behavior and justice.

It may be ventured that Islamic Law inherited, or willingly embraced, the demarcation of private rights and wrongs from pre-Islamic times on the Arabian Peninsula. That is not to say that *haqq ādami* crimes, and attendant *ta'zīr* punishments, are direct importations. They are not. But, it is to suggest a linkage, or continuity.

#### § 43.03 RESTRICTIONS ON IMPOSING *HADD* PUNISHMENTS

Except for the most heartless of beings or evil of sadists, no one likes seeing imposed, or having to impose, a *hadd* punishment. In both theory and practice, the *Shari'a* tries to minimize the scope of applicability of these severe sanctions. One obvious method is these sanctions, with rare and indeed odd cases, apply only to Muslims who commit a *haqq Allāh* offense, typically against another or other Muslims.

That is, a *hadd* punishment is not usually — or at least not automatically — applied to a non-Muslim perpetrator. For example, a non-Muslim would not be prosecuted in Malaysia or the UAE for drinking alcohol in an area, such as a hotel or restaurant, in which alcohol is lawfully served. But, egregious behavior by a non-Muslim drinker, such as public drunkenness coupled with sexually immodest acts, or with disorderly conduct such as fighting, might trigger a prosecution, and the penalty might involve flogging. To be sure, change the hypothetical example a bit, by changing the country, and the result may differ. In Saudi Arabia, it is unwise for a non-Muslim to drink with impunity, as the risk of prosecution and punishment is real.

A related point is that *hadd* punishments tend not to be administered if the victim of the crime at issue is a non-Muslim. That is likely to be true if the perpetrator is a non-Muslim, as the *Shari'a* does not (or should not) ordinarily apply to a case involving two non-Muslims — except, perhaps, in the most extreme jurisdictions under Taliban-like influence. It also is likely to be true even if the perpetrator is a Muslim. This fact, of course, raises the charge by some critics of hypocrisy, or more poignantly, of providing less defense to non-Muslim than Muslim populations.

How else does the *Shari'a* restrict the scope of application of *hadd* punishments? Nine further methods are noteworthy. Each one is a traditional limitation on this scope. There are yet other limits, concerning repentance, which (like the nine) are found in the *Shari'a* and mixed legal systems.

#### [A] Narrow Definitions

First, Islamic Penal Law insists on narrow definitions. The elements of a crime that triggers a *hadd* punishment are defined in narrow terms. Each element must exist.<sup>15</sup> Consequently, it is not easy to bring and prove a case alleging a *haqq Allāh* crime.

#### [B] Strict Evidentiary Requirements

Second, evidentiary requirements (particularly as to the number and nature of eyewitness testimony) are demanding. It is not easy to prove a *haqq Allāh* offense has been committed. Generally, two male witnesses are required. The testimony of one male witness and two females may be acceptable, reflecting a general rule of Islamic Evidence Law that the testimonial value of a woman is half that of a man, except on matters with which women are presumed to have special expertise, namely, pregnancy, birth, and menstrual cycles.

This dichotomy of probative value based on gender is obviously a controversial point (to put the matter politely). Women are no more mendacious than men, and perhaps even less so, and the dichotomy seems as much rooted in ignorant chauvinism as based on anything else. But, as a practical matter, insistence on a male witness or two female witnesses can be an impediment to successful prosecution and conviction. Note, further, that in a case of unlawful sexual intercourse, specifically, adultery, four male witnesses are needed. Indubitably, that doubling of the number and restriction to males serves to limit prosecutions, both across Muslim countries and through the ages. Moreover, it is not just the number of witnesses that is relevant. It also is their qualifications, and the substance of what they say, that matters.

Related to evidentiary requirements is the reality that even if a confession is offered to a *haqq Allāh* crime, it may be withdrawn. Withdrawal is called "*rujū*," as it is when in the context of Contract Law. Other than in cases of false accusation of unlawful intercourse, says Professor Schacht, some *ulema* urge that a *qādi* suggest the possibility of withdrawing a confession to a person who previously made a confession to a *haqq Allāh* crime (except for false accusation of unlawful sexual intercourse). Generally, one confession is enough for a *hadd* punishment offense. But, four confessions are needed for adultery, a deliberate symmetry with the number of witnesses needed for this crime.

#### [C] Resemblance (*Shubha*)

A third device in the *Shari'a* to minimize the range of use of *hadd* punishments is known as "*shubha*," which means "resemblance." As Professor Schacht writes:

Important, too, is the part assigned to *shubha*, the "resemblance" of the act which has been committed to another, lawful one, and therefore, subjectively speaking, the presumption of *bona fides* in the accused.<sup>16</sup>

<sup>15</sup> See SCHACHT, *supra*, at 176.

<sup>16</sup> SCHACHT, *supra*, at 176.

That is, if one unlawful act is similar to another act that is lawful, then the accused may be let off, on the presumption the accused did the lawful act (or, at least, meant to do so).

Note that the scope of operation of *shubha* is broad. Suppose a new convert to Islam is caught drinking alcohol, but claims he did not know that this behavior is punishable as a *ḥaqq Allāh* offense. That is an instance in which *shubha* may be invoked. Other cases embraced by *shubha* include necessity (*ḍarūrāh*), duress (*ikrāh*), and age of minority. In brief, any context that would give an Islamic judge reasonable doubt as to whether a serious crime was committed may lead the *qāḍī* to find that no crime occurred. Put colloquially, "*shubha*" connotes giving a defendant "the benefit of the doubt."

#### [D] No Cumulation

A fourth way the *Shari'a* restricts the imposition of *ḥadd* punishments is via a simple rule against cumulation. Only one punishment is imposed for all offenses of the same kind. For instance, suppose a perpetrator is drunk while committing another offense that carries a stricter *ḥadd* punishment than does drinking alcohol (such as unlawful sexual intercourse, or *zinā*). The offender will be prosecuted for drinking alcohol, and the lesser punishment associated with drinking imposed on him. There is an exception, namely, if the offender intentionally got drunk so as to be charged for the lesser offense. In that case, the mental state of the offender works against the offender, and the more severe of the two potentially applicable punishments may be inflicted.

As another example, a person convicted of multiple counts of theft, all of which are linked in one event, such as where the person stole a luxury wallet and shoes from a designer store, will not have his or her hand and foot amputated. Rather, he or she will lose his hand for having stolen both the wallet and shoes. Of course, the party is liable for another *ḥadd* punishment later on, through commission of a separate and distinct act of theft. Obviously, not cumulating the punishments does more than minimize their egregiousness. It also serves the practical function of graduation, *i.e.*, of graded threat. The punished party is on clear notice from the first application that another offense will trigger another *ḥadd* sanction. The result may be to the likelihood the punished party will be specifically deterred from further misdeeds.

#### [E] Limitations Period

In any legal system, a statute of limitation period is a potential barrier to prosecution, conviction, and punishment. The longer the period, the lower the barrier, and *vice versa*. In the *Shari'a*, the statute of limitations for *ḥaqq Allāh* offenses is quite short. This brevity is a fifth method for circumscribing the application of *ḥadd* punishments.

The typical period is 1 month.<sup>17</sup> For the crime of drinking alcohol, at least according to the prevailing opinion among Islamic legal scholars (*fukahā'*), the

period is shorter: it is only as long as the smell of alcohol or drunkenness persists.<sup>18</sup> That is a matter of hours. Theoretically, the crime remains punishable thereafter, but an Islamic judge (*qāḍī*) will not accept evidence of the crime. But, in all instances, the statute of limitations is tolled if there is a good justification for delay in bringing the case. One such reason is geographic distance with respect to gathering parties, witnesses, or evidence.

#### [F] Incapacity: Age and Mental Deficiency

The *Shari'a* recognizes two types of incapacity — age and mental deficiency — which constitute the sixth and seventh ways to circumscribe application of the severest punishments. A *ḥadd* punishment cannot be administered to a minor. Only an adult can be subject to a *ḥadd* punishment. By definition, a minor is too young to be held criminally liable for his or her behavior. "Too young" generally is defined in terms of puberty, *i.e.*, the age of majority tends to be the age at which an adolescent reaches sexual maturity and is capable of reproduction.

However, this age is fairly young. Indeed, because of demographic and health trends in certain countries, it may be increasingly young. It can be as young as 12 to 14 years of age. Thus, query whether the limitation is efficacious in precluding the severe punishment of persons aged 16 or 17, who would under American law generally not be subject to the adult criminal justice system.

As with age, mental deficiency is a restriction on punishment not unlike that in American Criminal Law. A person cannot be held criminally liable for a behavior if that person is insane or otherwise mentally incompetent. The *Shari'a* does not call for application of *ḥadd* punishments to an insane person, or to one who otherwise is incapable of understanding the nature of one's act, and differentiating right from wrong.

After all, each *ḥaqq Allāh* offense has an intent requirement — a *mens rea* element, known in Arabic as "*niyya*," which means "intent" or "intention." (In contrast to "*mens rea*," the term "*niyya*" can refer to an intention in general, and not necessarily a criminal intention in specific.) The perpetrator must have had the requisite criminal intent, and that is not possible if he or she is mentally incompetent. Where American and Islamic Penal Law may or may not be similar is on the test for insanity. That test has evolved through the ages in English and American Law. It may be a potentially fruitful area of comparative legal research to compare and contrast that evolution with the development of tests for mental competency used in Islamic Penal Law. What is apparent is that in *Shari'a* courts, like American ones, expert testimony by court-appointed psychiatrists and psychologists is taken to ascertain the mental competence of defendants.

Accordingly, for example, suppose a person who is mentally incompetent (or not of age) kills another person. That homicide (*katl*) would be considered a mistake (*khata'*). Like the typical case of mistake, no retaliation could be carried out against the perpetrator. But, unlike the typical mistake case, no blood money (*diya*) would be called for. Instead, traditionally, a circle of people connected to the perpetrator

<sup>17</sup> See SCHACHT, *supra*, at 176.

<sup>18</sup> See SCHACHT, *supra*, at 176.



(known as "*ākila*") would perform a religious expiation (*kaffāra*) on behalf of the perpetrator, and the perpetrator would not be disqualified from any inheritance from the victim.

### [G] Necessity (*Ḍarūrāh*)

A general doctrine applying throughout the *Sharī'a* is that of necessity. The Arabic term for "necessity" is "*ḍarūrāh*," sometimes transliterated as "*darūrāt*." Necessity serves as an exception to every rule of Islamic Law, whether the matter at hand is a personal, private obligation, such as any of the other Five Pillars, or a public right, such as free enjoyment of property. As Professor Kamali writes:

Necessities make the unlawful lawful — *al-ḍarūrāt tubīḥ al-maḥzūrāt*.<sup>19</sup>

For instance, in respect of dietary practices, *surah* 2 *ayah* 173 of the Qur'ān states:

<sup>172</sup>You who believe, eat the good things We have provided for you and be grateful to God, if it is Him that you worship. <sup>173</sup>He has only forbidden you carrion, blood, pig's meat, and animals over which any name other than God's has been invoked. *But if anyone is forced to eat such things by hunger, rather than desire or excess, he commits no sin*; God is most merciful and forgiving.<sup>20</sup>

This example indicates that necessity can arise in urgent circumstances and demand an immediate decision. Likewise, an owner of a large supply of food, which he intends for ordinary use in his home, is not entitled to withhold it from another person, and hoard it, when that person requests a portion of the food supply to prevent certain or probable death by starvation.<sup>21</sup> Preventing this misery clearly is more necessary than safeguarding the right of the owner to his food. As another illustration, which does not involve a crisis, a Muslim is relieved of the obligation to pray at the requisite five daily times if she is a surgeon and is in the middle of performing an operation on a patient. Most instances of takings (expropriation of nationalization) of private property on behalf of the public interest (*maṣlaḥah*), justified as necessary, do not involve urgency.

Technically, necessity (*ḍarūrāh*) is a defense to a criminal charge. It may be invoked when all of the elements of a *ḥaqq Allāh* offense may exist, but the defendant argues he or she had no choice but to commit the crime. For example, theft was necessary because the defendant or his or her family was starving, and no food was otherwise available. Or, drinking alcohol was necessary because the defendant was parched, and no alternative non-alcoholic beverage was readily available. The *Sharī'a* recognizes the validity of this defense, which if successful, alleviates a *ḥadd* punishment.

<sup>19</sup> MURAMMAD HASHIM KAMALI, *THE RIGHT TO LIFE, SECURITY, PRIVACY AND OWNERSHIP IN ISLAM* 282 (Cambridge, England: Islamic Texts Society, 2008). [Hereinafter, KAMALI.]

<sup>20</sup> Qur'an, *supra*, 2:172-173 at 19 (emphasis added).

<sup>21</sup> See KAMALI, *supra*, at 281.

### [H] Duress (*Ikrāh*)

Like necessity (*ḍarūrāh*), duress (*ikrāh*), is a defense to a criminal charge. Thus, *ikrāh* is a concept that is intra-disciplinary within the *Sharī'a*: it is relevant to Contract and Penal Law. Again, all of the elements of a *ḥaqq Allāh* offense exist. Yet, the defendant argues the defendant was compelled to commit the crime. If true, then duress invalidates a declaration of intent (*niyya*), and eliminates culpability. Thus, duress (*ikrāh*) renders an otherwise illegal act permissible, and erases the prospect of a sanction, including a *ḥadd* punishment.

For example, suppose a person drinks alcohol (*shurb al-khamr*) under threat of death or mutilation.<sup>22</sup> With either of these threats present, drinking is permissible. Another interesting example is feigning apostasy (*riddah*) — the case of *takiyya*, a topic also mentioned in *Shī'ite* law. Like drinking (*shurb al-khamr*), apostasy is forbidden. Indeed, apostasy is a sin (whereas martyrdom is meritorious). But, suppose a Muslim fakes apostasy while under duress? The behavior is excused. Conversely, if the element of duress (*ikrāh*) does not exist, or is not recognized by the adjudicator, then the appropriate penalty is applied in full.

Professor Schacht elaborates on the nature and effect of *ikrāh*:

What is envisaged in the first place is the threat (*tahdīd*); it is recognized only if the one party is in a position to carry it out and the other party fears that this may actually happen. The effects of duress in civil and those in criminal law, how far it invalidates a declaration and how far it diminishes responsibility, are not distinguished. The effect in civil law is that the threat of death, severe beating, and long imprisonment makes the declaration voidable (by *khiyār, optio*); exceptions, however, are made mainly in favour of desirable transactions, such as manumission of slaves and adoption of Islam. The effects in criminal law are discussed casuistically; the effect of duress, whenever it is recognized, is not only to remove the penal sanction, but to make the act itself allowed; if it is not recognized, the penalty (*ḥadd*) is applied in full. For instance, drinking wine under the threat of death or mutilation is permissible, and the refusal to do so would be sinful. Conversely, apostasy from Islam is a sin and martyrdom meritorious, but it is allowable to feign apostasy under duress. (This simulation, *takiyya*, plays an important part in *Shī'ite* religious law.)<sup>23</sup>

The idea, then, is a threat of grave harm coupled with the ability to carry it out. When both prongs of the test for *ikrāh* are met, then the result not only is to eliminate the prospect of a *ḥadd* punishment, but also to transform the illicit act into a licit one.

Three comments are worth adding. First, it is unclear whether the test for *ikrāh* is subjective or objective. Clearly, under the first prong, to constitute "*ikrāh*," there must be a threat, which is called "*tahdīd*." How is an adjudicator to know if a threat exists? The adjudicator must pursue two inquiries:

<sup>22</sup> See SCHACHT, *supra*, at 118.

<sup>23</sup> SCHACHT, *supra*, at 117-118 (emphasis added).

- (1) Was the party making the threat in a position to carry out the threat?
- (2) Did the party to whom the threat was made fear that the threat actually might be carried out?

But, in investigating these matters, what is the specific test? Is it objective: whether a reasonable person in the situation of the defendant would have believed that there was a threat, and the party making the threat could carry it out? Or, is it subjective: whether the defendant as is reasonably believed there was a threat that could be carried out? The answer is not entirely clear. In some instances, the two-pronged test is interpreted charitably in favor of the accused. For example, in cases of unlawful intercourse (*zinā*) or drinking wine (*shurb al-khamr*), it is necessary to prove the accused behaved voluntarily.

Second, exactly how far *ikrah* is a defense to a criminal charge may depend on the facts and circumstances. In other words, not all situations of duress are equal. Suppose the threat is of death, a severe beating, or long imprisonment. These extreme threats give rise to sufficient duress to render a declaration made by the afflicted party voidable. The concept of voidability is the same as that in Islamic Contract Law — namely, *khiyār*, which is a right of rescission. In effect, the afflicted party can rescind his or her otherwise unlawful act or statement. Other situations of less severe stress, however, may not lead to complete exoneration. Interestingly, even in cases of extreme duress, there are exceptions for transactions the *Shari'a* regards as desirable. Examples include conversion to Islam or freeing of slaves.<sup>24</sup> The first of these examples appears to imply that a conversion to Islam made under duress — in effect, a forced conversion — need not be rescinded if, upon later reflection, the new Muslim embraces the change.

If true, however, by no means is forcible conversion encouraged or justified. This point leads to a third comment. There is an obvious corollary principle that emerges from the existence of the defense of *ikrah*. Human rights violations — in particular, confessions or testimony secured under torture or threat thereof — are unreliable and inadmissible. At least, every Islamic jurisdiction does or should recognize them as such, in both theory and practice. It is blatantly inconsistent to recognize duress as a defense to a crime, and thereby free a defendant, but to penalize a defendant on the basis of coerced evidence.

## § 43.04 CONFESSION AND REPENTANCE

### [A] Schacht's Illustrations

Appreciating the importance of repentance, and giving it legal effect, ought to be an indispensable feature of any Sacred Legal System. After all, if a — or the — goal of such a System is to bring the Law of God and the law of this world into closer union, and thereby draw people closer to the Divine, then encouraging genuine expression of sorrow, and heart-felt apology, by a wrong doer helps achieve that goal. This expression and apology shows a penitent heart, one opened to, and indeed seeking, a better path than trodden before, a path leading to

reconciliation with the Creator. Exemplifying this path is the Catholic Christian Sacrament of Reconciliation: a priest, acting *in persona Christi* (in the person of Christ) hears confessions, gives advice and penances, and — following a good act of contrition by the penitent — offers absolution from sins committed.

Islamic Law, specifically the Penal Law, also gives a prominent place to repentance. That should not be surprising, given the attributes of Allāh understood by Muslims around the globe. Among the Ninety Nine Names of God, surely one of the most commonly used in the Qur'an, Islamic religious literature, and everyday life, is that of Allāh the "Most Merciful, the Most Compassionate." The *Bismallah*, the opening of *surah* 1 uses the term "mercy" four times:

<sup>1</sup>In the name of God, the Lord of Mercy, the Giver of Mercy! <sup>2</sup>Praise belongs to God, Lord of the Worlds, <sup>3</sup>the Lord of Mercy, the Giver of Mercy, <sup>4</sup>Master of the Day of Judgment.<sup>25</sup>

The Arabic term for "mercy" is "*rahman*." God (*Allāh*) is a giver of mercy. Doing so is "inherent in God's nature."<sup>26</sup> Lest there be any doubt about the importance of mercy in the *Shari'a*, the *Bismallah* starts every *surah* save one, though only in *surah* 1 is it counted as the first *ayah*.<sup>27</sup>

Mercy, of course, is the consequence of authentic repentance, and repentance makes possible reconciliation. That is true at two levels: the relationship between a wrongdoer and God, and between a wrongdoer and the victim of the wrongful act. A wrongdoer expresses genuine contrition for the wrongful act through prayer or other pious action to God, and through a heart-felt statement of sorrow to the victim (or victim's kin, if the victim is dead) of that act. God, in His mercy, shows compassion to the wrongdoer in a way that others, and even the wrongdoer, may not recognize immediately, or in this lifetime. The victim (or victim's kin) may — depending on their disposition — act mercifully toward the wrongdoer. For example, they may forego a right of retaliation, or a right to collect monetary compensation. Interestingly, in Human Rights Law, lawyers and scholars sometimes remark (particularly in the context of Truth and Reconciliation Commissions, as in South Africa) that victims of torture often have as their highest priority not vengeance, but rather a face-to-face meeting with their torturer to hear why the torturer perpetrated the torture, and to hear the words "I am sorry."

As for the *Shari'a*, *hadd* punishments have a religious character to them, because the crimes to which they are associated are *haqq Allāh* (claims of Allāh). That linkage is clear enough. But, as just intimated, there is another reason, that is, another way in which *hadd* punishments are religious in character. Repentance — called "*tawba*" — may cause a *hadd* punishment not to be applied. In certain cases, genuine and clear repentance may result in the lifting of a *hadd* punishment.

For example, Professor Schacht identifies two cases:<sup>28</sup>

<sup>25</sup> Qur'an, *supra*, 1:1-4 at 3 (emphasis added) (footnotes omitted).

<sup>26</sup> See Qur'an, *supra*, fn. b at 3.

<sup>27</sup> See Qur'an, *supra*, fn. c at 3.

<sup>28</sup> See Schacht, *supra*, at 176.

<sup>24</sup> See Schacht, *supra*, at 118.



- A thief returns the object he or she stole before anyone applies for prosecution of the case.
- A highway robber repents before he or she is arrested.

Suppose the wrongdoer expresses *tauba*. The result is the *hadd* punishment lapses, or better put, is not applied. Islamic Penal Law treats the wrong as an ordinary civil wrong (i.e., a tort), or “*jināya*.” (The plural, “civil wrongs” or “torts,” is “*jināyāt*.”) Essentially, repentance downgrades the offense from a *haqq Allāh* to *haqq ādami* matter. The victim or next of kin is entitled to retaliation, or possibly financial compensation (blood money). But, the victim or next of kin can choose mercy, and pardon the perpetrator.

As these examples show, the timing of repentance is relevant. A *post hoc* attempt by a perpetrator at repentance makes no difference as to culpability. It is not a defense to a crime that the perpetrator already has completed. Additionally, even if an expression of *tauba* is timely, the perpetrator is likely to have to perform religious expiation — a penance, to use the Christian term — of sorts, such as fasting. This expiation is known as “*kaffāra*,” and is part of the liability for commencing criminal conduct. It is another instance of the sacred character of the *Shari’a*, in contrast with secular legal regimes.

### [B] Opinions of the Four Sunnite Schools

The illustrations provided by Professor Schacht do not provide a complete picture of the views on repentance among Islamic religious and legal scholars (the *ulema* and *fukahā*, respectively). At issue is the effect of repentance on imposition of a *hadd* punishment. The issue assumes a confession, i.e., the perpetrator admits to commission of a *haqq Allāh* offense, and further, expresses genuine remorse. Confession has the effect of triggering the *hadd* punishment, so the issue is whether repentance alleviates this sanction, even in an instance in which there is a witness (or multiple witnesses) to the crime. Manifestly, then, “confession” and “repentance” are distinct, because a wrongdoer can acknowledge his or her illegal behavior, but not be sorry for it. But, without repentance, a confession will not remove liability for a *hadd* punishment.

What, then, is the effect of a confession coupled with repentance? All Four Sunnite Schools — *Hanafī*, *Mālikī*, *Shāfi’i*, and *Hanbalī* — agree that confession and repentance by a perpetrator of highway robbery (*hirabah*, or *ka’ al-tariq*) before arrest affects the claim of Allāh, but not the rights of victims. That is, pre-arrest repentance eliminates the prospect of a *hadd* punishment, and indeed does reduce the offence from a *haqq Allāh* crime to a *haqq ādami* crime. Consequently, the wrongdoer is not liable for the severest of sanctions, but does not entirely get “off the hook.”

As to the other *haqq Allāh* offenses, the Four Schools are divided as to the effect of repentance:<sup>29</sup>

<sup>29</sup> See SHAHEED ABDUL QADIR OUDAH, CRIMINAL LAW OF ISLAM (India: International Islamic Publishers, 2002). [Hereinafter, OUDAH.]

- Opinion #1, Held by Some *Shāfi’i* and *Hanbalī* Scholars —

Repentance affects all other *haqq Allāh* offenses. That is because it affects the most serious of them, highway robbery. Thus, if a perpetrator acknowledges and repents for commission of *zinā* (unlawful sexual intercourse), *kadhif* (false accusation of unlawful sexual intercourse), *shurb al-khamr* (consuming alcohol), *sariqa* (theft), or *riddah* (apostasy), then the attendant *hadd* punishments are not imposed. Note that *kadhif*, unlike the other *haqq Allāh* offenses, is prosecuted upon the request of a plaintiff (namely, the target of the false accusation). Therefore, repentance might have no effect, depending on the disposition of the plaintiff.

- Opinion #2, Held by the *Hanafī* and *Mālikī* Schools, and by Other *Shāfi’i* and *Hanbalī* Scholars —

Repentance has no effect on the right of Allāh in respect of *hudūd* crimes. The *hadd* punishments are imposed. However, because the Qur’an excludes highway robbery, repentance is effective in such a case.

- Opinion #3, Held by a Minority of Scholars in Each of the Four Schools —

Repentance affects all *hudūd* crimes, and the punishment need not be imposed in any of them. But, the transgressor can choose to have the sanction applied. He or she may do so in preference to a more fearsome sanction imposed by Allāh upon the Day of Judgment. Put colloquially, the transgressor may opt to “take his or her medicine now,” rather than take the road to perdition later.

In all instances, if repentance coupled with or subsequent to a confession is to have the legal effect of eliminating the prospect of a *hadd* punishment, it must be honest and sincere, respectively. And, it must occur before arrest and commencement of prosecution.

### [C] Retraction of Confession

A topic related to confession and repentance is retraction of a confession. What is the legal effect of denial of a confession, after a confession is made, but where there is no witness to that crime (i.e., the crime is proved only by the confession)? Is the retraction accepted? Does the denial of the confession have any implication for imposition of a *hadd* punishment for a *haqq Allāh* offense?

As with the issue of confession and repentance, on this subject the Four Sunnite Schools evince different opinions:<sup>30</sup>

- Opinion #1: Held by Some *Hanbalī* Scholars —

Retraction of the confession is not accepted. The confession stands, which means — even if there is repentance — a *hadd* punishment is imposed. That is, going forward with this punishment is the result of not accepting the retraction of the confession.

<sup>30</sup> See OUDAH, *supra*.

- Opinion #2: Held by Some Scholars in All Four Schools —

Retraction of a confession is accepted for *haqq Allāh* offenses. The confession does not stand. In turn, a *hadd* punishment may be imposed, if the perpetrator is convicted of the crime at issue.

- Opinion #3: Held by the Majority of the *Māliki* School —

Retraction of a confession is accepted for *haqq Allāh* offenses. The confession does not stand, and under *Māliki* School precepts, a *hadd* punishment may be imposed, regardless of repentance.

However, this School does not accept retraction of a confession from a perpetrator who is a notorious person, namely, one who is infamous for having committed crimes. In practice, that means a retraction by a person with a criminal record is ineffective. In such instances, the applicable *hadd* punishment may be imposed.

- Opinion #4: Held by Some *Shāfi'i* Scholars and the Minority of the *Māliki* School —

Retraction of a confession is accepted for all *haqq Allāh* offenses, but only if *shubha* exists. That is, the retraction is effective if the illegal act at issue resembles a lawful act. In such instances, a *hadd* punishment is not imposed.

In sum, there is considerable variation across and within the Schools as to the legal implications of offering and then retracting a confession.

## § 43.05 ADDITIONAL CONSIDERATIONS ABOUT IMPOSING *HADD* PUNISHMENTS

### [A] Good Faith?

Noteworthy is what is not on the list of restrictions on imposing *hadd* punishments. There is no “good faith” (or *bona fide*) exception in Islamic Penal Law to relieve a perpetrator of liability. At best, the perpetrator may have recourse to the theory of culpability that distinguishes among deliberate intent (*amd*), quasi-deliberate intent (*shibh al-amd*), mistake (*khata'*), and indirect causation (*katl bi-sabab*).<sup>31</sup>

### [B] Self-Defense?

Likewise, the *Shari'a* does not have a general theoretical doctrine of self-defense. That is an important contrast with American Criminal Law. Rather, a claim of self-defense by a perpetrator is accepted — or not — on an *ad hoc*, case-by-case basis.

<sup>31</sup> See SCHACHT, *supra*, at 178.

To be successful in this defense, either or both of two elements must exist: the initial attack must be dangerous, a great deal must be at stake, or both.<sup>32</sup> Circumstances can add to, or subtract from, these elements. For example, a nighttime setting enhances the danger of an initial attack. In a case of forcibly obtaining access to water after permission is denied, the defense is more credible if there is extreme need for water (e.g., a person is dying of thirst) than if the water source is merely convenient.

### [C] Mixed Legal Systems

Above and beyond the conventional limitations on the scope of application of *hadd* punishments, there is a further one. It is perhaps the greatest restriction on this scope, but it is not a conventional one, i.e., it is not part of the Classical Theory of the *Shari'a*. It concerns the structure of the legal system in a particular Islamic country. A large number of Muslim countries have elected not to implement Islamic Penal Law, but rather rely on a modern criminal code, with typical punishments being imprisonment and fines. Examples include Algeria, Bangladesh, Jordan, Indonesia, Lebanon, Morocco, Palestine, Syria, and Tunisia. The vast majority of their Muslim populations would be horrified by an introduction of *hadd* punishments. Such countries have mixed legal systems, the admixture consisting of elements of the *Shari'a*, but also of a continental European Civil Code, American Common Law, and/or indigenous legal concepts.

A considerable number of Islamic countries do not have a legal system that is entirely based on the *Shari'a*. These countries tend to have a mixed legal system. Some subject areas are based on Islam. But, other areas are governed by rules left over from colonial influences, or intentionally imported from overseas. Malaysia and the Sultanate of Brunei are cases in point. Both are Islamic countries, with majority Muslim populations. Both use Islamic Family Law for Muslims. Yet, both were British Crown Colonies, Malaysia until 31 August 1957, and Brunei until 1 January 1984. As such, the legal systems of both rely on English Law, including the Common Law, and appeal to the Privy Council in London still exists. Thus, both use English Law for the field of Criminal Law, though Brunei applies a harsher interpretation than does England as to punishments. Likewise, their Contract and Property Law are based on that of England.

## § 43.06 PRACTICAL POINTS

### [A] Prosecution and *Muhtasib*

Who brings a criminal case in which a *haqq Allāh* offense is alleged? Likewise, who is responsible for prosecuting a *haqq ādami* charge? The general answer in most Islamic countries is the public prosecutor.

Interestingly, the *Shari'a* itself does not create the institution of a prosecutor who brings criminal charges on behalf of the public. That is, neither the *Qur'ān* nor *Sunnah* of the Prophet gives rise to an institution that is an office of public

<sup>32</sup> See SCHACHT, *supra*, at 184.



prosecutions, which would be directly akin to England's Crown Prosecution, or to America's federal United States Attorney's Office, state Attorney General's Office, or local District Attorney's Office. Rather, this administrative apparatus developed in Islamic countries over the centuries, under various Caliphates, and exists in modern legislation.

As it appears today in Muslim countries, the office of the public prosecutor is derived, directly or indirectly, from an older office, namely, that of the "*hisba*." This term refers to the Office of the Inspector of the Market. The person holding the Office, i.e., the Inspector, is known as the "*muhtasib*." This term refers to the Inspector of the Market (or Marketplace). As Professor Schacht explains:

... the office of the *muhtasib*, who [*sic*] in theory is the representative of the community in fulfilling the duty of "encouraging good and discouraging evil," has in practice become an office of public prosecutions.<sup>33</sup>

Indeed, the term "*muhtasib*" refers to someone, who through zeal for the *Sharī'a*, seeks to earn religious merit.<sup>34</sup> Ironically, in that sense the *muhtasib* — public prosecutor is not entirely unlike a handful of prosecutors in some non-Muslim jurisdictions.

### [B] Applying *Hadd* Punishments and *Imām*

If a *hadd* punishment is applicable, then who is responsible for administering it — or, given its severity, perhaps better said, inflicting it? There is no question of agency in carrying out the punishment. That is, it is forbidden to appoint an agent (*wakil*) for the purpose of exacting a corporal punishment. A principal cannot appoint a deputy to inflict a *hadd* punishment. That also is true for a retaliation (*kiṣāṣ*) punishment.

The answer is the *imām* is charged with the administration. That is logical, insofar as a *hadd* punishment is triggered by a *ḥaqq Allāh* offense. The *imām*, as a leader of prayers, is a religious figure. As such, the *imām* is not acting in the person of God — that would be blasphemous to assert. Rather, it is that the duty of ensuring the claims of *Allāh* are properly administered is in the same ambit as the other responsibilities of the *imām*.

Three points should be noted about this answer. First, the distinction between the *Sunni* and *Shī'ite* conception of an "*imām*" should be kept in mind. Second, the *imām* almost invariably is a man. Only in rare cases has a woman led prayers at a mosque.<sup>35</sup> (Time will tell whether they are exceptional or harbingers of a trend.) Despite them, it would be a male *imām* responsible for administration of a *hadd* punishment.

Third, and of greatest theoretical and practical interest, is the fact the *imām* may delegate this responsibility to another party. That ability appears to cut against the rule against appointment of a *wakil* to carry out the punishment. How

it is squared with the rule is not entirely clear, except to say the delegation is not made on an agency theory. Practically speaking, this ability may allow for an *imām* to appoint a woman to enforce a *hadd* punishment on another woman. Such an appointment would be appropriate, given the normal expectation that a male punisher would be physically stronger than a woman, and thus could inflict more injury, than either intended or should be permitted. However, the frequency of such appointments is uncertain.

As to the grisly details of how a *hadd* punishment is applied, they vary across Islamic countries. The following anecdotes and episodes give a sense of the range:

- In Iran, death by stoning for a woman convicted of adultery is said to have been carried out by the casting of a first, almost symbolic, stone, but followed by a dump truck offloading its container of stones on the woman.
- In Kismayo, a southern port city in Somalia, in October 2008, a 23-year old woman, Ms. Aisha Ibrahim Duhulow, was stoned to death for allegedly committing adultery. She is said to have confessed to a *Sharī'a* court, though Amnesty International said she was 13, and that her father stated she was raped by three men. When her family complained to the authorities, she was detained and accused of adultery. The court authorities said she insisted on application of the *hadd* punishment, saying that was what she deserved, even though she had several opportunities to review her confession. As for the punishment:

Numerous eyewitnesses say she was forced into a hole, buried up to her neck, [and] then pelted with stones until she died in front of more than 1,000 people. . . .

. . .

. . . [S]he had been crying and had to be forced into a hole before the stoning, reported to have taken place in a football stadium.

. . .

[A witness said] "[a]fter two hours, the Islamic administration in Kismayo brought the lady to the place and when she came out she said: 'What do you want from me?'"

"They said: 'We will do what Allāh has instructed us.' She said 'I'm not going, I'm not going. Don't kill me, don't kill me.'"

"A few minutes later more than 50 men tried to stone her."

The witness said people crowding round to see the execution said it was "awful."

"People were saying this was not good for *Sharī'a* law, this was not good for human rights, this was not good for anything."

But no one tried to stop the Islamist officials, who were armed, the witness said. He said one boy was shot in the confusion.

<sup>33</sup> SCHACHT, *supra*, at 190.

<sup>34</sup> See SCHACHT, *supra*, at 207.

<sup>35</sup> See *Women As Imams*, WIKIPEDIA, posted at [http://en.wikipedia.org/wiki/Women\\_as\\_imams](http://en.wikipedia.org/wiki/Women_as_imams).

According to Amnesty International, nurses were sent to check during the stoning whether the victim was still alive. They removed her from the ground and declared that she was, before she was replaced so the stoning could continue.<sup>36</sup>

Notably, in August 2009, a few months before the stoning, Kismayo was seized by the Al Shabab organization, a radical Islamist insurgency listed by the United States as a terrorist organization, and headed by Hassan Turki, whom the United States lists as a financier of terrorism.

- In Somalia, in January 2009, the Al Shabab Islamist militia, in control of much of Somalia, executed Mr. Abdirahman Ahmed, a prominent politician, for apostasy.<sup>37</sup> He also was accused of spying for Ethiopian forces that had tried to oust the Islamists from the capital, Mogadishu, and other parts of the country. The execution occurred in the port city of Kismayo by shooting Mr. Ahmed following afternoon prayers on a Thursday.
- In Somalia, in June 2009, Al-Shabab convicted four young men of theft.<sup>38</sup> They had stolen three mobile phones and two assault rifles. Each was sentenced to have a hand and leg cut off. The sentences were carried out publicly by hacking off one hand and one leg of each person. The sentences had to be postponed because of extreme heat, which would have caused the men to bleed to death. The four men then were taken by ambulance for medical treatment.
- In the UAE, the punishment of flogging (lashing) is administered for the offense of drinking, but not publicly. Eighty lashes are administered, with the prosecution in attendance. The flogger must hold a book under his armpit so that he cannot fully extend his arm and take a full swing at the convict. All 80 lashes are administered on one occasion, 40 on the left side, and 40 on the right side, of the body, from the neck down to the side or upper legs. The administration is quick, taking a few minutes. A doctor is present to ensure the convict does not die. The instrument used for the flogging is a cane, akin to a walking stick.
- In certain other *Shari'a* jurisdictions, flogging is administered in a broadly similar manner as in the UAE, but in smaller lots of 3 or 4 lashes. A doctor may be present to ensure there is no permanent damage done to the kidneys of the victim.

The public nature of many of these punishments is (in theory) designed to set an example for observers, and thus serve as general deterrence. Indeed, non-Muslim westerners occasionally will find themselves invited to be present at the punishments, such as in the central square of Riyadh, where they are episodically administered after Friday prayers are completed. It goes nearly without mentioning that the public nature of the sanction, as well as the punishment itself and

procedures used for their administration, violate International Human Rights Law, and indeed basic concepts rooted not only in all other religions, but also in Natural Law, of human decency and dignity.

<sup>36</sup> *Stoning Victim "Begged for Mercy,"* BBC News, 4 November 2008, posted at <http://bbc.co.uk>.

<sup>37</sup> *Somali Executed for "Apostasy,"* BBC News, 16 January 2009, posted at <http://news.bbc.co.uk>.

<sup>38</sup> *See Somali "Thieves" Face Amputation,* BBC News, 22 June 2009, posted at <http://news.bbc.co.uk>.



## Chapter 44

### CLAIMS OF GOD (HAQQ ALLĀH): SEX CRIMES

As witnesses not of our intentions but of our conduct, we can be true or false, and the hypocrite's crime is that he bears false witness against himself. What makes it so plausible to assume that hypocrisy is the vice of vices is that integrity can indeed exist under the cover of all other vices except this one. Only crime and the criminal, it is true, confront us with the perplexity of radical evil; but only the hypocrite is really rotten to the core.

Hannah Arendt (1906-1975)

Historian and Philosopher, *On Revolution* (1963)

#### SYNOPSIS

##### § 44.01 UNLAWFUL SEXUAL INTERCOURSE (ZINĀ)

- [A] Biblical Comparisons: 6th and 9th Commandments
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- [C] Scope and Elements
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##### § 44.02 ZINĀ AND RAPE

- [A] Consent
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##### § 44.03 ZINĀ AND HOMOSEXUALITY

- [A] Islamic View
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##### § 44.04 FALSE ACCUSATION OF UNLAWFUL SEXUAL INTERCOURSE (KADHF)

- [A] Biblical Comparisons: 8th Commandment
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- [C] Elements and Evidentiary Requirements
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##### § 44.05 RELATIONSHIP OF KADHF TO ZINĀ

# § 44.06 MUTUAL EXCLUSIVENESS OF SEX CRIMES (KADHF AND ZINĀ) AND DIVORCE THROUGH LI'ĀN

## § 44.01 UNLAWFUL SEXUAL INTERCOURSE (ZINĀ)

### [A] Biblical Comparisons: 6th and 9th Commandments

In no major religion of the world, nor in many legal systems, is unbridled sexual intercourse an acceptable behavior. That is, throughout the ages, it has not been deemed a religiously or legally acceptable practice for a man to be free to have intimate relations with any woman he chooses, regardless of her wishes, or *vice versa*. Adultery — sexual relations outside the bonds of marriage — is a particular target of religious and ethical norms. Professor Hussain writes:

The Romans used to parade an unfaithful wife naked on a donkey, allowing the crowds to insult her and spit upon her. The Babylonians drowned an adulterous wife and the Hebrews stoned her to death. Up until about the 16th century in England, adultery was an offense punishable by the ecclesiastical courts. The punishments varied from a fine to mutilation — one penalty was cutting off the nose. Until the middle of the present century, adultery and, indeed, all sex outside of marriage was regarded as reprehensible. Adultery was a matrimonial offense leading to divorce, and women, found guilty of adultery usually lost custody of their children and were deprived of their property. Women were treated more severely than men.<sup>1</sup>

In the United States, one of the most renowned tales of adultery is told by the celebrated novelist, Nathaniel Hawthorne. *The Scarlet Letter*, published in 1850, is a book widely read in American high school and college English courses as a masterpiece of American literature and a compelling moral study.<sup>2</sup> The title refers to the letter "A," for adultery, which the protagonist, Hester Prynne — who lives in a village in Puritan New England and bore an illegitimate child — was compelled to wear on the bosom of her dress.

To be sure, among states in the United States, few criminal statutes retain adultery, and the offense is unprosecuted. Significant attention in American (and English) Criminal Law is given to sex crimes, but they tend to be crimes of violence — namely, rape and attempted rape. The *Uniform Code of Military Justice (UCMJ)*, applicable to American military personnel, still includes (in Article 134) adultery as an offense. Yet, it appears the allegation of adultery, if made at all, is one likely to be associated with prosecution for a charge of conduct unbecoming an officer. Nevertheless, most Americans, whether uniformed or not, hardly consider adultery as morally acceptable.

<sup>1</sup> JAMILA HUSSAIN, *ISLAMIC LAW AND SOCIETY — AN INTRODUCTION* 136 (Annandale, New South Wales, Australis: The Federation Press, 1999). [Hereinafter, HUSSAIN.]

<sup>2</sup> See NATHANIEL HAWTHORNE, *THE SCARLET LETTER AND OTHER WRITINGS* (1850, New York, New York: W.W. Norton & Co., 4th rev'd ed., 2004). [Hereinafter, *SCARLET LETTER*.]

Perhaps the most famous injunction against adultery is in the 10 Commandments. They are a Covenant God made with Moses and his people, the Israelites, during their journey from slavery in Egypt under the Pharaoh (probably Ramses II, who reigned from 1290-1223 B.C.) to the Promised Land.<sup>3</sup> The 10 Commandments given by God to Moses on Mount Sinai, and set out in *Exodus* in the Old Testament of the Bible, state:

<sup>1</sup>Then God delivered all these commandments.

<sup>2</sup>"I, the LORD, am your God, who brought you out of the land of Egypt, that place of slavery. <sup>3</sup>You shall not have other gods besides me. [1st Commandment.] <sup>4</sup>You shall not carve idols for yourselves in the shape of anything in the sky above or on the earth below or in the waters beneath the earth; <sup>5</sup>you shall not bow down before them or worship them. For I, the LORD, your God, am a jealous God, inflicting punishment for their fathers' wickedness on the children of those who hate me, down to the third and fourth generation; <sup>6</sup>but bestowing mercy to the thousandth generation, on the children of those who love me and keep my commandments.

<sup>7</sup>"You shall not take the name of the LORD, your God, in vain. [2nd Commandment.] For the LORD will not leave unpunished him who takes his name in vain.

<sup>8</sup>"Remember to keep holy the Sabbath day. [3rd Commandment.] <sup>9</sup>Six days you may labor and do all your work, <sup>10</sup>but the seventh day is the Sabbath of the LORD, your God. No work may be done then either by you, or your son or daughter, or your male or female slave, or your beast, or by the alien who lives with you. <sup>11</sup>In six days the LORD made the heavens and the earth, the sea and all that is in them; but on the seventh day he rested. That is why the LORD has blessed the Sabbath day and made it holy.

<sup>12</sup>"Honor your father and your mother, that you may have a long life in the land which the LORD, your God, is giving you. [4th Commandment.]

<sup>13</sup>"You shall not kill. [5th Commandment.]

<sup>14</sup>"You shall not commit adultery. [6th Commandment.]

<sup>15</sup>"You shall not steal. [7th Commandment.]

<sup>16</sup>"You shall not bear false witness against your neighbor. [8th Commandment.]

<sup>17</sup>"You shall not covet your neighbor's house. [9th Commandment.] *You shall not covet your neighbor's wife, nor his male or female slave, nor his ox or ass, nor anything else that belongs to him.*" [10th Commandment.]<sup>4</sup>

<sup>3</sup> See also CATECHISM OF THE CATHOLIC CHURCH ¶¶ 2380-2381 at 572 (United States Catholic Conference, Inc., Washington, D.C.: Libreria Editrice Vaticana, 2nd ed. 1997) (discussing adultery as an offense against the dignity of marriage). [Hereinafter, CATECHISM.] For Catholic Christian teaching on the 6th and 9th Commandments, see *id.*, ¶¶ 2331-2331 at 560-576, ¶¶ 2514-2527 at 601-605, respectively.

<sup>4</sup> *The Book of Exodus*, 21:1-17, in *THE CATHOLIC STUDY BIBLE* 83-84 (New York, New York: Oxford University Press, 1990, New American Bible trans.) (emphasis added). [Hereinafter, BIBLE.] Catholic Christians traditionally enumerate as the 1st Commandment the injunction in verses 1-6, and treat as



## § 44.06

## § 44.01

## [A]

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Two Commandments deal with adultery. The 6th Commandment is an outright prohibition. The 10th Commandment (sometimes numbered as the 9th Commandment) deals with a sin that can give rise to adultery, namely, "covetousness," or excessive desire.<sup>3</sup> Covetousness is one of the "7 Deadly Sins," which also are called the "Capital" or "Cardinal" Sins in Catholic Christianity. These Sins may be recalled by the acronym "PLACES + G," which stands for "Pride," "Lust," "Anger," "Covetousness," "Envy," "Sloth," and "Gluttony." Seven virtues are their opposites: Humility; Chastity; Patience; Charity; Kindness; Diligence; and Temperance, respectively.

## [B] Key Qur'anic Passages

The 10 Commandments are widely appreciated as a moral basis for Judaism, Christianity, and Islam. Unsurprisingly, then, the *Sharī'a* proscribes adultery, or more generally, unlawful sexual intercourse. The Qur'ān contains the following key passages:

- *Surah 17, ayah 32* —

And do not go anywhere near *adultery*: it is an outrage, and an *evil* path.<sup>4</sup>

Manifestly, this passage is most closely akin to the 6th Commandment.

- *Surah 24, ayat 1-3* —

<sup>1</sup>This is a *surah* We have sent down and made obligatory: We have sent down clear revelations in it, so that you may take heed.<sup>2</sup>Strike the adulteress and the adulterer one hundred times. Do not let compassion for them keep you from carrying out God's law — if you believe in God and the Last Day — and ensure that a group of believers witnesses the punishment. <sup>3</sup>The adulterer is only [fit] to marry an adulteress or an idolatress,

the 9th and 10th Commandments the injunctions in verse 17. See *id.*, fn. 20.1-17 at 88.

Interestingly, in respect of inter-generational punishment, referenced in *Exodus* 25-6 and *Deuteronomy* 5:9-10:

God does not punish us for another's sins, but because of the solidarity of human society, the good or evil deeds of one generation may make their effects felt even in later generations. Yet note how God's mercy allows the good effects of virtue to last much longer than the bad effects of vice: a thousand generations compared to one.

*Id.*, fn. 5, 9f at 198.

<sup>5</sup> The 10 Commandments also are set forth in another Book of the Old Testament, *Deuteronomy*, and the place they are given by God to Moses is referred to as "Mount Horeb." See *id.* at *The Book of Deuteronomy*, 5:1-2, 6-21. That version is quoted in connection with the discussion of theft.

The Commandments against adultery and theft are worded identically in the two versions. *Id.*, 5:18-19. There are minor differences in the two versions in the punctuation or wording of the 1st, 3rd, 4th, and 8th Commandments. There are minor differences in the two versions of the 9th and 10th Commandments, and in *Deuteronomy* the order of these two Commandments is the inverse of that in *Exodus*. In Catholic Christianity, the 6th and 9th Commandment sometimes are paired together, based on the order in *Deuteronomy*.

<sup>6</sup> THE QUR'AN — A New Translation by M.A.S. Abdel Haleem 17:32 at 177 (Oxford, England: Oxford University Press, 2004) (emphasis added). [Hereinafter, QUR'AN.]

and the adulteress is only [fit] to marry an adulterer or an idolater: *such behavior is forbidden to believers.*<sup>7</sup>

There is a notable substantive difference between *surah* 24, *ayah* 2 and the 6th Commandment. The 6th Commandment establishes adultery as a sin, but itself does not address the question of punishment. *Surah* 24, *ayah* 2 presumes adultery is a sin, or put in Islamic terms, a *haqq Allāh* offense, and immediately focuses on punishment.

- *Surah* 24, *ayah* 33 —

*Those who are unable to marry should keep chaste* until God gives to them enough out of His bounty.<sup>8</sup>

This passage is a clear injunction against pre-marital sex.

In light of these Qur'anic quotations, it is worth considering the bold statement by Professor Schacht:

The concept of adultery . . . is *unknown* to Islamic law; the wife has no exclusive right on the person of the husband, and although extra-marital intercourse on her part is neglect of her marital duties, it is punished only as a crime against religion.<sup>9</sup>

This statement is misleading in three respects. First, *zinā* is a crime — a *haqq Allāh* offense — in Islamic Penal Law. To say adultery is "unknown" to the *Sharī'a* wrongly connotes that Muslims do not care about the special nature of the marital bond. They do.

Second, Muslim husbands are not free to roam about and behave promiscuously — even though some, like their non-Muslim counterparts, do. To say that the wife has "no exclusive right" on her husband's body is technically correct under Islamic Family Law. But, it neglects not only the discipline of Islamic Penal Law, but also the discipline of the community. Unlike pre-Islamic times on the Arabian Peninsula, when the distinction between sexual intimacy within and outside of marriage was blurry in some communities, the advent of Islam brought (*inter alia*) a strong exhortation in favor of responsible, dignified behavior. Reputation as an adulterer hardly is championed in any community.

Third, the word "only" in the above-quoted passage seriously understates the importance of a "crime against religion." The understatement is conceptual. In the thinking of a sacred legal system, a crime against "religion" matters greatly. It implicates the essential and distinctive sacrosanct character of the system. That is entirely different from a dismissive comment that might be made in a secular legal system about adultery, such as "well, that is between him and God." The understatement also is practical. Commission of such an offense does more than render one liable for a *ḥadd* punishment. It also jeopardizes the soul of the transgressor for all eternity.

<sup>7</sup> QUR'AN, *supra*, 24:1-3 at 220 (emphasis added).

<sup>8</sup> QUR'AN, *supra*, 24:33 at 223 (emphasis added).

<sup>9</sup> See JOSEPH SCHACHT, AN INTRODUCTION TO ISLAMIC LAW 179 (Oxford, England: Oxford University Press [Clarendon Paperbacks] 1982) (emphasis added). [Hereinafter, SCHACHT.]

### [C] Scope and Elements

The *ḥaqq Allāh* offense presumed in *Surah* 24, *ayah* 2 is known as “*zinā*.” It is the most basic and significant Qur’ānic penal legislation on sex. The Arabic term “*zinā*” encompasses “all extramarital sexual intercourse between a man and a woman.”<sup>10</sup> That means the scope includes any intimate relations outside of the bond of marriage — or, broadly put, unchaste behavior. Examples include:

- (1) Copulation between two unmarried persons.
- (2) Copulation between a married man and a woman who is not his wife, but rather the wife of another person.
- (3) Copulation between a married woman and a man who is not her husband, but rather the husband of another person.
- (4) Copulation between a married man and an unmarried woman.
- (5) Copulation between a married woman and an unmarried man.

As explained in the discussion of false accusation (*kadhf*), the general term for illicit sex outside the marital bond is “fornication.” Each example above would be considered “fornication.” The term “adultery” is one type of fornication, namely, between a married person and someone else who is not the spouse of that married person. Thus, “adultery” applies to examples (2) through (5). “Fornication” applies uniquely to example (1).

It must be emphasized both men and women are liable for *zinā*. The Qur’ān plainly does not discriminate between the two. *Surah* 2, *ayah* 2-3, quoted above, clearly speaks about men and women, and forbids unchaste behavior to all “believers.” Yet, one of the great tragedies in some Muslim countries is there is no equal justice under law in respect of *zinā*. Rather, it is the woman who gets charged, prosecuted, stoned to death, or flogged. That often occurs because the woman is unjustly accused in what is a *bona fide* case of rape. This unacceptable situation reflects a failure to understand authentic Islamic Penal Law, a deliberate neglect of it, or both. The underlying conditions in which this failure occurs are poor education, male chauvinism, and poverty.

What are the essential elements necessary to prove a charge of the *ḥaqq Allāh* offense of *zinā* against a man, woman, or both? There are two: act, and category. As for the culpable mental state (*mens rea*) or intent (*niyya*), it seems to be presumed from the existence of these two elements.

First, there must be, first, a sexual act. That act must be intercourse. Kissing or touching, even of the private parts of the body of a man or woman, would not qualify — though such acts may lead to prosecution for a lesser offense, such as indecent or lewd behavior. However, the *Shari’a* does not seem to require that ejaculation occur. Mere penetration by a man of a woman would constitute intercourse.

<sup>10</sup> Qur’ān, *supra*, fn. a to 24:2 at 220 (emphasis added).

Observe that *zinā* does not encompass lustful thoughts that are not acted out. In the Catholic Christian tradition, such thoughts are “adulterous,” as Saint Augustine explains in recounting the teachings of Christ:

... [W]hen the lustful man looks on a woman with desire, even though she is chaste, he has committed adultery. For the Lord [Jesus Christ] said in plain truth: *Whoever has looked upon a woman with desire has already committed adultery with her in his heart.* He has not entered her bedroom, yet he has ravished her within the bedroom of his heart.<sup>11</sup>

Without repentance, this kind of “adultery” is punishable in the next life. Indubitably, Islam takes the same approach, namely, prosecuting the overt act of adultery, and leaving for the Day of Judgment the adulterous heart.

On the second element, intimacy must involve persons in one of three defined categories. They are: (1) unmarried persons; (2) an unmarried person and a married person; or (3) two people who are married but not to each other. That is, as the five examples indicate, there must be copulation outside matrimony. So, the second element may be seen as one large category, persons outside of matrimony. Conventionally put, there must be “fornication” broadly defined or “adultery” narrowly defined.

In the conventional terms of the *Shari’a*, this second element typically is stated as follows.<sup>12</sup> Sexual intercourse is unlawful if it occurs without:

- *Milk*, or
- *Shubhat milk*.

“*Milk*” refers to the “marital right,” that is, the right to intercourse arising from a marriage. (In former times, the right also can arise from ownership of a female slave.) Obviously, *milk* exists if there is a valid marriage between a man and woman. “*Shubhat*” (from “*shubha*”) refers to resemblance. Hence, “*shubhat milk*” is a resemblance to a marital right. *Shubhat milk* exists if a marriage actually were *fāsid* (defective, voidable), but the husband thought it was valid. *Shubhat milk* also would exist during the waiting period (*’idda*) after a marriage has been irrevocably (i.e., definitely) dissolved, but the husband thought this waiting period was similar to that after a revocable repudiation.

In sum, as long as a husband and his sexual partner are married, or they believed they were, then their intimate relations are licit. The follow-on issue is whether the test for their belief is an objective or subjective one. Under an objective test, the question would be whether an ordinary man in the position of the husband would have thought himself to be married. Under a subjective test, the question would be whether the husband in particular thought himself to be married. Under either test, there also may be a question of whether the belief was reasonable. Exactly how

<sup>11</sup> Saint Augustine, *Sermon On Pastors* (Sermon 46, 9: CCL 41, 535-536), in *THE DEVINE OFFICE — THE LITURGY OF THE HOURS*, vol. IV 272 (New York, New York: Catholic Book Publishing Corporation, 1975) (emphasis original).

<sup>12</sup> See SCHACHT, *supra*, at 178.



these questions are addressed under the *Shari'a* may differ from one jurisdiction to another.

### [D] Evidentiary Requirements

Just as it delineates the substantive *haqq Allāh* offense of *zinā*, the Qur'ān also sets forth evidentiary and procedural rules for the prosecution of this crime. To commence a case of *zinā*, a husband must swear under oath that his wife has committed an unchaste act, namely, adultery. That is, he swears she had sexual intercourse with a man other than him, i.e., one to whom she is not married. Equivalently, he must swear under oath that she has had a child whom he did not father. Depending on the case, the wife may offer an affirmation under oath to the contrary.

If the case involves an unmarried person or persons, then commencement will occur in a slightly different way. A man might level an accusation, under oath, that a woman has committed an unchaste act, such as fornication. That man need not be one of the sexual partners, but rather a witness to the act. One of the partners could accuse the other, but the disincentive for doing so would be strong — namely, possible prosecution of both parties for *zinā*. In all such instances, the woman may make a counter-oath.

Can the accusation be made by a wife against a husband, or a woman against a man? The answer is “yes.” The rules on *zinā* apply equally to men and women. Of course, in practice, the rules are not applied equally. Almost invariably, it is the wife or woman who bears the brunt of the accusation. Table 44-1 summarizes the pattern of accusation under oath and counter-oath, using the five examples set out earlier.

Witnesses play a major role in cases of unlawful intercourse. To prosecute the case, and thus to impose a *ḥadd* punishment for *zinā*, there must be four male witnesses. This requirement emanates from *ṣūrah* 24, *ayah* 4 of the Qur'ān (quoted above). This passage prescribes the need for four male witnesses. The normal number of witnesses called for in a *ḥadd* punishment case is two. Hence, the doubling of the figure represents at least a doubling of the degree of difficulty for successful prosecution of *zinā*.

Table 44-1:  
Possible Ways of Commencing a Case of *Zinā*

Substantive Accusation	Accusation Made Under Oath By	Oath to the Contrary Made By
Fornication, Example (1) — Copulation between two unmarried persons.	A third party, such as a male. Or One of the two sexual partners (unlikely).	The woman accused. Or The other sexual partner.
Adultery, Example (2) — Copulation between a married man and a woman who is not his wife, but rather the wife of another person.	Wife	Husband
Adultery, Example (3) — Copulation between a married woman and a man who is not her husband, but rather the husband of another person.	Husband	Wife
Adultery, Example (4) — Copulation between a married man and an unmarried woman.	Wife	Husband
Adultery, Example (5) — Copulation between a married woman and an unmarried man.	Husband	Wife

But, there is yet more significance to the evidentiary requirement. It clearly means the evidence of a woman in a case of alleged unchastity is not admissible. The testimony of a woman is not admissible to prove the charge of *zinā*. In turn, the hurdle to a woman commencing a case is even higher than that faced by a man. Men — particularly in some traditional Islamic communities — may be unwilling to testify against another man. Indeed, tragically, such men sometimes threaten, intimidate, or commit violence against a woman brave enough even to suggest the infidelity of her husband or of another man.

The evidentiary requirement is “at least” double in difficulty in comparison with most other *haqq Allāh* offenses (except for *kadhf*) because of who the four male witnesses must be, the degree of certainty as to their testimony, and what they attest to. Put bluntly, the four males cannot be just any four guys. Rather, they all must be of strong moral integrity. That is, they must be “*adl*,” which means “trustworthy,” or “of good character.” Relatedly, the testimony they provide must be “*shahadah* evidence,” which means there is no doubt as to its truth. Further, they must have personally witnessed unlawful sexual intercourse between the couple in question. That is, all of them must have personally seen the same unlawful act on the same day.

Professor Hussain aptly summarizes these requirements:

... [T]he evidence required to convict a person of *zinā* liable to *ḥadd* is particularly strict. The offense must be proved by the *shahadah* evidence of

four 'adl (trustworthy) male Muslims, each present at the same time, who must each have seen the act of penetration with their own eyes. *Shahadah* evidence is the strongest kind of evidence; there cannot be even the slightest shadow of doubt. To be 'adl, a witness must be proven to be of impeccable character; otherwise his evidence will be rejected. Using these standards, it is almost impossible to obtain a conviction for *zinā*.<sup>13</sup>

Use of the term "*shahada*" is no accident. It is the first of the Five Pillars of Islam, concerning bearing witness to the oneness of God (Allāh) and to Muhammad as His Messenger. Reciting the *shahada* with sincerity in front of an *Imām* also is how one converts to Islam. Viewed with these points in mind, it becomes quite clear how serious a matter it is when Islamic Penal Law calls for "*shahada*" evidence.

As Professor Hussain says, the strict requirements help explain why prosecutions for *zinā* are so rare, even in a socially conservative society like Saudi Arabia:

The Saudis, who are no slouches at enforcement of the criminal law, say that a conviction for *zinā* is obtained only *about once every hundred years* in their country.<sup>14</sup>

Indubitably, the strict requirements are the key reason for this rarity. Aside from the sad spectacle of viewing pornographic movies and television programs, it is not an everyday occurrence for four men simultaneously to watch a couple in real time engaged in intimacy outside the bonds of marriage. To be sure, in poor communities, the couple does not have the luxury of inhabiting a large house with separate, locked rooms. In some Muslim countries, it can be difficult for an unmarried couple to check into a hotel room. Even in this latter respect, however, with reforms in the Kingdom, it is possible for a woman to check into a hotel room on her own, though typically the floors of the hotel will be segregated by gender, or by singles versus couples and families. There also may be truly odd cases in which a couple records its misdeed on camera, only to have the tape wind up in the hands of authorities. Nevertheless, most couples engaged in infidelity do so discreetly, especially with the punitive risks the couple runs under the *Shari'a*.

Being witness to sexual intercourse is not enough. The second point to which all four male witnesses must attest is to the fact that what they saw was unlawful. In a case of adultery, that means the witnesses must know of the validity of any marriage in which one of the parties engaged in intimacy is involved, and of the matrimonial state of the other party, namely, that the other party is either validly married to someone else, or not married at all. In a case of fornication of two unmarried persons, the witnesses must know the persons are not validly married to each other. This kind of knowledge presumes the witnesses are familiar with the personal histories of both parties in the couple.

It is not enough that the four witnesses be 'adl, offer *shahadah* evidence, and testify to personal knowledge of unlawful intercourse and the matrimonial state of both parties in the couple. All four witnesses must be present at the trial. Further they must be present at the punishment. Indeed, there appear to be some

<sup>13</sup> HUSSAIN, *supra*, at 137.

<sup>14</sup> HUSSAIN, *supra*, at 137 (emphasis added).

circumstances in which they must be participants in the punishment. In such instances, if the punishment is stoning, then they must cast the first stone. Otherwise, the *hadd* punishment is not administered.

Why are the evidentiary requirements concerning *zinā*, as set out in *surah* 24, *ayah* 4, of the Qur'ān, so demanding? The answer comes soon after that *ayah*. An accusation of unchaste behavior was brought against one of the wives of Muhammad, 'Ā'isha. That accusation was false, as *ayah* 10-21 indicate. False accusation of unlawful sexual intercourse is a *haqq Allāh* offense, with the *hadd* punishment set out in *ayah* 4 itself. From an authentic Islamic perspective, the requirements are demanding to protect women from the kind of tribulation that befell 'Ā'isha.

Additionally, Professor Schacht offers an observation relevant to answering the question posed.<sup>15</sup> As a matter of cultural practice, in unchastity cases, Muslims tend not to want to give evidence. On other subjects, many Muslims might regard providing testimony as a religious duty. But, in cases involving a possible *hadd* punishment, the preference is to keep silent about the matter, and there is even skepticism about the probative value of giving an oath. Thus, strict evidentiary requirements help ensure those Muslims who may be eager to testify to the unlawful sexual behavior of someone else are put to the test, as to their personal character and quality of their testimony.

Modern forensic science has ushered in new crime-fighting techniques, some of which have been chronicled in dramatic television programs like CSI. One such technique is the use of DNA evidence. It is increasingly common for such evidence to be used under American Criminal Law. Indeed, DNA evidence has resulted in the reversal of many convictions for serious crimes, and even exonerated persons on death row. Is DNA evidence admissible under the *Shari'a* in a case of *zinā*? The answer is yes, and it is increasingly — though still infrequently — used. However, DNA evidence cannot be used in lieu of a witness. That is, the testimony of four male witnesses remains a requirement.

There is a second way in which to prosecute a case of *zinā*, and that is on the basis of a four-fold confession. Professor Hussain explains:

The other way *zinā* may be proved is by confession, but confession also is subject to rigorous standards. The confession must be *voluntarily* made on *four separate occasions before the court*, when the person confessing is *aware of the nature of the offense and the prescribed punishment*.<sup>16</sup>

Here, too, the requirements are strict. Only if each of them is met can the *hadd* punishment be imposed.

First, given the prejudicial views sometimes harbored by non-Muslims about the *Shari'a*, and the sorry record in some Muslim countries of safeguarding the rights of criminal suspects and defendants, it is important to state categorically that a confession may not be extracted by torture. Indeed, that is a general principal in

<sup>15</sup> See SCHACHT, *supra*, at 198.

<sup>16</sup> HUSSAIN, *supra*, at 137 (emphasis added).



Islamic Penal Law.<sup>17</sup> Rather, the confession must be given of one's own free will. To safeguard further the rights of the confessing party, the admissions must be in front of an Islamic judge (*qāḍī*).

Second, four distinct confessions are required. The confessions must be specifically about unlawful sexual intercourse. Thus, the party confessing must admit to the elements that constitute the crime of *zinā*. The confessing party has time to reflect between the occasions — unless there is an abuse of process, and the party is pressured to confess four times all in short order. Such an abuse invalidates the confessions. It is the *Hanafi* School, in particular, that champions the doctrine that *zinā* must be admitted to four times. The Qur'ān does not specifically call for a four-fold confession, and the *Sunnah* is silent on the matter. The Ancient Schools of Law at Basra and Kufa used analogical reasoning (*qiyās*) to reach the following conclusion: if the Qur'ān prescribes the need for four witnesses to *zinā*, then by parity four confessions must be needed.<sup>18</sup>

Third, the confessing party must understand what he or she is doing. They must be clear in their mind that they are admitting to *zinā*, and that this crime carries a *ḥadd* punishment. This requirement suggests some obligation on the part of law enforcement authorities, or the Islamic court, to apprise the party of the nature of the offense and the concomitant punishment. Presumably, if a party confesses to unlawful sexual intercourse and genuinely had no knowledge of what that meant or its consequences, then that party would not be liable for the *ḥadd* punishment. Indeed, the case might well be one of mental incapacity on the part of the confessing party.

Why might a person confess to *zinā* freely, four times, and with full knowledge of the offense and the sanction? The answer depends on the individual and context. But, as a general matter, religion is the answer. Some persons prefer to suffer a punishment they believe they deserve on this earth — a punishment condoned by God (Allāh) — than to suffer eternally in hell. By admitting their wrongdoing now, they may fare better on the Day of Judgment that awaits them after their death. This admission, however, begs an important question: if a *ḥadd* punishment is imposed on this earth, does Allāh punish the person again on the Day of Judgment? The majority view among *Sunni* Scholars is "no." They point out that the punishment is for a *ḥaqq Allāh* offense. There is no need for God to assert His claim, and punish the same offense twice. The minority view is the contrary, namely, that there is (or at least could be) punishment again in the afterlife.

The three requirements presume that a confession is offered orally, in writing, or both. Is there any other way to "confess" to *zinā*? In particular, can a pregnancy of a woman be regarded as a confession to unlawful sexual intercourse? If the woman is married, then the obvious answer is "no." No inference about whether intimacy occurred outside of the bonds of marriage can be drawn from the mere fact of pregnancy. Instead, a medical test concerning DNA and paternity would be required to uncover the legitimacy of the child, and thus whether the sexual partner was the lawful husband or another man. Even then, whether that test, coupled with

<sup>17</sup> See SCHACHT, *supra*, at 197.

<sup>18</sup> See SCHACHT, *supra*, at 38.

the pregnancy, could be taken as a "confession" is dubious. Still more dubious is the case of an unmarried woman. The majority of the *Sunni* Schools — *Hanafi*, *Shāfi'i*, and *Hanbali* — agree that the pregnancy of an unmarried woman is not a confession. They reason that there could be explanations for the pregnancy other than unlawful intercourse. Perhaps the woman held the mistaken view that she was validly married. Perhaps, tragically, the woman was raped.

*Imām* Mālik, however, takes a somewhat different view. Any unexplained pregnancy should be considered a confession to *zinā*. The only exception is where the woman manifests a lack of consent to intercourse, either at the time of intercourse, or shortly thereafter. In other words, for *Imām* Mālik and his followers in the *Māliki* School, unless the case is one of rape that is protested or complained of by the woman, the pregnancy of an unmarried woman is a confession to *zinā*. It scarcely needs mentioning that this approach is traditional, and works to the considerable detriment of unmarried women, particularly when coupled with the strict evidentiary requirements for proving rape — a point made by Muslim women scholars such as Professor Hussain.<sup>19</sup>

### [E] Ḥadd Punishment

The Qur'ān does not identify stoning to death as the punishment for *zinā*. The Qur'ān actually prescribes 100 lashes, as indicated in the above quotation from *surah* 24, *ayah* 2. Arguably, the lashes need not be administered with a cane, rod, or whip. In a footnote to *ayah* 2, concerning the statement about striking the adulteress and adulterer 100 times, Professor Abdel-Haleem observes:

*Jalada* in Arabic means "hit the skin" with the hand or anything else. There are reports that people used shoes, clothes, etc. (Bukhari, *Hudud* 4).<sup>20</sup>

The obvious point is the *ḥadd* punishment, perhaps, need not be a brutal one. Hitting the skin with a scarf — in theory, at least — might qualify.

Nevertheless, when the skin of a person convicted of *zinā* is hit, the instrument typically is severe. Moreover, as is well known, there is another *ḥadd* punishment for *zinā* — stoning. Because stoning is not set out in the sacred text, arguably it is not technically a "ḥadd punishment," unless that term is meant to include sanctions set out either in the Qur'ān or through the *Sunnah* of the Prophet.

In practice, the less severe *ḥadd* punishment (flogging) is used for less egregious cases of *zinā*, particularly fornication among unmarried persons. Thus, for instance, in Saudi Arabia, a *Hanbali* (*Wahhābi*) jurisdiction, the punishment for fornication between two consenting unmarried adults is flogging of 100 lashes each. The more severe *ḥadd* punishment (stoning) is used for the more notorious cases — namely, those in which one or both of the parties to unlawful intercourse is married. The line between the two occurrences is not always clear. It may differ from one *Shari'a* jurisdiction to another, and even one Islamic judge (*qāḍī*) to another, and depend on the precise facts.

<sup>19</sup> See HUSSAIN, *supra*, at 138.

<sup>20</sup> Qur'an, *supra*, fn. b to 24:2 at 220 (emphasis added).

Why is stoning included as a punishment for *zinā*, when it is not identified in the Qur'ān? Stoning was the punishment for adultery in Jewish Law — the Law of Moses. *The Book of Leviticus* in the Old Testament states:

If a man commits adultery with his neighbor's wife, both the adulterer and the adulteress shall be put to death.<sup>21</sup>

This passage does not expressly mention stoning as the means of execution. But, that this punishment was called for in Old Testament times is clear from *The Book of Deuteronomy*. It identifies stoning, albeit not necessarily in connection with adultery:

<sup>22</sup>If there is found among you, in any one of the communities which the LORD, your God, gives you, a man or a woman who does evil in the sight of the LORD, your God, and transgresses his covenant, <sup>23</sup>by serving other gods, or by worshipping the sun or the moon or any of the host of the sky, against my command; <sup>24</sup>and if, on being informed of it, you find by careful investigation that it is true and an established fact that this abomination has been committed in Israel: <sup>25</sup>you shall bring the man (or woman) who has done the evil deed out to your city gates and stone him to death. <sup>26</sup>The testimony of two or three witnesses is required for putting a person to death; no one shall be put to death on the testimony of only one witness. <sup>27</sup>At the execution, the witnesses are to be the first to raise their hands against him; afterward all the people are to join in. Thus shall you purge the evil from your midst.<sup>22</sup>

No earthly punishment is prescribed in the New Testament, but rather there is a famous case of an adulteress recounted in *The Gospel of John* (and discussed below).

As for the Qur'ān, it states in *surah 5, ayah 41*:

Messenger [Muhammad], do not be grieved by those who race to surpass one another in disbelief — those who say with their mouths, "We believe," but have no faith in their hearts and the Jews who listen eagerly to lies and to those who have not even met you, who distort the meanings of [revealed] words and say [to each other], "If you are given this ruling, accept it, but if you are not, then beware!"<sup>23</sup>

This verse seems to have nothing to do with the *ḥadd* punishment for *zinā*. But, Professor Abdel Haleem explains:

According to most interpreters, this [*ayah*] refers to a case where an eminent Jewish man and woman committed adultery. The Jewish community did not want to apply the biblical penalty of stoning, so they sent representatives to the Prophet to ask for a ruling, saying "If he orders you

to apply lashing, accept it, but if he orders stoning, do not accept it." (Razi).<sup>24</sup>

Accordingly, based on a *ḥadīth*, the punishment of stoning for *zinā* developed. The *ḥadīth* involved a woman who became pregnant through adultery, and apparently was sentenced to stoning with the approval of the Muhammad.

Accordingly, the overall sanctions scheme for *zinā* involves either flogging or stoning, depending on whether the couple engaged in unchaste behavior is married. As Professor Hussain summarizes:

In Islamic law, men and women should be treated equally with regard to *zinā*. There is some difference of opinion among the jurists as to the penalty. The Qur'ān prescribes 100 lashes, but the majority of the jurists agree that, on the authority of the *ḥadīth*, that the proper punishment for married adulterers is stoning to death, and the unmarried should be awarded 100 lashes.<sup>25</sup>

In sum, adultery triggers the death penalty, while fornication among unmarried persons triggers flogging. The distinction may be justified on the basis of the sanctity of marriage. While marriage is not viewed in Islam as a sacrament, as it is in Catholic Christianity, as the very concept of a sacrament is unknown in Islam, without doubt Islam cherishes the marriage bond. Violating it is a worse offense than unchaste behavior between two unmarried persons — though the attendant corporal punishments are contentious.

Note the initial observation of Professor Hussein in the above-quoted passage. Men — not just women — can be prosecuted for *zinā*. Nothing in the Qur'ān suggests only women are susceptible to this prosecution. Regrettably, in practice, cases of *zinā* brought against men are rare, and it is women who bear the brunt of not just the ignominious prosecution, but worse yet, the horrible death by stoning.

In practice, is the *ḥadd* punishment imposed in every instance of a successful prosecution for *zinā*? The answer is "no." Professor Schacht identifies instances in which an Islamic judge (*qāḍī*) may impose a discretionary (*ta'zīr*) sanction, such as a prison sentence, in lieu of a *ḥadd* punishment.<sup>26</sup> Illustrations include homosexual behavior and sexual intercourse with a prostitute. The liability also may be for a financial obligation — such as a monetary fine, or payment of a "fair *mahr*" (i.e., a fair nuptial gift).

Critically, other instances in which the *ḥadd* punishment might not be imposed concern a person who is a "*muḥṣan*."<sup>27</sup> This term "*muḥṣan*" has two meanings:

- A person who has never committed unlawful intercourse (*zinā*).
- A person who has concluded and consummated a valid marriage.

<sup>24</sup> QUR'AN, *supra*, fn. b to 5:41 at 71.

<sup>25</sup> HUSSAIN, *supra*, at 136-137 (emphasis added).

<sup>26</sup> See SCHACHT, *supra*, at 178.

<sup>27</sup> See SCHACHT, *supra*, at 125, 178-179.

<sup>21</sup> *The Book of Leviticus*, 20:10, in BURL, *supra*, at 130.

<sup>22</sup> *The Book of Deuteronomy*, 17:2-7, in BURL, *supra*, at 205-206 (emphasis added).

<sup>23</sup> QUR'AN, *supra*, 5:41 at 71.



A “*muḥṣan*” in the first sense is free from being falsely accused of wrongful intercourse. Because no *zinā* ever occurred, he or she cannot be charged with *kaḍhf* (discussed below). But, a “*muḥṣan*” in the second sense is liable for the charge of *zinā*. In turn, such a person is subject to the most severe *ḥadd* punishment, namely, stoning to death.

Conversely, consider a defendant who is not a “*muḥṣan*.” Such a person may have committed *zinā*, but did not conclude or consummate a valid marriage. For this non-*muḥṣan*, the *ḥadd* punishment liability is 100 lashes. For example, suppose an unmarried man has sexual intercourse with a married woman. The unmarried man is not a *muḥṣan*, and subject to flogging. For this non-*muḥṣan*, an Islamic judge (*qāḍī*) also might impose a *taʿzīr* sanction of imprisonment of 1 year. (Indeed, that appears to be so in Saudi Arabia.) As for the married woman, she is a *muḥṣan*, because she has concluded and consummated a valid marriage. So, she is subject to stoning to death.

Additionally, an unbeliever, i.e., a non-Muslim, is considered not to be a “*muḥṣan*.” Thus, the *ḥadd* punishment typically is not imposed on him or her, because of the status as a non-Muslim. But, the liability may be one for a *taʿzīr* punishment decided upon by a *qāḍī*. That sanction likely would involve imprisonment.

It cannot go without mention that the Islamic sanction for adultery is entirely distinct from that in Catholic Christianity. The well known case of a woman accused of adultery, from the *Gospel of John*, is as follows:

<sup>26</sup>But early in the morning he [Jesus] arrived again in the temple area, and all the people started coming to him, and he sat down and taught them.

<sup>27</sup>Then the scribes and the Pharisees brought a woman who had been caught in adultery and made her stand in the middle. <sup>28</sup>They said to him, “Teacher, this woman was caught in the very act of committing adultery. <sup>29</sup>Now in the law, Moses commanded us to stone such women. So what do you [Jesus] say?” <sup>30</sup>They said this to test him, so that they could have some charge to bring against him. Jesus bent down and began to write on the ground with his finger. <sup>31</sup>But when they continued asking him, he straightened up and said to them, “Let the one among you who is without sin be the first to throw a stone at her.” <sup>32</sup>Again he bent down and wrote on the ground. <sup>33</sup>And in response, they went away one by one, beginning with the elders. So he was left alone with the woman before him. <sup>34</sup>Then Jesus straightened up and said to her, “Woman, where are they? Has no one condemned you?” <sup>35</sup>She replied, “No one sir.” Then Jesus said, “Neither do I condemn you.

Go, [and] from now on do not sin anymore.”<sup>28</sup>

This story is intriguing in several respects. First, it is the only instance in the New Testament in which Jesus is writing. Lawyers and law students understandably tend to focus on the written word, and identify great figures in history with their published works. Yet, three of the most influential figures in all human history — Socrates, Christ, and Muhammad — left no written works.

<sup>28</sup> *The Gospel According to John*, 8:2-11, in BIBLE, *supra*, at 161-162 (emphasis added).

Second, what Jesus wrote remains a mystery. He wrote on the ground, and thus the content has long since disappeared. One conjecture is that Jesus wrote the names of the scribes and Pharisees who had themselves committed adultery or other unchaste acts. That conjecture is consistent with what Christ subsequently says — namely, in declining to reaffirm the Mosaic punishment, Jesus points out their hypocrisy.

In sum, Catholic Christian doctrine is that adulterers are to sin no more and be forgiven, as Christ did with respect to the adulteress. More generally, no sin is unforgivable, if genuine repentance is shown, and conversely hypocrisy is among the most heinous of sins. There is a slight analogy here with Islam, in that God (Allāh) is merciful and may forgive unchaste behavior, as did Christ, who is the Son of God to all Christians. But, the key difference is the punishment on this earth.

## § 44.02 ZINĀ AND RAPE

### [A] Consent

Is consent an element of *zinā*? With one limited exception, the answer is “no.” Professor Hussain explains:

*Zinā* includes rape, adultery, and fornication between unmarried persons, though the *Mālikī* jurist Al-Dasuqi classified rape under the heading of *Al-hirabah* [a crime against society that undermines its security].<sup>29</sup>

That is, whether sexual intercourse is voluntary or involuntary is irrelevant in prosecuting *zinā*. Non-consensual sex is rape, typically with the woman being the non-consenting party. Rape is included in the scope of *zinā*, and thereby treated as a *ḥaqq Allāh* offense.

Only one *Mālikī* School jurist, and presumably his adherents, offer a different approach. Arguably, the alternative approach is complementary, but graver, than the conventional one. That is because a *hirabah* offense is a crime against society, one that undermines the security of society. To the extent the alternative approach considers *zinā* as both a *ḥaqq Allāh* and *hirabah* offense, it treats rape more seriously than the conventional one, which treats rape as a *ḥaqq Allāh* offense alone.

So much for the theory — what about the practice? Tragically, not uncommonly, rape is treated distinctly from *zinā*. In all too many situations, in Muslim countries like Afghanistan, Bangladesh, Pakistan, and Saudi Arabia, a *bona fide* case of rape is not treated as *zinā*. A woman victimized by the violence of men, yet courageous enough to speak up against her accusers may find herself being the accused — a dangerous and tragic occurrence that is all the more likely if the men involved are powerful or well-connected. In other words, the victim of rape (the woman) winds up being prosecuted for unlawful sexual intercourse on the entirely wrong-headed and skewed view of the “facts” that she consented to the sex, and may even have encouraged it. The result is that *zinā* in the form of rape goes unprosecuted, and — in the most egregious cases — the victim may be stoned to death or flogged. The

<sup>29</sup> HUSSAIN, *supra*, at 136 (emphasis added).

"best" scenario is the woman perseveres in a shattered physical, psychological, and emotional state, angry, scared, and without justice.

Such occurrences are not authentically Islamic. To the contrary, they reflect a lack of understanding and application of true Islamic Penal Law, which in turn has deeper causes, such as poor education, backward cultural biases against women, and poverty. Fortunately, advocates for the rights of women are actively campaigning for change.<sup>30</sup>

A poignant and potentially tragic situation occurs when a rape victim becomes pregnant on account of the crime against her. Is the woman permitted to abort the baby she now carries? There is a majority consensus (*ijma'*) among Islamic religious scholars (*ulema*) who respond "no." This view appears comparable to the traditional teaching of the Catholic Church, which (in brief) is that life begins at conception, the rapist should be penalized for his crime, but the child — who, like the mother, is innocent — should not be put to death for the crime of another. Rather, the child should live, and if circumstances mandate (such as a young mother or mother ill-prepared to care for the child), should be given for adoption. However, there is a minority view among the *ulema*. This view holds that it is permissible for a female rape victim to abort her pregnancy. The rationale offered is that the child is the product of a forbidden act, namely, *zinā*.

A final question is whether, in the eyes of the *Shari'a*, a man can be "raped" by a woman? In American Criminal Law, prosecution of a woman for raping a man is possible. Such prosecutions are rare, however. When two adults are involved, even if the husband is a victim of a persistent pattern of abuse, it is difficult to overcome the defense that the husband simply could have "walked away." Some cases have involved a female teacher raping a minor, namely, an elementary or middle school student, though technically the charge pressed could be corruption of a minor as distinct from, or in addition to, rape. In contrast, most Islamic legal scholars (*fukahā'*) say "no." That is, the majority consensus (*ijma'*) is that rape is a crime perpetrated exclusively against women. Thus, it is not possible to impose on a woman a *hadd* punishment for rape. But, a minority of *fukahā'* say a man can be raped by a woman. In such cases, the minority argues, the female rapist is liable for a *hadd* punishment.

### [B] Difficulty of Prosecuting Rape

The independent Human Rights Commission of Pakistan reports (as of November 2006) that in Pakistan, a woman is raped every two hours, and gang raped every eight hours.<sup>31</sup> These statistics are shocking, all the more so because they are considered underestimations, as many rapes go unreported. As they are,

<sup>30</sup> For example, there is a group known as "Karamah," or the Muslim Women Lawyers for Human Rights, based in Washington, D.C. Its website is [www.karamah.com](http://www.karamah.com). This group also publishes position papers on a range of issues, including *zinā*, and posts them on its website. See [www.karamah.org/articles.htm](http://www.karamah.org/articles.htm).

<sup>31</sup> See *Pakistan Votes to Amend Rape Laws*, BBC NEWS, 15 November 2006, posted at <http://news.bbc.co.uk>.

the statistics indicate rape poses a central problem for Islamic Penal Law and women's rights.

On the one hand, *zinā* includes rape. That is helpful insofar as it highlights the seriousness of rape — a crime against God (Allāh). On the other hand, by including rape within *zinā*, the Penal Law also imposes the same evidentiary requirements in a rape case as in a case of consensual unlawful sex. Those requirements are too strict, impeding a woman from bringing a charge of rape in the first place, or making successful prosecution all but impossible. Note that under the *Shari'a*, DNA evidence can be used in a rape case — but, as with any case of *zinā*, it cannot be used in lieu of a witness. The testimony of four male witnesses still is necessary, and the testimony of a woman is not admissible to prove the charge of rape.

Why not simply alter the evidentiary requirements for rape? Professor Hussain comments:

The definition of *zinā* includes rape, and, where the same evidential standards are imposed, it becomes virtually impossible for a woman to prove that she was raped since few rapists choose to commit the crime in the presence of four upright Muslim men. . . . [T]he unfortunate victim, who has admitted sexual intercourse by laying the complaint, may be prosecuted while the rapist goes free. The Modern thinking is that the evidential standard mentioned in the Qur'an for *zinā* should not be applied to rape, since there are *hadith* in which the Prophet convicted men of rape on the evidence of the victim alone. There is no doubt that the traditional approach can lead to injustice — an analysis of decisions of the courts in Pakistan has shown a bias against female testimony and a tendency to arrest and imprison women for *zinā* on the basis of unsubstantiated allegations.<sup>32</sup>

In other words, Traditionists — who through the ages have been mainly men — decry any change as running afoul of the Qur'an, whence the four-male-witness rule comes. Modernists cite the example of the Prophet Muhammad. The *Sunnah* offers a clear example of a judgment of rape on the testimony of less than four male witnesses. Traditionists rebut that the Qur'an must take precedence over the *Sunnah*. The latter source of the *Shari'a* concerns the words and deeds of the Prophet. But, the former source is the Word of God (Allāh) that cannot contradict itself or be altered by the Prophet or interpretations of statements and actions of Muhammad. Modernists offer the following surrebuttal: Nothing in Islam requires Muslims to stop thinking. That is, surely the Prophet would not have rendered the decisions he did if he thought he was contradicting a revelation. Instead, why not see the issue as one in which the Qur'an does not preclude the singling out of rape from other cases of *zinā* in respect of evidentiary requirements, particularly if doing so is consistent with the moral and ethical teachings of Islam as to how one human being ought to treat another. In brief, Modernists urge, the Traditionist view is antediluvian and unsophisticated, and results in grave injustices.

<sup>32</sup> HUSSAIN, *supra*, at 139.



### [C] *Hadd* Punishment

As indicated earlier, under the Classical approach to the *Shari'a*, rape falls within the ambit of *zinā*, and thereby treated as a *haqq Allāh* offense. Consequently, the *hadd* punishment is stoning to death, or 100 lashes. Are these sanctions actually imposed in Islamic countries? The short answer is "yes." However, there are some instructive illustrations suggesting modest variations.

The *Māliki* School holds that the punishment for a man convicted of rape is stoning to death, if the man is married. But, if the rapist is a man who is unmarried, then the punishment is 80 lashes, plus blood money equal to what the payment would be for marriage (i.e., a fair nuptial gift, or *mahr*). In addition, an Islamic judge (*qāḍī*) may add a *ta'zīr* punishment, particularly imprisonment of more than one year. Is the female victim of the rape punished? No, answers the *Māliki* School, because she is not at fault.

In Saudi Arabia, the sanction for rape is 100 lashes, plus a *ta'zīr* punishment decided by an Islamic judge (*qāḍī*). The *Hanbali* (*Wahhābī*) School, to which the Kingdom adheres, regards the *Māliki* School punishment of 80 lashes as insufficiently severe, on the ground that rape is a crime of violence. An egregious case occurred in the early years of the new millennium when a young Saudi male videotaped and posted live on the internet himself and his friends raping a woman. The sanction for the lead perpetrator was not only 100 lashes, but also a *ta'zīr* punishment of 8 years jail.

### [D] Struggle in Pakistan

At least in Pakistan, the Modernists appear to have the upper hand in the debate. In November 2006, the Parliament in Islamabad voted to amend the strict *Shari'a* rules on rape.<sup>33</sup> Those rules had been in place under the 1979 *Hudood Ordinance*, which was a controversial set of Islamic Laws put in by the military ruler and sixth President of Pakistan, General Muhammad Zia ul-Haq (1924-1988). The *Ordinance* included the Qur'anic evidentiary requirements and *hadd* punishments for *zinā*, including rape.

Under the 2006 *Women's Protection Bill*, it is not necessary for a rape victim to have four male witnesses, without which they faced the charge of *zinā*. Instead, prosecutions for rape are made under secular law. Traditionists — that is, religious parties — boycotted the vote. They claimed the *Bill* would "turn Pakistan into a free-sex zone," was "a harbinger of lewdness and indecency in the country," and contrary to the Qur'an and *Shari'a*.<sup>34</sup> In truth, these claims seemed to be little else than a veil over an un-Islamic *status quo* in which men could behave more or less with impunity in respect of women. Yet, the extent to which the *Bill* actually is

<sup>33</sup> See *Pakistan Votes to Amend Rape Laws*, BBC News, 15 November 2006, posted at <http://news.bbc.co.uk>. In September 2006, Traditionists successfully blocked an earlier version of the legislation, which would have allowed rapists to be tried under secular law and the *Shari'a*. Human rights groups thought the earlier version was unwise, because it would have created confusion and allowed strong religious groups to manipulate the weak secular judiciary in Pakistan. See *id.*

<sup>34</sup> *Pakistan Votes to Amend Rape Laws*, BBC News, 15 November 2006, posted at <http://news.bbc.co.uk> (quoting opposition views).

implemented and its protections enforced to the benefit of rape victims remains to be seen.

### [E] Date Rape and Marital Rape

The concept of "date rape," which is present in the American Criminal Law system, does not exist in the *Shari'a*. "Date rape" involves copulation between two unmarried persons, with one of the partners later contending that the sexual encounter was not consensual. Often, such cases involve college students and excessive alcohol, and the male partner did not understand or ignored the protestations of the female partner. Such cases can be difficult to prosecute, as they involve contested accounts of what really happened and, put colloquially, whether "no" really meant "no." In the *Shari'a*, "date rape" would be treated as fornication as per example (1) earlier.

Likewise, the concept of "marital rape" does not exist in the *Shari'a*. Under United States Criminal Law, that is, in the statutes of certain states, one spouse, typically the husband, can be prosecuted for forcing sexual intercourse on the other spouse, typically the wife. However, such prosecutions are rare, because typically the marriage will have a history of consensual sex. Thus, as an evidentiary matter, it will not be easy to differentiate normal marital intimacy from non-consensual sex, or again put colloquially, it will be difficult to rebut the defense that a wife simply regrets the particular sexual encounter at issue. Moreover, DNA evidence is pointless in such a case, as there is no doubt the partners are married. Under the *Shari'a*, it is considered religiously prohibited (*ḥarām*) for a husband to force his wife to have sex with him, but when such behavior occurs, it is not prosecutable as a *zinā* offense.

## § 44.03 ZINĀ AND HOMOSEXUALITY

### [A] Islamic View

There is no doubt Islam looks askance at homosexuality. There are three key passages in the Qur'an:

- *Surah 4, ayah 15:*

If any of your women commit a *lewd* act, call four witnesses from among you, then, if they testify to their guilt, *keep the women at home until death comes to them or until God gives them another way out*.<sup>35</sup>

The "other way out" could be "another regulation, or marriage, or any other way," reports Professor Abdel Haleem.<sup>36</sup>

- *Surah 4, ayah 16:*

<sup>35</sup> Qur'an, *supra*, 4:15 at 52 (emphasis added).

<sup>36</sup> Qur'an, *supra*, fn. a to 4:15 at 52.

If two men commit a *lewd* act, punish them both; if they *repent* and *mend their ways*, leave them alone — God is always ready to accept repentance, He is full of *mercy*.

While the term used in the first two passages is “lewd,” the first passage pertains to lesbianism, and the second one to gay sex.

- *Surah 29, ayat 28-30:*

<sup>38</sup>And Lot: when He said to his people, “You practice *outrageous* acts that no people before you have ever committed. <sup>39</sup>How can you *lust after men*, waylay travelers, and commit *evil* in your gatherings?,” the only answer his [Lot’s] people gave was, “Bring God’s punishment down on us, if what you say is true.” <sup>40</sup>So he [Lot] prayed, “My Lord, help me against these people who spread *corruption*.”<sup>41</sup>

The context of this passage is the story of how God (Allāh) sent Noah, Abraham, Lot, and other prophets before Muhammad. (This passage also is relevant to highway robbery.) “Lusting after men” — presumably by other men — is listed with other “evils,” all of which Lot dubbed “corruption.”

Most *fukahā* treat homosexuality as within the scope of *zinā*. They point to the above-quoted passages in support. A close reading of the three passages, however, gives rise to debate about this conclusion. An even more difficult question is whether homosexual behavior or sodomy — assuming it is considered a *haqq Allāh* offense — triggers a *hadd* punishment? Islamic legal scholars (*fukahā*) do not agree on the answer.

Accordingly, for most *fukahā*, the appropriate focus of debate is on the correct punishment. Some *fukahā* advocate the most severe of *hadd* punishments. Others treat homosexuality as a less serious form of unlawful sexual intercourse, and thereby call for imposition of flogging (with a lesser number of lashes than 100), but not death. Professor Schacht reports the applicability of a *hadd* punishment for homosexual behavior is debated in Islamic legal circles.<sup>38</sup> In some such instances, particularly involving lesbianism, a discretionary (*ta’zīr*) sanction decided by an Islamic judge (*qāḍī*) is imposed in lieu of a *hadd* punishment.

In respect of this debate, a careful reading of the Qur’anic passages quoted above is important. *Surah 4, ayah 15* does not call for lesbian women to be stoned, or even flogged. The most serious punishment is for them to be “kept at home” until they die — in effect, house arrest for life. This passage also admits the possibility that God (Allāh) may give them an alternative, some of which are spelled out above. *Surah 4, ayah 16* also does not specifically identify stoning or flogging for gay men. It calls ambiguously for a punishment. Significantly, it hastens to add that should they repent and amend their way of life, they are to be left alone. This passage concludes with a reminder of Divine Mercy, a reminder that surely applies to homosexual women and men. To be sure, the repentance must be genuine, as *surah 4, ayat 17-18* make clear:

<sup>37</sup> Qur’AN, *supra*, 5:33-34 at 71 (emphasis added).

<sup>38</sup> See SCHACHT, *supra*, at 178.

<sup>37</sup>But God only undertakes to accept repentance from those who do evil out of ignorance and soon afterwards repent: these are the ones God will forgive, He is all knowing, all wise. <sup>38</sup>It is not true repentance when people continue to do evil until death confronts them and then say, “Now I repent,” nor when they die as disbelievers: We have prepared a painful torment for these.<sup>39</sup>

As for *surah 29, ayat 28-30*, these verses simply do not identify a precise kind of punishment for homosexual behavior. The reference to “God’s punishment” suggests a *hadd* sanction. But, the problem with this reference is that it is in the context of Lot’s people challenging, indeed almost taunting, God. That is, it is not a reference in which God (Allāh) says “this is the punishment for homosexuality.”

What is clear is homosexuality remains a taboo subject in all Islamic countries. In consequence, gays and lesbians lead a very difficult, secretive life, and are subject to inexcusable discrimination and violence. In the summer 2009, a prominent court in India — which is a religiously pluralistic country with a secular constitution — ruled that a law dating from the English Colonial Era that criminalized homosexuality was unconstitutional. The judgment followed a long campaign by advocates for gay rights. It remains to be seen whether the ruling will make an equal impression in the Muslim communities of India, and what kind of impression. That also is true in respect of Muslim countries. As for the United States, with the 2003 Supreme Court decision in *Lawrence v. Texas*,<sup>40</sup> which overruled a 1986 Supreme Court decision in *Bowers v. Hardwick*,<sup>41</sup> state laws on sodomy became unconstitutional. Nevertheless, sodomy remains an offense under the criminal statutes of approximately 21 states — albeit one that is unenforced and, with the Supreme Court ruling, unenforceable.

## [B] Contrast with Catholic Christianity

What also is clear is a distinction between Islamic Penal Law and Catholic Christian teaching about homosexuality. As indicated above, at least according to some Islamic legal scholars, under the *Shari’a*, homosexuality is a *haqq Allāh* offense, and the real debate — if there is to be any — is the severity of the punishment. Catholic teaching differentiates between the act and the actor.

According to Catholic Christian teaching, the act of homosexual sex is a sin. The *Catechism of the Catholic Church* explains:

Homosexuality refers to relations between men or between women who experience an exclusive or predominant sexual attraction toward persons of the same sex. It has taken a great variety of forms through the centuries and in different cultures. Its psychological genesis remains largely unexplained. Basing itself on Sacred Scripture, which presents homosexual acts as acts of grave depravity, tradition has always declared that “homosexual acts are intrinsically disordered.” [The Biblical passages referred to are

<sup>39</sup> Qur’AN, *supra*, 4:17-18 at 52.

<sup>40</sup> See *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>41</sup> See *Bowers v. Hardwick*, 478 U.S. 186 (1986).



from the Old Testament, namely, *Genesis* 19:1-29, and from the New Testament, namely, *Romans* 1:24-27, 1 *Corinthians* 6:10, and 1 *Timothy* 1:10. The quotation is from Paragraph 8 of *Persona Humana*, a document of the Congregation of the Doctrine for the Faith.] *They are contrary to the natural law. They close the sexual act to the gift of life. They do not proceed from a genuine affective and sexual complementarity. Under no circumstances can they be approved.*<sup>42</sup>

Most Muslims would agree with the gist of this precept.

Setting aside the specific scriptural bases for it, both great faiths — Islam and Catholicism — teach that homosexual acts are intrinsically and gravely morally wrong. As the italicized language indicates, in addition to the scriptural bases for this teaching, be they Qur'anic or Biblical, there is also a Natural Law foundation on which the teaching stands. It is not possible to procreate through a homosexual act, yet there are two purposes to sexual intercourse: to share love, and to be open to new life. The love-giving and life-creating purposes are inseparable. They entail complete mutual self-giving by the persons involved. The inseparability of the purposes, and the mutual self-giving, is readily apparent from the way in which humans are created as sexually complimentary beings, *i.e.*, men and women. An attempt to separate the two purposes, and gratify one's own pleasure, through a homosexual act runs contrary to the Natural Law.

But, what differentiates the Islamic and Catholic perspectives is the distinction between the act and actor, and the consequences for the actor. The *Shari'a* does not draw that distinction, and punishes the actor — the person engaged in a homosexual act — under the offense of *zinā*. Catholic teaching unambiguously delineates between act and actor: while not approving of homosexual acts, it does not call for the actors to be prosecuted and punished. To the contrary, as the *Catechism of the Catholic Church* explains:

The number of men and women who have deep-seated homosexual tendencies is not negligible. This inclination, which is objectively disordered, constitutes for most of them a trial. They must be accepted with respect, compassion, and sensitivity. Every sign of unjust discrimination in their regard should be avoided. These persons are called to fulfill God's will in their lives and, if they are Christians, to unite to the sacrifice of the Lord's Cross the difficulties they may encounter from their condition.<sup>43</sup>

Manifestly, the actor who commits the sin is to be treated with mercy in a non-discriminatory manner, and most definitely not subjected to persecution. That actor is a person entitled to human dignity.

This approach is founded on a general principle of Catholicism, namely, to hate sin, but not the sinner. Instead of prosecution and punishment, the *Catechism of the Catholic Church* proposes the following:

<sup>42</sup> See *Catechism, supra*, ¶ 2357 at 566 (emphasis added).

<sup>43</sup> See *Catechism, supra*, ¶ 2358 at 566 (emphasis added).

Homosexual persons are called to chastity. By the virtues of self-mastery that teach them inner freedom, at times by the support of disinterested friendship, by prayer and sacramental grace, they can and should gradually and resolutely approach Christian perfection.<sup>44</sup>

Notably, this advice applies also to unmarried heterosexual persons. In religious and scientific circles, there is a vigorous debate (alluded to in the first of the *Catechism* passages quoted above, in respect of the unexplained psychological genesis of homosexuality) about the relative influences of genetics and environment on homosexual tendencies, and about whether such tendencies are permanent or reversible through counseling and therapy. Nevertheless, within the Church, there is no advocacy for criminalization of homosexuality, or for imposition of punishments on homosexuals. An intriguing question is whether a majority of *fukahā'* might one day interpret, or re-interpret, the key Qur'anic passages, perhaps using *ijtihad* (independent reasoning), in a manner akin to Church teaching.

#### § 44.04 FALSE ACCUSATION OF UNLAWFUL SEXUAL INTERCOURSE (*KAHF*)

##### [A] Biblical Comparisons: 8th Commandment

In his novel, *The Scarlet Letter* (1850), Nathaniel Hawthorne provides ample reason why accusing a woman of adultery is a perilous exercise. Hester Prynne, the target of the accusation, thought herself to be a widow.<sup>45</sup> In fact, her husband, Roger Chillingworth, subsequently returned to their Puritan New England village — but he concealed his identity. When he saw his wife forced to wear the scarlet "A," he became obsessed with discovering the person with whom Hester had intimate relations. That person turned out to be Arthur Dimmesdale. He not only was a young minister, but also the leader in the community demanding identification of the father of Hester's child. In the end, Chillingworth destroys himself in seeking revenge against Dimmesdale. Dimmesdale destroys himself with guilt, confesses his adultery publicly, and dies in the arms of Hester. Hester emerges as a heroine, shows courage, and sets on a course with her daughter, Pearl, to migrate to Europe in search of a new life.

Interestingly, there is no rule in the 10 Commandments that specifically refers to false accusation of unlawful sexual intercourse. By no means does that suggest false accusation is regarded with nonchalance. To the contrary, there is a general rule — the 8th Commandment — against bearing false or dishonest witness.<sup>46</sup>

The Old and New Testaments of the Bible are replete with stories of violations of this rule, including the events surrounding the betrayal of Jesus by Judas Iscariot that led to the Crucifixion. Moreover, perjury is a criminal offense in American Law, albeit one difficult to prove because it involves showing not only

<sup>44</sup> See *Catechism, supra*, ¶ 2359 at 566.

<sup>45</sup> See *SCARLET LETTER, supra*; *MERRIAM-WEBSTER'S ENCYCLOPEDIA OF LITERATURE* (Springfield, Massachusetts: Merriam-Webster, 1995).

<sup>46</sup> For Catholic Christian teaching on the 8th Commandment, see *id.*, ¶¶ 2464-2503 at 591-601.

that the statement was materially false, but also that the defendant knew it was materially false when the defendant uttered it. It offends substantive and procedural fairness if perjured testimony is permitted, and of course such testimony can lead to wrong — and even dastardly — adjudicatory outcomes.

### [B] Key Qur'ānic Passages

In contrast to the Old Testament of the Bible, the Qur'ān does single out false accusation of unlawful sexual intercourse as a distinct claim of God (*haqq Allāh*). *Surah 24, ayat 4-21* state:

...<sup>4</sup>As for those who *accuse chaste women of fornication*, and then fail to provide *four witnesses, strike them eighty times*, and reject their testimony ever afterwards: they are the lawbreakers,<sup>5</sup> except for those who repent later and make amends: God is most forgiving and merciful.

<sup>6</sup>As for those who *accuse their own wives of adultery*, but have no other witnesses, let each one *four times* call God to witness that he is telling the truth,<sup>7</sup> and, the fifth time, call God to reject him if he is lying,<sup>8</sup> *punishment shall be averted from his wife if she in turn four times calls God to witness that her husband is lying*<sup>9</sup> and, the fifth time, calls God to reject her if he is telling the truth.

<sup>10</sup>If it were not for God's bounty and mercy towards you, if it were not that God accepts repentance and is wise . . .<sup>11</sup> *It was a group from among you that concocted the lie* — do not consider it a misfortune for you [people]; it was a good thing — and every one of them will be charged with the sin he has earned. He who took the greatest part in it will have a painful punishment.<sup>12</sup> When you heard the lie, why did believing men and women not think well of their own people and declare, "This is obviously a lie"?<sup>13</sup> And why did the accusers not bring *four witnesses* to it? If they cannot produce such witnesses, they are liars in God's eyes.<sup>14</sup> If it were not for God's bounty and mercy towards you in this world and the next, you would already have been afflicted by terrible suffering for indulging in such talk.<sup>15</sup> When you took it up with your tongues, and spoke with your mouths *things you did not know [to be true], you thought it was trivial but to God it was very serious*.<sup>16</sup> When you heard the lie, why did you not say, "We should not repeat this — God forbid! — It is a monstrous slander"?<sup>17</sup> *God warns you never to do anything like this again*, if you are true believers.<sup>18</sup> God makes His messages clear to you: God is all knowing, all wise.<sup>19</sup> A painful punishment waits in this world and the next for those who like *indecently* to spread among the believers: God knows and you do not.<sup>20</sup> If it were not for God's bounty and mercy and the fact that He is compassionate and merciful . . .<sup>21</sup> Believers, do not *follow in Satan's footsteps* — if you do so, he will urge you to *indecently* and *evil*. If it were not for God's bounty and mercy towards you, none of you would have become pure. God purifies whoever he will: God is all hearing, all seeing.<sup>47</sup>

<sup>47</sup> Qur'ān, *supra*, 24:4-21 at 220-221 (emphasis added).

Falsely accusing a woman of adultery or other unchaste behavior is the work of the devil, and thus not only "monstrously slanderous" and "indecent," but also "evil." Muslims are forbidden from making such accusations, unless they can prove them with four witnesses. Even then, the accused woman can rebut the charge by invoking God's help four times to the effect that the accuser is lying.

The seriousness of false accusation of unlawful sexual intercourse — or, as it is called in Arabic, "*kadhif*" — is based not only on the above-quoted passage itself, but also on an event in the life of Muhammad to which the passage alludes. *Ayah 11* speaks of the concoction of a lie. As Professor Abdel Haleem observes:

This [*ayah*] alludes to the accusation made against 'Aisha, the Prophet's wife.<sup>48</sup>

The accusation against 'Āisha (whose father was Abū Bakr, the first of the Four Rightly Guided Calphs) was, of course, false. Given this history, and the express reference in *ayah 6-9* to an accusation made by a husband against his wife, a key question arises: does the crime of *kadhif* apply only to men? Or, can a woman also be prosecuted for this *haqq Allāh* offense triggering a *hadd* punishment against her? Note that the story concerning 'Āisha includes two men and a woman.

The general answer appears to be that either men or women can be prosecuted for the crime. Professor Hussain writes:

If a *person* accuses another of unlawful sexual intercourse and cannot prove it by producing the necessary four witnesses, the accuser will be punished with 80 lashes.<sup>49</sup>

However, in practice, prosecutions against women are rare. A related question is whether only a husband can be prosecuted — as the Qur'ān seems to connote in *ayah 6-9* — or whether any man can be charged with the offense? Here the answer is clear, and is based on *ayah 4*: any person, whether or not related to the woman in question, is within the scope of prosecution. This understanding, too, is suggested by the use of the word "person" in the passage quoted from Professor Hussain.

What is the basic rationale for singling out false accusation of unlawful sexual intercourse, in particular, from bearing false witness, or perjury, in general? One response is historical, namely, the erroneous accusation against a wife of the Prophet, 'Āisha, from her travels in a caravan. Another explanation is systemic. *Kadhif* is a device to protect the dignity, honor, and reputation of women. What happened to 'Āisha should not happen to any woman. There is a third justification, albeit one running afoul of the Orientalist fallacy. In pre-Islamic times on the Arabian Peninsula, the line between marriage and concubinage was thin, sometimes non-existent. By highlighting the gravity of false accusation about the sexual behavior of a woman, the *Shari'a* advances the protection of women vis-à-vis those times.

<sup>48</sup> Qur'ān, *supra*, fn. b to 24:11 at 221 (emphasis added).

<sup>49</sup> Hussain, *supra*, at 138 (emphasis added).



### [C] Elements and Evidentiary Requirements

There are two elements to the crime of false accusation of unlawful intercourse (*kadhif*). The first element concerns the nature or content of the statement. The second element concerns the truth or falsity of the utterance.

First, the accusation must be specific as to one of two events, or both of them:

- Unlawful sexual intercourse (*i.e.*, *zinā*) occurred.
- An illegitimate child was born.

In other words, the statement must be that a woman engaged in illicit sex, or it must impugn the legitimacy of the child of a woman, or both.

It is worth reviewing the behavior that amounts to unlawful sexual intercourse. That is because there is debate in Muslim legal circles as to the applicability of a *hadd* punishment for *kadhif* to married versus unmarried persons. The key is the terminology in *surah* 24, *ayah* 4 versus *ayah* 6, namely, “fornication” versus “adultery,” respectively. “Fornication” refers to voluntary sexual intercourse between two unmarried people, or between people who are married but not to each other.<sup>50</sup> “Adultery” refers to voluntary sexual intercourse between one married person and another person (who may or may not be married) that is not his or her spouse, *i.e.*, intimacy between two people, one of whom is married to another person.<sup>51</sup> Thus, “fornication” is the more general term, because it includes intimacy among two unmarried people. “Adultery” is the more specific term, because it focuses on intimacy outside of the marriage bond. Stated differently, “fornication” includes “adultery,” where intimacy occurs between people who are married but not to each other. But, there are instances of “fornication” that are not “adultery,” where, for example, intimacy occurs between two unmarried people.

A husband, therefore, technically would not accuse his wife of “fornication,” but of “adultery” — having sex with a partner other than him. That is, the word “adultery” in *surah* 24, *ayah* 6 is properly linked to an accusation by a husband. What about *ayah* 4, however? An accusation of “fornication” may be made by anyone, meaning a man could accuse a woman of having sex with someone else, and neither the woman nor that other person is married. Could the accuser allege the woman committed “adultery,” assuming either she or her sexual partner is married? *Ayah* 4 does not rule out that possibility. That is because it uses the term “fornication,” which encompasses “adultery.”

Focusing on the technical terms, it appears Islamic Penal Law is oriented to leaving the charge of adultery to husbands, and the charge of fornication to non-husbands. But, the *Sharīʿa* does not leave a gap in which a non-husband is precluded from accusing a woman of adultery — he could do so by charging “fornication” under *surah* 24, *ayah* 4. Likewise, it does not leave a gap in which a husband is precluded from accusing a woman, not his wife, of fornication — he could do so under *ayah* 4.

<sup>50</sup> See THE OXFORD AMERICAN DICTIONARY AND THESAURUS 576 (New York, New York: Oxford University Press 2004) (entry for “fornicate”). [Hereinafter, OXFORD AMERICAN DICTIONARY.]

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The second element of *kadhif* is that the statement is false.<sup>52</sup> That is, what was said about the woman is not factually correct. The woman did not engage in wrongful sexual behavior. Or, if the first element involves impugning the heritage of a child, then the truth would be that the child in question is not illegitimate. Unless both elements exist, a prosecution for *kadhif* cannot go forward with success.

Even when both elements are present, a variety of factors can bring about dismissal of a charge of *kadhif*. For example, there may be discrepancies in the testimony of the four witnesses who are required to make the charge of *zinā* (unlawful intercourse). Of the four witnesses, one or more of them may not be qualified to give evidence. Possibly, one or more witness may withdraw (*rujāʿ*) his testimony.

As intimated, four male witnesses are required to prove a charge of *kadhif*. That is the same requirement — set out in the Qurʾān, *surah* 24, *ayah* 4 and 6 — as for *zinā*, and the equivalence is deliberate. Because *kadhif* embodies a statement about *zinā*, it would be illogical to require fewer witnesses than *zinā*. That is, analogical reasoning (*qiyaas*) supports the requirement of four male witnesses for the false accusation crime. Requiring more witnesses, however, would make a charge of *kadhif* even more difficult to prove, and thus lessen the protection afforded to the dignity, honor, and reputation of women.

Prosecution of *kadhif* is not contingent on demand by an applicant, who presumably is a woman wrongly accused. As a *haqq Allāh* offense, there is no discretion as to enforcement. But, the applicant must be present at the trial and any subsequent punishment. These facts — that a woman must bring the charge, typically against a man, and be at judicial and enforcement proceedings — are hurdles to bringing an application in the first place. That is all the more true if the social context is slanted against women.

### [D] Hadd Punishment

The *hadd* punishment for false accusation of unlawful sexual intercourse (*kadhif*) is flogging. Specifically, 80 lashes are prescribed. However, an Islamic judge (*qāḍī*) may apply a discretionary punishment (*taʿzīr*). Depending on the *Sunni* School to which the *qāḍī* adheres, that punishment could be 39, or 75, strokes. In other words, the *hadd* punishment of 80 lashes is not prescribed in every case, just as it is not in every instance of unlawful sexual intercourse (*zinā*). Whenever the *hadd* punishment is not imposed for whatever reason, the defendant remains liable for a *taʿzīr* punishment.

Professor Schacht cites one instance in which a *taʿzīr* rather than *hadd* punishment would be applied.<sup>53</sup> That is when the false accusation of unlawful

<sup>52</sup> Note there is a debate as to the effect of repentance by a person who commits *kadhif*. The *Hanafi* School argues that repentance does not change the fact that future testimony by that person must be rejected. The *Māliki*, *Shāfiʿi*, and *Hanbali* Schools argue that testimony of that person may be admitted after that person repents. See MOHAMED SALIM EL-AWA, PUNISHMENT IN ISLAMIC LAW: A COMPARATIVE STUDY 23 (Indianapolis, Indiana: American Trust Publications, 1981).

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intercourse is directed at an unbeliever. (Note, however, *surah* 24, *ayah* 4 of the Qur'an does not limit protection to believers.) On the one hand, the exercise of such discretion is justified on the ground Islamic Penal Law does (or ought) not to apply to relations between Muslims and non-Muslims. On the other hand, this discretion is troubling. It suggests protection of the dignity, honor, and reputation of non-Muslim women is less important than of Muslim women. In turn, it reinforces stereotypes among some Muslim men that non-Muslim women in the West and Far East are "loose" in respect of sexual behavior.

In *surah* 24, *ayah* 4, the Qur'an expressly states the punishment for *kadhif*. Reference is made to striking a false accuser 80 times. (Recall that for unlawful sexual intercourse (*zinā*), *surah* 24, *ayah* 2 speaks of 100 lashes.) Additionally, the passages quoted in the discussion of *zinā* — *surah* 5, *ayah* 41, and the comment by Professor Abdel Haleem — are the basis for this punishment of *kadhif*, as they are for the punishment for *zinā*. In other words, the *Sunnah* of Muhammad provides a further basis. Thus, insofar as a "hadd punishment" narrowly refers to one set out exclusively in the Qur'an, these punishments do not fit within that definition. It is more appropriate, perhaps, to think of the term as encapsulating a sanction set out in either the Qur'an or the *Sunnah*.

Interestingly, a species of false accusation, which does not concern sexual behavior, can trigger a *ta'zīr* punishment. Gravely insulting a Muslim with an epithet like "O son of a whore (*kahba*)" or "O sinner (*fāsik*)" may result in flogging, with the number of strokes determined by a *qādi*. Such epithets do not trigger the *hadd* punishment, because neither is an express accusation of adultery. Less severe, but still deeply offensive, insults, such as calling a Muslim a "dog" do not trigger this punishment, unless they are targeted at a descendant of the Prophet or a *Shari'a* scholar.<sup>54</sup> The latter outcome is based on *istihsān*, i.e., discretionary reasoning that is not strict *qiyās*.

#### § 44.05 RELATIONSHIP OF KADHIF TO ZINĀ

Notice that the first element of *kadhif* is essentially equivalent to an accusation of *zinā*, while the second element is that this charge is untrue. Consequently, it is somewhat disingenuous to declaim, without further explanation, there are only two elements to the charge of *kadhif*. All of the elements required for a charge of *zinā* are required, too.

Indeed, *kadhif* and *zinā* are interdependent. The crime of false accusation serves to restrict the scope of unlawful intercourse. Conversely, the crime of unlawful intercourse serves to restrict the scope of false accusation. That is, for two reasons, each crime delimits the boundaries of the other.

First, dismissal of an accusation of *zinā* results in *kadhif* — a charge of false accusation, assuming this charge is pressed. Any or all of the four witnesses in the earlier, unsuccessful case of *zinā* are liable for the *hadd* punishment for *kadhif*. Second, the fact false accusation is a *haqq Allāh* offense should mean the number of cases in which the *hadd* punishment for *zinā* is imposed is minimized. Knowing the

severity of this punishment, a rational person would be leery to make the accusation in the first place.

*Kadhif* and *zinā* are related in another way. The *Shari'a* treats unlawful intercourse severely, but does not treat perjury in general as a *haqq Allāh* crime. It would be conceptually inconsistent not to treat false accusation of unlawful intercourse with the same concern. If the underlying crime is an offense against God (Allāh), then surely accusing someone falsely of its commission also is such an offense.

#### § 44.06 MUTUAL EXCLUSIVENESS OF SEX CRIMES (KADHIF AND ZINĀ) AND DIVORCE THROUGH LI'ĀN

While *kadhif* and *zinā* are interdependent, they are mutually exclusive from a divorce procedure known as "*li'ān*." *Li'ān* is one of several grounds in Islamic Family Law for the dissolution of a marriage. Essentially, it entails a husband accusing his wife of committing an unchaste act. He must make this accusation under oath, and the wife may offer a counter-affirmation under oath.

Suppose a marriage is dissolved because of unchastity. That is, the husband initiates the procedure of *li'ān*, with success. Can the husband be held liable for the crime of *kadhif*, and subject to the *hadd* punishment of 80 lashes? The answer is "no." Can the wife be held liable for the crime of *zinā*, and subject to the *hadd* punishment of death? Again, the answer is "no." However, to be free of this liability, the wife must make an affirmation under oath that she did not commit any unchaste act, i.e., she must swear an oath counter to that of her husband. Dissolution of a marriage through *li'ān* immunizes each party, husband and wife, from being charged with the *haqq Allāh* offenses, and thereby frees them of concern about the *hadd* punishment.

This legal consequence is critical in the everyday practice of the *Shari'a*. It means many potential cases of *zinā* or *kadhif* are not brought. Instead, the unhappy couple de-escalates their dispute from what could be a *haqq Allāh* offense to a standard divorce procedure, *li'ān*. Rather than go through the harrowing ordeal of a trial in which conviction would result in a *hadd* punishment, and getting four witnesses and enduring publicity, why not dissolve the marriage quietly on the ground of infidelity? The question should not intimate *li'ān* is without trauma or heartbreak, quite the contrary, but only point out the enormous difference in incentives between the two legal options.

The situation of eschewing a potential case of *zinā* or *kadhif*, and electing the *li'ān* procedure, raises an obvious question: isn't someone lying? If a husband swears under oath that his wife was unfaithful, and the wife provides a counter-oath that she engaged in no infidelity, then the situation is a classic "he said, she said." In this situation, in the absence of four witnesses, it is sensible not to pursue a *haqq Allāh* charge. As for the alleged adultery, it is the basis for the divorce via *li'ān*. That is, legal effect — dissolution of the marriage — is given despite the likelihood one of the parties is mendacious.

<sup>54</sup> See SCHACHT, *supra*, at 179.

## Chapter 45

### CLAIMS OF GOD (*ḤAQQ ALLĀH*): DRINKING AND STEALING

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Good rises from good actions, and that is good.  
Beyond that, what else do saints and good people say?

I am willing to give up my breath and my life for you,  
Even though I don't know the first thing about sacrifice.

The abundant objects of the world mean nothing at all!  
But if the wine is free, how could Ghalib hold back?

Mirza Ghalib  
(1797-1869, Great Classical Urdu and Farsi Poet of India during British Rule), *Questions*, in MIRZA GHALIB, *THE LIGHTING SHOULD HAVE FALLEN ON GHALIB — SELECTED POEMS OF GHALIB* (Robert Bly & Sunil Dutta eds, 1999)

#### SYNOPSIS

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## § 45.01 CONSUMING ALCOHOL (SHURB AL-KHAMR)

## [A] Biblical Contrasts: Wedding Feast at Cana and Last Supper

Alcohol plays an important role in the traditions, practices, and culture of many of the world religions, both present and past. Islam stands in marked contrast to this fact. That was not always the case. Professor Hussain reports:

The consumption of alcohol in moderation was at first allowed in Islam. Later, it was forbidden completely.<sup>1</sup>

Her report is corroborated by Professor Abdel Haleem, translator of the Qur'ān:

The prohibition of intoxicants was introduced by stages, and they were eventually made completely unlawful.<sup>2</sup>

Unfortunately, neither Professor expounds on the point or offers further support. It is fascinating, and worthy of exploration, to conceive the *Shar'ia* prohibition on drinking is not an intrinsic part of Islam since inception. Indeed, Muslim scholars commonly appreciate that consumption of alcohol is the subject of a gradual ban, one evolving over time. Likewise, the concomitant punishment has been the subject of debate.

In Judaism, wine is a part of every Passover meal.<sup>3</sup> Wine, of course, plays a central role in Christian history. As recounted in *John* in the New Testament, and depicted in the large masterpiece, *The Wedding Feast at Cana* (1562-63) by Veronese (Paolo Caliari, 1528-1588) that hangs in the Louvre Museum in Paris opposite the *Mona Lisa*, changing water into wine at the wedding in Cana, at the suggestion of His Mother, Mary, was the first miracle performed by Jesus.<sup>4</sup> Wine was served at the Last Supper, a scene depicted by many of the greatest artists, including Leonardo Da Vinci (1452-1519) in his fresco *The Last Supper* (1495-98) in Santa Maria delle Grazie in Milan, Italy.<sup>5</sup>

Indeed, in Catholic Christianity, under the doctrine of transubstantiation, everyday around the world, multiple times during the day, priests consecrate wine, turning it into the blood of Christ under the appearance of wine, as they do with bread, turning it into the body of Christ under the appearance of bread. That is, they celebrate the Sacrament of the Holy Eucharist, and through participation in this Sacrament, Catholics grow in holiness, that is, they become more Christ-like. The Sacrament — an outward sign of inward grace instituted for the benefit of

people — was instituted by Christ Himself (i.e., it is not an invention of the Church), and is recounted in *The Gospel According to Matthew* in chapter 26, verses 26-29, *The Gospel According to Mark* in Chapter 14, verses 22-25, *The Gospel According to Luke* in chapter 22, verses 13-20, and *The Gospel According to John*, in chapter 6, verses 47-59. In other words, the Eucharist is evidenced in all four New Testament Gospels. Saint Paul also recounts the Lord's Supper in *The First Letter to the Corinthians*, chapter 11, verses 23-26.<sup>6</sup>

In a famous passage from *The Gospel According to Mark*, Christ also warned that it is foolhardy to fear defilement from outside sources:

<sup>3</sup>Now when the Pharisees with some scribes who had come from Jerusalem gathered around him [Jesus], <sup>2</sup>they observed that some of his disciples ate their meals with unclean, that is, unwashed, hands. <sup>3</sup>For the Pharisees and, in fact, all Jews do not eat without carefully washing their hands, keeping the tradition of the elders. <sup>4</sup>And on coming from the marketplace they do not eat without purifying themselves. And there are many other things that they have traditionally observed, the purification of cups and jugs and kettles [and beds]. <sup>5</sup>So the Pharisees and scribes questioned him, "Why do your disciples not follow the tradition of the elders but instead eat a meal with unclean hands?" He [Jesus] responded, "Well did Isaiah prophesy about you hypocrites, as it is written:

"This people honors me with their lips, but their hearts are far from me;

"In vain do they worship me, teaching as doctrines human precepts."

<sup>8</sup>You disregard God's commandment but cling to human tradition." . . . <sup>14</sup>He [Jesus] summoned the crowd again and said to them, "Hear me, all of you, and understand. <sup>15</sup>Nothing that enters one from outside can defile that person; but the things that come out from within are what defile. . . .

<sup>17</sup>When he got home away from the crowd his disciples questioned him about the parable. <sup>18</sup>He said to them, "Are even you likewise without understanding? Do you not realize that everything that goes into a person from outside cannot defile, <sup>19</sup>since it enters not the heart but the stomach and passes out into the latrine?" (Thus he declared all foods clean.) <sup>20</sup>"But what comes out of a person, that is what defiles. <sup>21</sup>From within people, from their hearts, come evil thoughts, unchastity, theft, murder, <sup>22</sup>adultery, greed, malice, deceit, licentiousness, envy, blasphemy, arrogance, folly. <sup>23</sup>All these evils come from within and they defile."

By extension, wine — an exogenous element — is not *per se* the source of defilement.

<sup>1</sup> JAMILA HUSSAIN, ISLAMIC LAW AND SOCIETY — AN INTRODUCTION 136 (Annandale, New South Wales, Australia: The Federation Press, 1999) (emphasis added). [Hereinafter, HUSSAIN.]

<sup>2</sup> THE QUR'AN — A NEW TRANSLATION BY M.A.S. ABDEL HALEEM fn. a to 4:43 at 55 (Oxford, England: Oxford University Press, 2004) (emphasis added). [Hereinafter, QUR'AN.]

<sup>3</sup> See, e.g., *The Kosher Wine Review*, posted at [www.kosherwinereview.com](http://www.kosherwinereview.com).

<sup>4</sup> See *The Gospel According to John*, 2:1-11, in THE CATHOLIC STUDY BIBLE 150-151 (New York, New York: Oxford University Press, 1990, New American Bible trans.). [Hereinafter, BIBLE.]

<sup>5</sup> Leonardo's work, of course, focuses on the announcement by Jesus that one of the Twelve Disciples would betray Him, as recounted in *John* 13:21-22.

<sup>6</sup> Its roots, or at least the use of wine in religious events, long pre-date the New Testament. The Old Testament *Book of Genesis* recounts the Priest Melchizedek using wine in a blessing for Abram the Hebrew: See *The Book of Genesis* 14:18-20 in BIBLE, *supra*, at 18.

<sup>7</sup> *The Gospel According to Mark*, 7:1-8, 14-23, in BIBLE, *supra*, at 78-79 (emphasis added).

Here, then, is a point of distinction between Islam and Christianity: while drinking is a crime in Islam, and eating pork is strictly forbidden, there are no such consumption injunctions in Christianity. To be sure, Christ urges his followers to be vigilant so that they are ready for not only their own death, but also the end of time. *The Gospel According to Luke* recounts this exhortation:

<sup>34</sup>“Beware that your hearts do not become drowsy from *carousing and drunkenness* and the anxieties of daily life, and that day catch you by surprise <sup>35</sup>like a trap. For that day will assault everyone who lives on the face of the earth. <sup>36</sup>Be vigilant at all times and pray that you have the strength to escape the tribulations that are imminent and to stand before the Son of Man.”<sup>9</sup>

Saint Paul warns against drunkenness in his *Letter to the Ephesians*:

<sup>15</sup>Watch carefully then how you live, not as foolish persons but as wise, <sup>16</sup>making the most of the opportunity, because the days are evil. <sup>17</sup>Therefore, do not continue in ignorance, but try to understand what is the will of the Lord. <sup>18</sup>And do not get drunk on wine, in which lies debauchery, but be filled with the Spirit, <sup>19</sup>addressing one another [in] psalms and hymns and spiritual songs, singing and playing to the Lord in your hearts, <sup>20</sup>giving thanks always and for everything in the name of our Lord Jesus Christ to God the Father.<sup>9</sup>

Moreover, temperance is one of the Four Cardinal Virtues in Catholic Christianity, along with prudence, justice, and courage. And, following Saint Frances of Assisi, there may be some virtue in vegetarianism. But, done in moderation, enjoying a beer, sipping a glass of red wine, relaxing with a gin and tonic, or eating a ham sandwich is perfectly acceptable.

In sum, the distinguishing point is on the origin of a spiritual poison. In Christianity, as the above-quoted passages indicate, the ultimate source is intrinsic, in the shadows of the human heart. In Islam, as the criminalization of alcohol consumption suggests, extrinsic sources are viewed as foul.

<sup>9</sup> *The Gospel According to Luke*, 21:34-36, in BIBLE, *supra*, at 138 (emphasis added).

The expression “Son of Man” refers to Jesus and is explained by Saint Irenaeus of Lyons (2nd century A.D. — 202 A.D.) in his treatise, *Against Heresies* (c. 180 A.D.):

That is why the Lord proclaims himself the Son of Man, the one who renews in himself that first man [Adam] from whom the race born of woman [Eve] was formed; as by a man’s defeat [on account of disobedience to God in the Garden of Eden] our race fell into the bondage of death, so by a man’s victory [on the Cross] we were to rise again to life.

Quoted in THE DIVINE OFFICE — THE LITURGY OF THE HOURS, vol. 1, 244-245 (New York, New York: Catholic Book Publishing Corp., 1975). In effect, there is a link between the fall of the first man, Adam, and the redemption of all men through the Son of Man, Jesus, and between the seduction of Eve into disobedience, and the obedience of the Virgin Mary and her advocacy for Eve and, by extension, all who seek her intercession.

<sup>9</sup> *The Letter to the Ephesians*, 5:15-20, in BIBLE, *supra*, at 308 (emphasis added).

## [B] Analyzing Qur’ānic Passages on Drinking

It certainly has never been the case that Islam and alcohol were complete strangers. One New York oenologist recounts the history of wine in Moorish Spain:

During their almost seven-hundred-year control of Spain [711-1492 A.D.], the Moors had oppressed neither Christians nor Jews, nor much of local culture for that matter. The ancient wine production in Andalusia continued — in fact, there is a record of the last Moorish king of Seville, Al-Motamid, praising wine both for the revenue and for the pleasure that it has provided him over his years in power. Much of Andalusian wine production was at Jerez, which had been one of the wealthiest Iberian cities under Moorish control. Just about all the Jerez wines for export went to England.

...

Distillation also took place under the Moors in Spain. Their important contribution to the practice was the alembic pot still method (from the Arabic, *al-embik*). Like most other matter, wine is made up largely of water. The alcohol in wine generally accounts for anywhere from 8 to 14 percent of the volume. Alembic distillation concentrates the alcohol by separating it from the water as a vapor (the spirit).

Alcohol has a lower boiling point than water, so to collect condensed alcoholic vapors, wine is boiled in a highly conductive copper pot to release alcohol as steam. The steam is recaptured in a specially designed pot cover that channels impurities away from the steam. The steam “liquefies” and the alcohol is stored in a separate container. The remaining wine goes through more distillation cycles until all the alcohol has been drawn off. The end result is called *brandy*, a name . . . that was not applied until the sixteenth century.<sup>10</sup>

The Moors were not the only Islamic authorities to condone alcohol. The Moghuls, and some of their Emperors, drank alcoholic beverages. Today, there is open alcoholic beverage production and consumption in certain Muslim countries — red wine in Jordan, Lebanon, and Morocco, Anchor beer in Malaysia, Efes beer in Turkey are a examples.

Given the observations of Professors Hussein and Abdel Haleem, Moorish and Moghul history, and modern-day realities, why is it that drinking alcohol is considered not only a crime, but also a *haqq Allāh* offense triggering a *hadd* punishment? One glib response is that only Jews and Christians living in tolerant Muslim lands cross the line. Yet, casual observation indicates this explanation is inaccurate. Another glib answer is that the Moors and Moghuls are exceptions. More typical of Islamic history are the Ottomans: “some famous *but illicit* wines . . . were being produced in Damascus under Ottoman rule.”<sup>11</sup> These sweet wines

<sup>10</sup> THOMAS PELLECHIA, WINE — THE 8,000-YEAR-OLD STORY OF THE WINE TRADE 97, 101 (New York, New York: Thunder’s Mouth Press, 2006). [Hereinafter, PELLECHIA.]

<sup>11</sup> PELLECHIA, *supra*, at 84.



were exported to Britain in the summer, to compensate for the diminished supply of French and German wines from the prior spring. This answer suggests a difference between *de jure* prohibitions by Muslim governments on alcohol, and *de facto* trading that occurs, sometimes with officials turning a blind eye or extending a palm-upward hand, whenever market conditions are favorable.

Still another glib answer is the "Qur'an says so." Without delving into what the sacred text says about drinking, this answer is unsatisfying. The three key passages are as follows.<sup>12</sup> A close inspection of them reveals the answer actually may be unpersuasive:

• *Surah 2, ayah 219:*

They ask you [Prophet] about intoxicants and gambling: say, "There is *great sin* in both, and *some benefit* for people: the *sin* is greater than the *benefit*."<sup>13</sup>

• *Surah 4, ayah 43:*

You who believe, *do not come anywhere near the prayer if you are intoxicated, until you know what you are saying*; nor if you are in a state of major ritual impurity — though you may pass through the mosque — until you have bathed; if you are ill, on a journey, have relieved yourselves, or had intercourse, and cannot find any water, then find some clean sand and wipe your faces and hands with it. God is always ready to pardon and forgive.<sup>14</sup>

• *Surah 5, ayat 90-93:*

<sup>90</sup>You who believe, intoxicants and gambling, idolatrous practices, and [divining with] arrows are repugnant acts — *Satan's doing*: *shun* them so that you may prosper. <sup>91</sup>With intoxicants and gambling, Satan seeks only to *incite enmity and hatred* among you, and to *stop you remembering God and prayer*. Will you not give them up? <sup>92</sup>Obey God, obey the Messenger [Muhammad], and always be on your guard: if you pay no heed, bear in mind that the sole duty of Our Messenger is to deliver the message clearly. <sup>93</sup>Those who believe and do good deeds will not be blamed for what they may have consumed [in the past] as long as they are mindful of God, believe

<sup>12</sup> A fourth passage, *surah 16, ayat 65-67*, plainly does not contain a prohibition on consuming alcohol, but rather reminds Muslims that God (Allāh) provides them with beverages:

<sup>90</sup>It is God who sends water down from the sky and with it revives the earth when it is dead. There truly is a sign in this for people who listen. <sup>91</sup>In livestock, too, you have a lesson — We give you a drink from the contents of their bellies, between waste matter and blood, pure milk, sweet to the drinker. <sup>92</sup>From the fruits of date palms and grapes you take sweet juice and wholesome provisions. There truly is a sign in this for people who use their reason.

*Qur'an, supra*, 16:65-67, at 170. Obviously, it is one point to assert God is the ultimate source of non-alcoholic beverages, namely, water, milk, and juice. It is quite a different point to say a person is confined to drinking non-alcoholic beverages exclusively. Without reference to any other passages or sources, the second point does not follow logically from the first one.

<sup>13</sup> *Qur'an, supra*, 2:219 at 24 (emphasis added).

<sup>14</sup> *Qur'an, supra*, 4:43, at 55 (emphasis added).

and do good deeds, then are mindful of God and believe, then are mindful of God and do good deeds: God loves those who do good deeds.<sup>15</sup>

Read literally, *surah 2, ayah 219* does not forbid drinking. It is a cost-benefit analysis of alcohol. It warns of risks — "great sin" — but also admits "some benefit." On balance, the cost-benefit ratio is not favorable. Does that conclusion apply to some persons, or is it a systemic conclusion, applying to all Muslims? Might it be the case some Muslims who drink responsibly do not experience net negative effects, but over the entire community (*ummah*) there is a net loss? The passage does not resolve these questions.

Likewise, read literally, *surah 4, ayah 43* is not a prohibition against drinking. Rather, the passage concerns the proper demeanor for prayer, and essentially says "do not show up to the mosque drunk," or, for that matter, dirty or in a state of what Catholic Christians would call "mortal sin." The passage calls for internal purification before approaching God (Allāh) in prayer, and reminds Muslims God is merciful. Critically, both *surah 2, ayah 219*, and *surah 4, ayah 43* presume Muslims do drink, and counsels them to avoid the deleterious effects of alcohol by doing so with temperance.

Indubitably, the most stringent admonition against alcohol is in *surah 5, ayat 90-91*. Drinking is associated with the devil, and two particular dastardly effects are recounted: fighting, and sloth. That is, people who drink may be prone to argue with and become violent against others, they may be lax about worshipping God, or both. By stirring up disagreements with neighbors, and forgetting a life of prayer, alcohol takes a person away from God and his people. These points are manifestly true, and few non-Muslims would disagree. But, non-Muslims — and some Muslims — would hasten to add that the effects occur when alcohol is consumed excessively, and that moderation is required in all things, not just drinking. Does the passage actually forbid the consumption of alcohol in moderation? The closest it comes to doing so is the exhortation to "shun" drinking, and a plea to give it up. Thereafter is a reminder of God's mercy — even believers who consumed alcohol in the past will be forgiven if they are pure-hearted and charitable. As Professor Abdel Haleem explains in respect of *ayah 93*:

It was reported that when wine was forbidden, some companions asked the Prophet, "What about those believers who used to drink and have already died? What state would they be in?" This [*ayah 93*] is the reply to that question, and it also applies to the living.<sup>16</sup>

It thus is clear the consumption of alcohol was not always forbidden in Islam, and is not clearly prohibited by the Qur'an.

But, it is equally clear that consuming alcohol has deleterious social consequences. As Dr. El-Awa notes, Muhammad observed drinking was commonplace among the Arabs of his time:

<sup>15</sup> *Qur'an, supra*, 5:90-94 at 76-77 (emphasis added).

<sup>16</sup> *Qur'an, supra*, fn. d to 5:93 at 76 (emphasis added).

In the Qur'ān, the drinking of alcohol and various other actions, such as usury (*ribā*) and eating the flesh of swine (*akl al-khanzīr*), are simply declared to be forbidden (*ḥarām*). [Note the earlier discussion in respect of Qur'ānic passages about drinking.] *The drinking of alcohol, however, was the most common of these practices among the Arabs; hence, the Prophet imposed a punishment for it, while the other prohibited acts remained purely civil issues, or as crimes for which there can be a ta'zīr punishment.*<sup>17</sup>

A more explanatory account comes from the New York oenologist:

According to legend, Muhammad, while on a journey by foot, came upon a noisy, joyous Arab village. He asked a local man what it was that made the people so happy. The man told him that a wedding had taken place that day and now everyone was celebrating over some local wine. Muhammad made note of the joy that the wine had brought to the people, expecting that it might be a good idea to mention it to his followers.

On his way back, as he passed through the village where the wedding had taken place a few days before, Muhammad found the street littered with debris, injured men, and perhaps a corpse or two. When he asked what it was that made this happy place come to such a disaster he was told that the men over-indulged in wine, started to argue, and broke out fighting.

Muhammad supposedly decided on the spot that wine's power for mayhem outstripped its ability to create joy and he concluded that this is what he should let his followers know.<sup>18</sup>

In sum, Islamic teaching is a remarkably utilitarian cost-benefit calculus: consuming alcohol, whatever its short-term pleasures, jeopardizes the security of the community (*ummah*), and worse yet, potentially puts one's soul in jeopardy in the life that is to come. While Allāh is a forgiving God, it is presumptuous to drink — especially in excess — in view of these risks, and then expect to be forgiven. The obvious follow-up inquiry is whether this particular calculus is amenable to revision by a pro-active change in parameters, meaning specifically whether the appropriate remedy is not a prophylactic prohibition, but public pedagogy, on the pros and cons of alcohol.

### [C] Practical Realities in Muslim World

As a practical matter, it is privately admitted by some Muslims the real threat at issue is not drinking *per se*, but drinking in excess and drunk driving. It is an open secret that even in Saudi Arabia, the consumption of alcoholic beverages by Muslims occurs. There are even rehabilitation centers in the Kingdom to deal with alcoholism. This reality is not to suggest it is acceptable to violate the laws of the Kingdom, or any other country — quite the contrary. Rather, the point is that even in the most conservative Muslim societies, and in particular in the "Islamic Heartland," alcohol is consumed illicitly.

<sup>17</sup> MOHAMED SALIM EL-AWA, PUNISHMENT IN ISLAMIC LAW: A COMPARATIVE STUDY 44 (Indianapolis, Indiana: American Trust Publications, 1981) (emphasis added). [Hereinafter, EL-AWA.]

<sup>18</sup> PELLEGRINA, *supra*, at 63.

In the Kingdom, and countries like Malaysia and the Sultanate of Brunei, where rules on alcohol consumption have become stricter in recent years, some officials are concerned that Muslims — especially youth — will drink, but are not able to handle even a small amount of alcohol. While drunk, they may injure or kill themselves and others in automobile accidents. Accordingly, in Malaysia in 2009-2010, a Muslim Malay woman was sentenced to public flogging for openly drinking a beer. Repeat tourists to Johor Bahru between the late 1980s and present day (like your author) notice it is increasingly difficult to find beer or wine served in restaurants and hotels. In the Sultanate non-Muslims may bring a small quantity of beer or wine on their person into Brunei, but must consume it privately (as your author did). No alcoholic beverages otherwise maybe imported, or are sold. Yet, as recently as the 1990s, Brunei had pubs and taverns.

The obvious response to this concern is not to forbid alcohol consumption throughout the country, for both Muslims and non-Muslims alike. Rather, it is to have an American- or European-style public campaign to teach all persons, should they choose to drink, about responsible drinking and social behavior.

### [D] Elements

The *haqq Allāh* offense of drinking alcohol is known in Arabic as "*shurb al-khamr*." The word "*khamr*" means "intoxicating drink," or "wine." As Dr. El-Awa reports:

[t]he Prophet defined *khamr* as "any drink which makes a person drunk," and he declared all drinks of this sort to be forbidden (*ḥarām*).<sup>19</sup>

However, the offense extends well beyond wine to drugs and other mind-altering substances. This extension follows logically from analogical reasoning (*qiyās*).

*Shurb al-khamr* actually consists of two separate offenses bundled into one. The first crime is drinking alcohol (or taking an illegal narcotic), regardless of the amount ingested. The second offense is being in the state of drunkenness (or "high" on a narcotic). An inference from this differentiation is that ingesting a small or moderate amount of alcohol does not lead automatically to drunkenness in every instance. (This inference would not hold for all narcotics, which in any event are illegal in virtually every non-Muslim, as well as Muslim, jurisdiction.) The conclusion might be, therefore, that drinking alcohol to an extent that does not lead to drunkenness is lawful. Indeed, that is what Professors Hussain and Abdel Haleem (quoted above) indicate was the legal *status quo* in the early days of Islam. However, under the *Shari'a* as it is practiced today, this inference is not drawn. Rather, the two crimes are conflated, which essentially means that any amount of alcohol (or narcotics) produces drunkenness (or a "high").

Non-teetotalers, both Muslim and non-Muslim, may regard this conflation as based on a different meaning of "drunkenness." Under American Criminal Law, the term has a quantitative definition, namely, exceeding a statutorily permissible ratio

<sup>19</sup> EL-AWA, *supra*, at 44. Dr. El-Awa says this definition is reported in a *hadith* recorded by *Imām* Muslim, and also is mentioned in commentary provided by Al Nawawī set out in the compilation by *Imām* Bukhari, vol. X at 172. See *id.*, n. 7 at 65.



of alcohol in the bloodstream (e.g., depending on the state, 0.1 percent or 0.08 percent). Any driver of a vehicle who tests positively — i.e., whose blood-alcohol ratio exceeds the threshold — is charged with the offense of driving while intoxicated, or driving under the influence of alcohol. In contrast, the *Shari'a* has a zero-tolerance rule. Ingesting any amount of alcohol renders the drinker under its influence, i.e., intoxicated. Non-teetotalers might be inclined to dismiss this approach as confusing relaxation, or a mere “buzz,” with rip-roaring drunkenness. Muslims adhering to the rule on *shurb al-khamr* would respond even the slightest “buzz” is proof of the influence of alcohol.

In any event, the elements of *shurb al-khamr* are clear enough. There must be an intoxicating beverage, from which the perpetrator has taken a sip or more. That drinking must be intentional, i.e., the *mens rea* (*niyya*) requirement is that the perpetrator must be aware at the time of ingesting that the beverage contained alcohol. In other words, the actions — that the defendant drank and became drunk — must be voluntary. The same elements, of course, would hold for a drug.

### [E] Evidentiary Requirements and *Hadd* Punishment

To prosecute *shurb al-khamr*, the evidence of two witnesses is required. They must be reliable and male. As in certain other instances, it may be possible to substitute the testimony of one male witness with two female witnesses.

Assuming the elements for and witnessed to *shurb al-khamr* exist, what is the *hadd* punishment? None is set forth in the Qur'ān. This fact, perhaps, reinforces the analysis of the Qur'ānic passages earlier — namely, the sacred text sets out no clear prohibition against drinking. Dr. El-Awa examines the considerable uncertainty surrounding the correct *hadd* punishment for *shurb al-khamr*:

... As the definition of the *hadd* punishment implies, it can be prescribed only by God. In the one instance in which it was prescribed not by the Qur'ān but by the *Sunnah* [namely, death by stoning for a married person committing *zinā*], the Prophet made it absolutely clear that he was acting according to divine revelation (*waḥy*).

On the other hand, when the Prophet imposed a punishment for drinking, he neither declared that he had imposed it according to revelation nor did he prescribe it in specific terms; that is, he did not fix a definite sentence as the punishment. The Prophetic reports concerned with drinking are related by all the collectors of *ahādith*, but in none of these reports can one find the Prophet fixing a definite number of lashes as punishment, as is claimed by Muslim jurists.

All the Schools of Islamic Law consider the drinking of alcohol to be a crime for which a *hadd* punishment is prescribed. Although they disagree about the number of lashes which should be inflicted, they all claim it to have been fixed by the Prophet. According to the *Hanafi* School, the punishment for drinking is eighty lashes. The same view is held by the *Māliki* and *Hanbali* Schools. According to another *Hanbali* view, and to the *Shāfi'i*, *Zāhiri*, and *Zaydi* (Fiver *Shi'ite*) Schools, the punishment is only forty lashes.

This disagreement about the number of lashes to be inflicted is a result of the differing views ascribed to the Companions of the Prophet. It was reported that the first Caliph, Abū Bakr, used to impose forty lashes upon the person who drank; 'Omar did likewise during the first few years of his Caliphate. Afterwards, when the number of drinkers increased unprecedentedly, 'Omar consulted the Prophet's Companions at Medina about the matter. 'Ali or, according to some, 'Abd al-Rahman b. 'Awf, suggested that the punishment for drinking should be parallel for the punishment for slander (*kadhif*). In accordance with this report, some jurists hold the view that the *hadd* is forty lashes with another forty lashes as *ta'zir*, while others consider the *hadd* to be eighty lashes, supporting their view by claiming that this number resulted from consensus (*ijma'*).

When we turn to what was reported to have been said or done by the Prophet . . . , we find that in none of the related reports did the Prophet say that a person who drank should be given forty lashes or eighty lashes. All that is related is that the Prophet ordered the offender to be beaten; “beat him” is the most specific word (*sic*) he is reported to have said. In addition to this, in some, but not in all, cases, the Prophet ordered his Companions to reprimand the offender; again, he took up some dust and threw it in the offender's face, although not in every instance. At the same time, when one of his Companions reprimanded a drunken man after he had been punished, the Prophet stopped him on the grounds that this might help Satan to induce the offender to commit more sins. In the Prophet's time, there were no specific methods of beating offenders. In some instances, they were beaten with articles of clothing, hands, or sandals; while in other cases they were beaten with sticks and palm branches, in addition to sandals.

Moreover, the exact amount of lashes an offender should receive was not known to the Prophet's Companions. . . .

... [I]t is narrated by reliable transmitters that the Prophet said, “If a person drinks wine, lash him for the first three times and put him to death for the fourth.” [Dr. El-Awa cites to the *ḥadīth* compilation of Abū Dawūd.] But when a man was brought before the Prophet for the fourth time, he did not have him put to death, but simply ordered him to be beaten.

All these reports show clearly that there was no fixed punishment for drinking in the Prophet's time, nor was such punishment known during the epoch of his Companions.<sup>20</sup>

What, then, is the “bottom line”? First, the punishment for drinking alcohol that has been agreed upon and applied is flogging. This punishment is based on the *Sunnah* of the Prophet. Yet, up through the *Umayyad* Caliphate (651–750 A.D.), the correct number of strokes remained a matter of considerable debate.<sup>21</sup> Since then, the generally agreed upon punishment is 80 lashes. To the extent this figure represents

<sup>20</sup> El-Awa, *supra*, at 44–46.

<sup>21</sup> See JOSEPH SCHACHT, AN INTRODUCTION TO ISLAMIC LAW *id.* 1 at 16 (Oxford, England: Oxford University Press (Clarendon Paperbacks) 1982). [Hereinafter, SCHACHT.]

a consensus (*ijma'*), it is essential to appreciate it is more of a majority view within one or a few Schools.<sup>22</sup> The reality is that the exact number of strokes varies across, and even within, the Four *Sunni* Schools. The range is between 40 and 80 lashes.<sup>23</sup>

## § 45.02 THEFT (SARIKA)

### [A] Biblical Comparisons: 7th, 9th, and 10th Commandments

In no major religion of the world, nor in any legal system, is theft an acceptable behavior. As with unlawful sexual intercourse (*zinā*), specifically adultery, for theft perhaps the most famous injunction is in the 10 Commandments. They summarize the Covenant God made with Moses and his people, the Israelites. The 10 Commandments are set out in *Exodus* and *Deuteronomy* in the Old Testament of the Bible. (The *Exodus* version is quoted in the discussion of *zinā*). The *Deuteronomy* version is:

<sup>6</sup>"I, the LORD, am your God, who brought you out of the land of Egypt, that place of slavery. <sup>7</sup>You shall not have other gods besides me. [1st Commandment.] <sup>8</sup>You shall not carve idols for yourselves in the shape of anything in the sky above or on the earth below or in the waters beneath the earth: <sup>9</sup>you shall not bow down before them or worship them. For I, the LORD, your God, am a jealous God, inflicting punishments for their fathers' wickedness on the children of those who hate me, down to the third and fourth generation; <sup>10</sup>but bestowing mercy, to the thousandth generation, on the children of those who love me and keep my commandments.

<sup>11</sup>"You shall not take the name of the LORD, your God, in vain. [2nd Commandment.] For the LORD will not leave unpunished him who takes his name in vain.

<sup>12</sup>"Take care to keep holy the Sabbath day as the LORD, your God, commanded you. [3rd Commandment.] <sup>13</sup>Six days you may labor and do all your work; <sup>14</sup>but the seventh day is the Sabbath of the LORD, your God. No work may be done then, whether by you, or your son or daughter, or your male or female slave, or your ox or ass or any of your beasts, or by the alien who lives with you. <sup>15</sup>For remember that you too were once slaves in Egypt, and the LORD, your God, brought you from there with his strong hand and outstretched arm. That is why the LORD, your God, has commanded you to observe the Sabbath day.

<sup>16</sup>"Honor your father and your mother, as the LORD, your God, has commanded you, that you may have a long life and prosperity in the land which the LORD, your God, is giving you. [4th Commandment.]

<sup>17</sup>"You shall not kill. [5th Commandment.]

<sup>22</sup> See EL-ARAB, *supra*, at 47-48.

<sup>23</sup> See HUSSEIN, *supra*, at 136.

<sup>18</sup>"You shall not commit adultery. [6th Commandment.]

<sup>19</sup>"You shall not steal. [7th Commandment.]

<sup>20</sup>"You shall not bear dishonest witness against your neighbor. [8th Commandment.]

<sup>21</sup>"You shall not covet your neighbor's wife. [9th Commandment.]

"You shall not desire your neighbor's house or field, nor his male or female slave, nor his ox or ass, nor anything that belongs to him." [10th Commandment.]<sup>24</sup>

Notably, there are actually three Commandments that deal with theft.<sup>25</sup> The obvious, direct one is the 7th Commandment. The 9th and 10th Commandments concern motivations that sometimes prompt theft — covetousness (*i.e.*, great desire), envy (*i.e.*, jealousy), or sloth (*i.e.*, a lack of hard work) which are among the "Seven Deadly Sins."

### [B] Key Qur'anic Passages

As the 10 Commandments are roundly recognized as a moral basis for all three Abrahamic faiths, Judaism, Christianity, and Islam, it is hardly surprising that the *Shari'a* clearly forbids and criminalizes theft. This crime is called "*sarika*," and it is a *haqq Allāh* offense triggering a *ḥadd* punishment. The Qur'an states in *surah* 5, *ayat* 38-39:

<sup>38</sup>Cut off the hands of thieves, whether they are male or female, as punishment for what they have done — a deterrent from God: God is almighty and wise. <sup>39</sup>But if anyone repents after his wrongdoing and makes amends, God will accept his repentance: God is most forgiving, most merciful.<sup>26</sup>

If there is one phrase in the Qur'an about which non-Muslim westerners who have never read this sacred scripture are aware, then it probably is the first clause of *ayah* 38. Unfortunately for the image of Muslims and the *Shari'a*, in the minds of some non-Muslim westerners, the entire Islamic Legal System has been reduced to this *ḥadd* punishment. The barbarity of the cutting off of a hand or foot is not to be minimized. But, the subtleties of the crime of theft, much less of other dimensions of Islamic Penal Law, are not to be missed either. That is, pursuing all of the theoretical and practical dimensions of *sarika* in an open-minded manner is important to reaching a full appreciation, and informed critique, of the scheme.

<sup>24</sup> The Book of Deuteronomy, 5:6-21, in BIBLE, *supra*, at 193-194 (emphasis added).

<sup>25</sup> For Catholic Christian teaching on the 7th, 9th, and 10th Commandments, see CATECHISM OF THE CATHOLIC CHURCH ¶¶ 2401-2449 at 577-590, ¶¶ 2331-2391 at 560-576, ¶¶ 2514-2527 at 601-605, and ¶¶ 2534-2550 at 606-611, respectively (United States Catholic Conference, Inc., Washington, D.C.: Libreria Editrice Vaticana, 2nd ed. 1997). [Hereinafter, CATECHISM.]

<sup>26</sup> QUR'AN, *supra*, 5:38-39 at 71.



[C] *Hadd* Punishment

As for the heinous *hadd* punishment for *sarika*, if applicable, under the jurisprudence of three of the four Schools, it must be imposed as follows: after the first theft, the right hand of a person found guilty of the theft is cut off. In the event the same person commits a second theft, his or her left foot is cut off. These three Schools are the *Māliki*, *Shāfi'i*, and *Hanbali* Schools.

Their theory is that it would be inhumane to cut off his or her left hand, because he could not eat. Similarly, it would be cruel to cut off both feet, because then the culprit would be unable to walk. (There is, of course, the modern possibility of prosthetic devices to assist persons without hands or feet, but that was not foreseen in the early Islamic period, and remains unlikely for most people in the world, who are in far too poor a condition to afford such healthcare. There also would be a certain ludicrousness to cutting off two hands or two feet, only to replace them with prosthetic devices.) The theory also is that rendering a person incapable of eating or walking would turn that person into a ward of the state, community, or charitable organization.

The *Hanafi* School takes a different approach.<sup>27</sup> For any subsequent theft, no amputation should occur. Rather, the punishment should be by a *ta'zir* (discretionary) remedy. In this regard, it may be remarked that the *Hanafi* School has a different view from the other Schools of what constitutes inhumane punishment for repeat offenders.

Suppose a convicted and punished thief subsequently is found guilty of a third, or still further, thefts? As indicated, cutting off the left hand would make it impossible for the culprit to eat, and otherwise function, without nearly continual assistance. Cutting off the remaining foot would make ambulatory motion impossible. In such an instance, the sanction is imprisonment. That is, the thief is jailed until he or she repents. Imprisonment is particularly likely if the thief does not have full use of his remaining hand or foot.<sup>28</sup> Monetary fines are not part of the *hadd* punishment. That absence is an important distinguishing feature from American Criminal Law, particularly in respect of corporate and white-collar cases, in which fines are an oft-imposed sanction.

There is an important contrast between the *hadd* punishment for *sarika* and Christian doctrine. In the *Gospel of Mark*, Jesus says:

<sup>42</sup>“Whoever causes one of these little ones [children] who believe [in me] to sin, it would be better for him if a great millstone were put around his neck and he were thrown into the sea.<sup>43</sup> If your hand causes you to sin, cut it off. It is better for you to enter into life maimed than with two hands to go into Gehenna, into the unquenchable fire. . . .<sup>44</sup> And if your foot causes you to sin, cut it off. It is better for you to enter into life crippled than with two feet to be thrown into Gehenna. . . .<sup>45</sup> And if your eye causes you to sin, pluck it out. Better for you to enter the kingdom of God with one eye

<sup>27</sup> See EL-ANA, *supra*, at 5.

<sup>28</sup> SCHACHT, *supra*, at 180.

than with two eyes to be thrown into Gehenna, where ‘their worm does not die, and the fire is not quenched.’”<sup>29</sup>

The contrast is obvious, and concerns the way in which sacred texts are interpreted. The Qur’anic punishment for theft is read literally, at least according to the classical theory of Islamic Law. Throughout all of its history, the Catholic Church never has read the above-quoted text to mean Jesus commands a sinner to amputate a hand or foot that brings about sinful behavior. Rather, the passage is understood as an admonition to avoid succumbing to temptation to sin, with the stern nature of the warning coming through a dramatic metaphor. The contrast Christ offers is that however dreadful it would be to cut off one’s own hand or foot, that outcome is preferable to being condemned to hell, that is, Gehenna, which Jews and Christians understood as a place to which evil persons go.<sup>30</sup>

## [D] Evidentiary Requirements

Evidentiary requirements in the *Shari’a* are impediments to the imposition of *hadd* punishments. With respect to *sarika*, prosecution occurs only on the demand of an applicant, without which no *haqq Allāh* case is brought. Typically, the applicant is the victim. That applicant must be present at both the trial and the punishment. Two reliable male witnesses are required for a successful prosecution.<sup>31</sup> A confession made before a *Shari’a* court may be the basis for imposition of the *hadd* punishment. But, there must be a twice-fold confession by the defendant. Insistence on a confession on two separate occasions is based on *qiyās*, as is the requirement of a four-fold confession for unchastity (*zinā*). If there must be two witnesses to prosecute *sarika* successfully, then there must be two confessions, just as four witnesses or four confessions are needed in a case of *zinā*.

Notably, the *Hanafi* School allows for imposition of the *hadd* punishment for theft after only a single confession.<sup>32</sup> *Imām* Abū Hanifa reasoned if two confessions were required, then the first confession would create a civil debt of the defendant to the victim. Once such a debt is incurred, a *hadd* punishment could not be imposed. Thus, in the *Hanafi* School, a single confession of theft triggers the *hadd* punishment.

<sup>29</sup> The Gospel According to Mark, 9:42-43, 45, 47, in BULE, *supra*, at 83 (emphasis added).

<sup>30</sup> “Gehenna” corresponds to a site surrounding the Old City of Jerusalem (named the “Valley of Hinnom,” from which “Gehenna” is derived), where idolatrous Jews sacrificed their children to a god (Molech), and where garbage and bodies of criminals and dead animals were tossed and burned. The place became associated with destruction and constant fire. The general Arabic term for Hell is “*naar*.” Within Hell (*naar*), there are various regions, the worst of which is called “*jahannam*.” The term “*jahannam*” is related directly to the name “Gehenna.” See GHEHNA, WIKIPEDIA, posted at <http://en.wikipedia.org/wiki/Gehenna>. Note that “Gehenna” as a destination for wicked persons is different from “Sheol” (used in Jewish writings) or “Hades” (used in Ancient Greek and Christian writings), which is the abode of the dead. See *id.*

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<sup>32</sup> See SCHACHT, *supra*, at 38.

<sup>27</sup> See EL-AWA, *supra*, at 5.

<sup>28</sup> SCHACHT, *supra*, at 180.



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## [E] Elements

What are the elements of *sarika* that trigger the *hadd* punishment? The Qur'ān does not identify them. By not saying much about what behavior rises to the level of a culpable act of theft, it is as if the Qur'ān assumes that some crimes — namely, theft — are so obviously wrong, or that they are universally forbidden, that every Muslim knows, or should know, of their prohibited elements. Thus, the Qur'ān focuses on the punishment for theft (discussed below). Accordingly, the ingredients of *sarika* seem to be derived in part from analyzing Property Law. Under Islamic Property Law, there are two basic forms of possession — legitimate and illegitimate. The *Shari'a* seeks to protect the true owner of property, and safeguard intended transfers of possession by differentiating them from misappropriation. As a civil matter, illegitimate possession can result from usurpation. But, as a criminal matter, it can result from theft or highway robbery. Thus, the identification and punishment of these two crimes — theft and highway robbery — are the way Islamic Penal Law protects legitimate possession.

To be liable for the *hadd* punishment for *sarika*, a person must take private property by stealth, and the value of that property must be above a minimum threshold, which traditionally is 10 *dirhams*. Thus, there are five elements: private property, taking, stealth, minimum value, and criminal intent (*mens rea*, *niyya*).

## • Private Property

The first element is the nature of the object in question. It must be private property, which is to say it cannot be an exempt object. Because of their nature, certain objects cannot be stolen. Even if they exceed the minimum value and are taken stealthily, the taking is not *sarika*, and thus does not bring down the *hadd* punishment on the taker.

Public goods or public property — air, water in a sea, lake, or river, for example — would be exempt objects.<sup>33</sup> After all, everyone, including the alleged thief, is a part owner in a public good. Thus, wild flora and fauna, assuming they have no owner, would be exempt. Examples would be grass, wood, fish, and birds. A free person cannot be an object of property susceptible to theft. (Rather, the offense would be kidnapping.) Conversely, wood that has been made into a door, or fruit or meat that has been harvested and processed, would not be exempt.<sup>34</sup> Someone has taken them, exercised ownership and control over them, and added value to them.

Two polar opposite categories — holy and forbidden objects — are exempt. A holy object, such as the Qur'ān, or possibly a book on Islam, cannot be an object of property, and thus is not *in commercio*, i.e., not in the stream of commerce.<sup>35</sup> In turn, taking it cannot give rise to a case of *sarika*. *Zam zam* water might also fall within this category of objects exempt because of their holiness. This water comes from a stream inside the compound of the Grand Mosque in Mecca that has been flowing for centuries. But, if this water has been bottled with the intention of

33 See SCHACHT, *supra*, at 180.34 See SCHACHT, *supra*, at 180.35 SCHACHT, *supra*, at 180.

selling it, then it has been placed in commerce, and would be non-exempt. Forbidden objects — alcohol, pork, pork products, or pornography — are exempt, too. The rationale is the same as for holy objects: forbidden ones are not legitimate objects of commerce. Additionally, forbidden objects are viewed as having no value, and thus do not meet the minimum threshold requirement.<sup>36</sup> (Such objects have value on the “black market,” but being forbidden, they are not officially recognized to have a legitimate commercial value.) Of course, taking a forbidden object, or indeed trafficking in one, gives rise to serious offenses, but not *sarika*.

## • Taking

How is it decided whether a non-exempt object truly is “taken”? The answer is that it is considered “private” and “taken” if all three of the following three conditions exist:

- (1) The accused does not own the object (i.e., he has no right of ownership — “milk”).
- (2) There is no semblance of the accused having a right of ownership (“*shubha milk*”).
- (3) The accused does not have lawful possession or custody. (“Custody” over a thing or things is called “*hiz*.”)

The conditions concerning lawful possession or custody are significant in two respects.

First, various acts that might otherwise be thought as calling for a *hadd* punishment actually would not give rise to this liability. For example, taking property from a nearby relative is not subject to a *hadd* punishment. A person who qualifies as close relative is known as “*mahram*.” (The plural is “*mahrim*.”) In effect, ownership of an object by a nearby relative is extended to a close family member who takes it, and the taking does not count as a theft. This term has significance in Islamic Family Law, too. Not only are such persons so close in family connection that they are ones from whom *sarika* is not a possibility, but also they are too close to marry. Thus, the term “*mahram*” connotes a “forbidden person” in the sense of matrimony and theft.

Another illustration of an act that ostensibly is theft, but in actuality does not rise to the level of *sarika* is embezzlement. That is because the embezzler is in lawful possession of the property in question. Embezzlement is called “*khiyāna*.” Do these examples mean that a Muslim can embezzle funds, or steal from close relatives, with impunity? The answer is “absolutely not.” These acts are considered offenses, and are actionable as civil wrongs, or torts (*jinnāyāt*).

The second aspect of lawful possession or custody concerns removal of the object in question. A person accused of *sarika* actually must have removed the object — taken it — from the custody of another, and have gained custody of it himself or herself. If the object stays put, then there is no theft. To use the Arabic term, there must be a change in *hiz*. Professor Schacht thus writes of the

36 See HUBBAIN, *supra*, at 135.

quintessential instance of a thief being "caught red-handed."<sup>37</sup> In such a case, there may have been no change in custody. Consequently, some Islamic legal scholars (*fukahā*) argue the thief is not liable for a *hadd* punishment. An example might be where police catch a thief intending to steal a precious Islamic illuminated manuscript from a museum: the police walk in as the thief is breaking into the protective case in which the manuscript is preserved, and is about to pick up the manuscript. The manuscript has not moved, hence the thief is nowhere near the exit with the manuscript tucked in his backpack. Some *fukahā* go so far as to urge the thief is not be liable for the *hadd* punishment even if he had handed the object to an accomplice.

What about stealing an object from a house that a person has been allowed to enter? Or, what if the invited guest-cum-thief takes the property and hands it to an uninvited accomplice standing just outside the door or window?<sup>38</sup> These acts do not contain the "stealth element." They also lack the "possession/custody element."

#### • *Stealth*

As to the third element necessary for *sariqa*, stealth, it is a critical one. That is because of the potentially large number of "thefts" that are not, from the perspective of the *Sharī'a*, actionable in terms of a *hadd* punishment. "Stealth" means that the accused must not have stolen the property openly. Open theft is called "*nahb*." Certainly, the *Sharī'a* does not condone robbery. Rather, it is an offense, akin to a civil wrong or tort, known as "*jināya*," which creates a different kind of liability. Likewise, taking the property of another when someone is unaware of the taking, such as pick-pocketing, does not satisfy the element of stealth.<sup>39</sup> (Pick-pocketing, or more generally "snatching things unaware," is called "*ikhtilās*.") Again, the liability would be one as a *jināya*.

That outcome appears odd. Stealth and a lack of awareness seem intimately related. The logic that pick-pocketing is done openly is dubious, as is the logic that it is done unbeknownst to the victim. Many thefts occur in an open context, such as on a street or in a marketplace. And, theft occurs precisely because the owner of private property is unaware of the action — if the owner knew, then presumably he or she would attempt to prevent the taking, otherwise the taking would be consensual, and thereby not theft at all.

#### • *Minimum Value*

The fourth element of *sariqa* concerns minimum value, and in effect is a *de minimis* rule. The value of an object taken must equal or exceed a minimum threshold, otherwise the *hadd* punishment cannot be imposed. That threshold was established by Islamic religious and legal scholars (*ulema* and *fukahā*, respectively) through the use of analogical reasoning — *qiyās*. Some *ulema* in the Ancient Schools of Iraq at Basra and Kufa analogized rather crudely to five fingers,

<sup>37</sup> See SCHACHT, *supra*, at 180.

<sup>38</sup> See SCHACHT, *supra*, at 180.

<sup>39</sup> See SCHACHT, *supra*, at 180.

and arrived at 5 *dirhams* as the threshold.<sup>40</sup> If an accused was going to have his or her hand cut off, and thereby lose five fingers, then it had better be on account of stealing property worth at least 5 *dirhams*. The amount that prevailed — for rather arbitrary reasons — was 10 *dirhams*, and this figure remains the threshold for the *Hanaḥi* School. But, in an effort to impart greater authority to the 10 *dirham* threshold, the *ulema* expressed it as a tradition, namely, a doctrine that had commenced at the time of the Caliph 'Alī (656-661 A.D.). Note what happened was the cloaking (or embodying) of dubious analogical reasoning (*qiyās*) in sacred tradition.

An obvious question is what happens in an instance of multiple culprits, that is, where a theft is committed by more than one person? In such cases, the total value of the stolen property is divided by the number of thieves. For the *hadd* punishment to apply, the result must at least equal 10 *dirhams*.

#### • *Mens Rea (Niyya)*

A defendant cannot be convicted of *sariqa*, and the *hadd* punishment cannot be imposed, unless the defendant acted with the requisite criminal intent.<sup>41</sup> In particular, the defendant must have known the object stolen was owned by someone else, and not an exempt object such as a public good. Further, the defendant must have sought to remove the object from the place of its proper custody.

### § 45.03 HIGHWAY ROBBERY (KAṬ' AL-ṬARĪK OR HIRABAH)

#### [A] Biblical Comparisons: 5th and 9th Commandments

There is no rule in the 10 Commandments that specifically refers to "highway robbery." By no means does that suggest highway robbery is regarded with indifference. Rather, the prohibition would fall within the 7th Commandment against stealing, and insofar as a death occurs in the course of the commission of a theft, the 5th Commandment as well.<sup>42</sup> In modest contrast to the Old Testament of the Bible, the Qur'ān does single out highway robbery as a distinct claim of God (*haqq Allāh*).

In Arabic, the crime of highway robbery is formally called "*kaṭ' al-ṭarīk*." The word "*kaṭ*" means "robbery," while "*ṭarīk*" means "highway." Watchers of American television programs and movies may be amused that Islamic Penal Law singles out "highway robbery," given the many cartoons and westerns in which bandits of one kind or another are depicted as plundering travelers in an amusing, entertaining, or dramatic way. Investors in financial markets also may be amused, as the label "highway robbery" sometimes is applied to unscrupulous practices on

<sup>40</sup> See SCHACHT, *supra*, at 38.

<sup>41</sup> See HUSSAIN, *supra*, at 135.

<sup>42</sup> For Catholic Christian teaching on the 5th and 9th Commandments, see CATECHISM, *supra*, ¶¶ 2258-2317 at 544-559, ¶¶ 2331-2391 at 560-576, and ¶¶ 2514-2527 at 601-605, respectively.



Wall Street. But, from the perspective of the *Shari'a*, put bluntly, highway robbery is no joke.

### [B] Good Order of Society and Concept of "Hirabah"

In several respects, highway robbery is an intriguing offense. It is indeed a distinct *haqq Allāh* crime, conceptually it is a hybrid offense:

This crime is regarded as related to theft on one side and to homicide on the other, but it is not subsumed under these, except in the case of active repentance before arrest.<sup>43</sup>

Theft (*sarika*) is a *haqq Allāh* crime, whereas homicide falls within *haqq ādamī*. Nonetheless, not only is this offense a *haqq Allāh* crime, but also it is viewed as a crime against society. That is because it is seen as undermining the peace, stability, and good order of society. Thus, the Arabic term that sometimes applies to it is "*hirabah*." Narrowly defined, this term means "highway robbery." More generally, the term refers to a crime against society, i.e., an offense that undermines the security of the society.

The concept of "*hirabah*" in the broad sense is important. In some countries, like Saudi Arabia, rape is viewed as a "*hirabah*" offense. As a result, it triggers a punishment even higher than that for unlawful sexual intercourse (*zinā*). For instance, the punishment imposed may be 100 lashes, plus the sanction used in a case of adultery or fornication. Moreover, anecdotally at least, in the event a rape victim goes to Saudi authorities and says she is raped, this statement cannot be used against her as a confession of adultery. The justification for these rules is that rape is a crime that undermines the security of society. Nevertheless, rape prosecutions are few and far between in many *Shari'a* jurisdictions. The reasons include fear, shame, corruption, and male dominance of the law enforcement and judicial systems. Notably, to facilitate prosecutions of rape, the *Māliki* School has more flexible rules on evidence than certain other Schools. Courageously, various Muslim Human Rights organizations, including groups of women lawyers, are working to change this unfortunate state of affairs.

Turning to the textual basis for including highway robbery as a *haqq Allāh* crime that triggers a *hadd* punishment, the Qur'an contains provisions on highway robbery. For instance, *sura* 5, *ayat* 33 states:

<sup>33</sup>Those who wage war against God and his Messenger and strive to spread corruption in the land should be punished by death, crucifixion, the amputation of an alternate hand and foot, or banishment from the land: a disgrace for them in this world, and then a terrible punishment in the Hereafter, <sup>34</sup>unless they repent before you overpower them: in that case, bear in mind that God is forgiving and merciful.<sup>44</sup>

This passage does not explicitly mention "highway robbery." However, in keeping with the enlarged meaning of "*hirabah*," explained earlier, the crime is one of

promulgating corruption in the land — that is, a menacing society. Moreover, the punishments referenced are precisely those applied to culprits of highway robbery.

In *sura* 29, *ayat* 28-30, the Qur'an references highway robbery, when recounting how God (Allāh) sent Noah, Abraham, Lot, and other pre-Muhammadan prophets:

<sup>28</sup>And Lot: when He said to his people, "You practice outrageous acts that no people before you have ever committed. <sup>29</sup>How can you lust after men, waylay travelers, and commit evil in your gatherings?" the only answer his [Lot's] people gave was, "Bring God's punishment down on us, if what you say is true." <sup>30</sup>So he [Lot] prayed, "My Lord, help me against these people who spread corruption."<sup>45</sup>

The term "waylay travelers" connotes highway robbery, and (depending on the English translation of the Qur'an) sometimes is expressed as such. It is described as "outrageous," listed alongside "evil" acts, and blamed for spreading "corruption." The thrust of this passage is important, namely, how the prophetic messages sent by God were not heeded by the people to whom they were sent, or subsequently were misinterpreted and abused, leading to morally depraved, wicked behavior — of which highway robbery is one.

### [C] Elements

What, exactly, is highway robbery (*hirabah*)? The Qur'an does not clearly lay out its indispensable elements, which is not surprising, given that it is a sacred text, not a model penal code. But, as its name suggests, "highway robbery" is the taking of possessions of persons, without their consent, who are on a journey. These persons are particularly vulnerable. As they are in transit, they are defenseless, or nearly so. They also may well be exposed to the elements. These facts certainly catch the attention of would-be raiders and plunderers, and not surprisingly, the crime long pre-dates Islam. For example, it plagued caravans of pilgrims on the Arabian Peninsula who travelled to Mecca to worship at the *Ka'ba* before the advent of Islam. The scourge continued. Indeed, in various Muslim and non-Muslim countries, it persists to the present, afflicting poor devout pilgrims undertaking long, difficult voyages to a place of worship.

Thus, the elements of highway robbery (*hirabah*) are theft plus context. That is, the same elements as exist for *sarika*, including the *mens rea* (*niyya*) requirement, must be present. In addition, the context must be one in which the victims are not in their home or office, but rather en route from one location to another. However, is a robbery that occurs at a place of leisure — e.g., a gymnasium, social club, shopping mall, or movie theater — a "highway" robbery? The answer is uncertain:

This [highway robbery] refers to robbery with violence. There are differences among the jurists as to whether the offense can only relate to robbery on the highway, or whether armed holdups in urban areas are also included.<sup>46</sup>

<sup>43</sup> SCHACHT, *supra*, at 187.

<sup>44</sup> QUR'AN, *supra*, 5:33-34 at 71 (emphasis added).

<sup>45</sup> QUR'AN, *supra*, 5:33-34 at 71 (emphasis added).

<sup>46</sup> HUSSAIN, *supra*, at 135.

Note that violence need not actually occur. The mere threat of it suffices. Consequently, there are two aspects of the context — that it be a “highway,” perhaps broadly defined, and that there be violence or the threat thereof.

### [D] *Hadd* Punishment

The debate among Islamic legal scholars (*fukahā*) as to armed holdups in urban areas, and other possible environments that might qualify as a “highway,” is not merely academic. Rather, the punishments for highway robbery (*hirabah*) are severe, in some cases even more so than for theft (*sarika*). The Table summarizes these punishments. Notably, they apply to all participants in the crime, regardless of their particularized behavior, *i.e.*, whether they are principals or accomplices. Summarized, the sanctions are:

- death — if the robber has killed but has not got away with the stolen property;
- crucifixion — where the robber has killed and got away with stolen property;
- cutting off the hand and foot on opposite sides — for robbery with violence where the robber does not kill the victim;
- exile — where the robber frightens the victim but does not kill or get away with the stolen property.<sup>47</sup>

The period of exile in the last case is unclear, as is evident from the last of row Table 45-1. What happens in the scenario of a bungled effort at highway robbery, where the would-be perpetrators get away? There is no prescribed *hadd* punishment. In effect, what occurred was a failed attempt, and the *Shari'a* does not contain a complete set of rules on the law of attempts. In practice, law enforcement authorities would search for the miscreants, whose acts may constitute *haqq ādami* offenses.

Similarly, regarding punishment, Professor Schacht reports:

... [T]he penalties inflicted differ according to the facts of the case. If only plunder has happened and the value of the loot, when divided by the number of culprits, at least equals the minimum amount required for the *hadd* [punishment] for theft to be applicable, the right hand and the left foot are cut off; if only homicide has happened, execution with the sword takes place, not as retaliation but as *hadd*; if both plunder and homicide have happened, execution by crucifixion alive takes place. These punishments are awarded to all accomplices, whatever their individual acts; on the other hand, if one of them is exempt from *hadd*, *e.g.*, because he is a minor, the *hadd* for highway robbery lapses for all, although each remains criminally responsible for his own individual acts.<sup>48</sup>

<sup>47</sup> HUSAIN, *supra*, at 135.

<sup>48</sup> SCHACHT, *supra*, at 180-181.

Four points are worth noting from this report. First, in respect of the “minimum amount” referenced, that threshold is defined in terms of the value of the stolen property. The same value that applies to theft (*sarika*) applies to highway robbery — generally, 10 *dirhams*. If there are two or more highway robbers, then the value of the stolen property is divided by the number of perpetrators. The result must at least equal the minimum threshold for the *hadd* punishment to be applied. The evidentiary requirements, in terms of witnesses, also are the same for the *sarika* and *hirabah* offenses.

Second, if the case is one of homicide but not theft — in effect, the highway robbery was badly and tragically bungled — then it still is not viewed as one of *jināya* (civil wrong, or tort). That is because highway robbery is a crime that gives rise to a *hadd* punishment. The fact a homicide, but not a theft, occurred does not transform a highway robbery case involving the *hadd* punishment into a homicide offense.

Third, a *hadd* punishment cannot be administered to a minor. By definition, a minor is too young to be held criminally responsible for his or her actions. The result is the entire band of robbers is relieved of their collective liability for a *hadd* punishment. But, they may be held accountable for their individual wrongdoings. This rule creates a perverse incentive for unscrupulous behavior. A band of thieves that is apprehended ought to hope it can count among its members a minor, and thus in planning its crime will recruit a minor to its ranks.

Fourth, Professor Schacht recounts the amputations as being right hand and left foot. *Sura* 5, *ayah* 33 refers to “amputation of an alternate hand and foot.” Professor Abdel Haleem, in a footnote to this passage, explains the amputation may be “[l]eft hand and right foot, or *vice versa*.”<sup>49</sup> Obviously, to a right-handed person, whether the amputation is to that hand matters greatly, and likewise for a left-handed person. Moreover, if the culprit has no hand or foot to be amputated (*e.g.*, no right hand or left foot), or if the culprit has them, but they are paralyzed, then a *ta'zir* (discretionary) punishment is applied.

Table 45-1:  
Summary of *Hadd* Punishments for Highway Robbery (*Hirabah*)

Elements Present	Punishment Applied
Theft only	Cutting off hand and foot
Homicide, robber(s) do (does) not escape with loot	Execution by sword
Homicide, robber(s) escape(s) with loot	Crucifixion
Neither theft nor homicide, robber(s) do (does) not escape	Exile
Neither theft nor homicide, robber(s) escape(s)	?

In brief, the punishment depends on whether theft, homicide, or both have occurred, and whether the culprits escape (before, of course, being caught). If highway robbery does not result in the death of another person, then the applicable punishment, as set forth in the *Qur'an*, is cutting off the right hand and left foot. Note that for each culprit, both limbs are cut, whereas in a case of theft (*sarika*) as

<sup>49</sup> QUR'AN, *supra*, fn. a to 5:33 at 71.



a first offense, the right hand is cut, with the left foot being cut only after a second offense. If the highway robbery results in a death, then the applicable punishment, as specified in the Qur'ān, is death by the sword or crucifixion. As crucifixion is not used anymore, death by the sword, or other means, is applied. Any exemption from the *ḥadd* punishments for one confederate is extended to all of them, the group is disaggregated in terms of criminal liability, and each one is held accountable for his or her particular contributions.

In respect of the elements of highway robbery that results in the death of a victim, there is a clear analogy to the American Criminal Law concept of felony murder. Depending on the state jurisdiction, commission of a felony that results in a murder can lead to the severest of sanctions, namely, the death penalty. That penalty can apply even to a confederate who does not "pull the trigger." However, it is not entirely clear whether, under the *Sharī'a*, the death of an innocent bystander, as distinct from the intended target of thievery, triggers the severest punishments. For instance, suppose thieves raid a camel caravan, but in the mayhem end up killing a passing shepherd. Presumably, there ought to be no distinction, if the point is to underscore the gravity of the crime and deter it.

## Chapter 46

### CLAIMS OF GOD (ḤAQQ ALLĀH): CONVERTING AND RELIGIOUS FREEDOM

And we are reminded that *because it is our common human dignity which gives rise to universal human rights, they hold equally for every man and woman, irrespective of his or her religious, social or ethnic group.* In this regard, we must note that *the right of religious freedom extends beyond the question of worship and includes the right — especially of minorities — to fair access to the employment market and other spheres of civic life.*

Address of His Holiness Pope Benedict XVI, Meeting with Muslim Religious Leaders, Members of the Diplomatic Corps, and Rectors of Universities in Jordan, Mosque Al Hussein bin Talal, Amman, Jordan, 9 May 2009 (emphasis added)

#### SYNOPSIS

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- § 46.02 DISTINGUISHING AUTHENTIC FROM UNAUTHENTIC ISLAM
- § 46.03 APOSTASY (*RIDDAH AND IRTIDĀD*)
  - [A] Definitions and Categories
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  - [A] Is There Really an Injunction?
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#### § 46.01 SOCRATES, THE EXAMINED LIFE, AND FREEDOM OF CONSCIENCE

Of the many famous remarks of Socrates (*circa* 470/469-399 B.C.) recorded in the *Dialogues* of Plato (*circa* 428/427-348/347), perhaps none is more so than his statement in *The Apology* that the unexamined life is not worth living. Further,

Socrates states in *Crito*: "... the really important thing is not to live, but to live well.<sup>1</sup>" To live well is, Socrates teaches, to live an examined life. A soul-searching examination of one's life is an intensely personal matter, and part of a life-long spiritual journey. Indeed, on that journey this examination may occur on several occasions.

The event that triggers deep introspection may be tragedy, such as the death of a loved one, or triumph, such as achievement of one's worldly ambitions. The famed Holocaust survivor and Austrian neurologist and psychiatrist, Dr. Victor Frankl (1905-1997 A.D.), insists in his classic, *Man's Search for Meaning* (1946), that even in the most hellish conditions on earth, such as the Concentration Camps in which Nazi Germany put six million Jews to death, plus millions of others (including Christians, disabled persons, and homosexuals), there is meaning, if only we study ourselves and our conditions. It may be in sacrificing one's life for another, even a stranger, as the example of Saint Maximilian Kolbe (1894-1941) — a Polish Catholic Priest who voluntarily perished in the Holocaust so that a Jewish father with a wife and children could live — shows.

Socrates did not pre-judge the outcome of the examination. That, too, is an intensely individual matter. It may lead to a re-dedication of oneself to religious faith. It may lead to a conversion to another religious faith. It may lead to profound uncertainty, an agnosticism or even atheism that is rebuffed only at the moment of death. For Socrates, it is the quest that matters — an authentic, honest introspection. Whether life is wasted depends not on the end point of the quest, but on whether one takes up the quest.

A quest, be it to run a marathon, hike to the top of a rainforest canopy, or traverse a desert, is born of yearning. There is a sense of "something" that propels one to the quest. What is it like to run a marathon? What does the rainforest look like? What is the feeling of insignificance in a desert like? A spiritual quest is born of a yearning to answer the question posed by the renowned Catholic Christian writer, Father Dom Chautard (1858-1935), in his classic, *The Soul of the Apostolate* (1946), where are you going, and why?<sup>2</sup> There is a sense this world is not our True Home, and that it offers no enduring, deep-seated satisfaction (to use the Sanskrit term, *santosh*). There is a yearning to know the Creator (or, for some, whether there really is a Creator), and know the purpose the Creator has for oneself (or, for some, whether there is any purpose at all). There is a yearning to know how to order one's life, and one's relations with others, to realize an after life, and Eternal Life, in a state that both Christians and Muslims call "Heaven."

For Socrates, an examination of one's life — a quest — must be open-ended. The individual must have freedom to explore. Courage is indispensable, because the individual does not know where the quest may lead. (Not surprisingly, Sir Winston Churchill (1874-1965) identifies courage as the prime virtue, because it is the one on

which all others depend.) In modern international legal parlance, Socrates asks for freedom of conscience, or equivalently termed, freedom of religion. At the starting line, one cannot be certain whether one will finish the marathon, or in what time. At the bottom of the rainforest, the vista at the top of the canopy is hidden by lush plant life and protected by a steep, slippery, muddy ascent that not everyone can mount.

So it is with a spiritual quest. At the beginning, the seeker knows the questions, not the answers. The quest has meaning because answers are not deterministically scripted. The seeker knows not whether the outcome is an Abrahamic faith (Judaism, Christianity, or Islam), an Eastern faith (e.g., Hinduism or Sikhism), or an Eastern philosophy (arguably, Buddhism). Nor is the seeker certain as to the denominations within these systems, such as Catholic and Protestant Christianity, *Sunni* or *Shi'ite* Islam, or Theravada (Southern), Mahayana (Eastern), Tibetan (Northern, or Vajrayāna), and Zen Buddhism. The sense these systems will address the yearning, coupled with uncertainty as to which system will do so, and how, makes the quest yet more exciting.

## § 46.02 DISTINGUISHING AUTHENTIC FROM UNAUTHENTIC ISLAM

What a shame it is that the reality for Muslims living in most Islamic countries is they cannot openly enter into this kind of spiritual quest. It is sometimes remarked (including to your author by a dear Saudi friend), without understating the challenges religious minorities in such countries face, that no one has less freedom of religion than a Muslim in a Muslim country. Why, *i.e.*, what gives credence to this remark?

Many Muslim countries, with Egypt, Indonesia, Malaysia, and Turkey being notable exceptions, lack robust book markets. One cannot walk the streets of Bandar Seri Begawan, Dubai, Muscat, or Riyadh, for example, and find a large bookstore like Barnes & Noble or Borders stocking a healthy supply of works on non-Muslim religions. (That contrasts with Lawrence, Kansas, where the local bookstores boast fine collections on Islam.) This oppressive anti-intellectual reality is partly a result of government restrictions on freedom of speech and thus on inquiry, conscience, and religion. The 1989 Rushdie Affair exemplifies this reality. It remains the sad fact that not only in Iran, which was the focal point of the Rushdie case, but also in several countries — including the Brunei Sultanate and Saudi Kingdom — it is illegal to import religious literature or non-Muslim Sacred Texts, such as the Bible. (There is typically an exception of an allowance to carrying a copy on one's person for personal use, as your author has found out on several trips.) In brief, the average Muslim in several Islamic countries does not have the option to stroll down to a local bookstore, pick up a book on, say, Buddhism, much less hear a presentation on Buddhist meditation techniques by the author on a book tour, and thereafter procure a copy autographed by, and chat with, the author.

Regrettably, the reason is even more sinister than a dearth of good bookstores or government restrictions: the rule against apostasy, as it is (wrongly) understood and implemented in the *Shari'a*. Muslims simply are not free to convert openly, or

<sup>1</sup> Plato, *Crito*, in *Collected Dialogues* 33 (Princeton, New Jersey: Princeton University Press/Bollingen Series, 1989) (Edith Hamilton & Huntington Cairns eds.).

<sup>2</sup> This classic work by Father Chautard was translated into English from French, and published posthumously. See JEAN-BAPTISTE CHAUTARD, *THE SOUL OF THE APOSTOLATE* (Abbey of Gethsemani, Trappist, Kentucky, 1946).



even to question openly whether Islam is the right path for them. Their spiritual quest, therefore, has a pre-determined outcome: it must be a re-affirmation of their Islamic faith. While they might be able to opt to follow the rules of a different School among the Four Schools, the possibility of turning to Zen Buddhism, or even an Abrahamic option like Catholicism, is a perilous heresy. Consider Pakistan's *Apostasy Bill* of 2006. It calls for sentencing Muslim men to death, and women to life in prison, for leaving Islam. Further, consider the blasphemy laws of that country, set out in the *Pakistan Penal Code*:

295-B. Defiling, etc., of Holy Qur'an:

Whoever willfully defiles, damages or desecrates a copy of the Holy Qur'an or of an extract therefrom or uses it in any derogatory manner or for any unlawful purpose shall be punishable with imprisonment for life.

Sec. 295-B added by P.P.C. (Amendment) Ordinance, I of 1982.

295-C. Use of derogatory remarks, etc., in respect of the Holy Prophet:

Whoever by words, either spoken or written, or by visible representation or by any imputation, innuendo, or insinuation, directly or indirectly, defiles the sacred name of the Holy Prophet Muhammad (peace be upon him) shall be punished with death, or imprisonment for life, and shall also be liable to fine.

Sec. 295-C ins. by the Criminal Law (amendment) Act, 111 of 1986, S. 2.<sup>3</sup>

In brief, impose a death sentence, life imprisonment, and/or a fine for a conviction of blaspheming Islam, specifically the Prophet Muhammad in word, deed, or symbol, and a life sentence for insulting Islam via desecrating the Qur'an.

Tragically, in Pakistan in January 2011, Salman Taseer, a progressive politician and Governor of Punjab, was assassinated for his call to repeal the blasphemy law and his championing of the case of Asia Bibi, a poor Christian woman whom a Pakistani court in 2010 sentenced to death for blasphemy she allegedly committed, but denies, during an argument with other farmers in a village in Punjab in June 2009. He was assassinated in daylight in Islamabad by his own police guard, who dubbed Governor Taseer a "blasphemer."<sup>4</sup> In March 2011, the only Christian in Pakistan's cabinet, Shahbaz Bhatti, a Catholic and the Minister for Religious Minorities, was assassinated while driving to work in Islamabad by the Taliban. The Taliban branded him a blasphemer for his opposition to the blasphemy law.<sup>5</sup>

Is turning to a different branch of Islam an option, as might a Christian convert from Protestantism to Catholicism (or *vice versa*)? Generally, the answer is "no." Changing from *Sunni* to *Shi'ite* Islam is a radical, even heretical step. Is changing affiliations within a branch of Islam an option, as might a Protestant change from

<sup>3</sup> *Pakistan Penal Code*, Sections 295-B, 295-C, posted at [www.punjabpolice.gov.pk/user\\_files/File/pakistan\\_penal\\_code\\_xlv\\_of\\_1860.pdf](http://www.punjabpolice.gov.pk/user_files/File/pakistan_penal_code_xlv_of_1860.pdf).

<sup>4</sup> See *Staring into the Abyss*, THE ECONOMIST, 8 January 2011, at 3; *Pakistan on Strike Against Bill to Amend Blasphemy Law*, BBC NEWS, 31 December 2010, posted at <http://bbc.co.uk>.

<sup>5</sup> See Matthew Green & Farhan Bokhari, *Guns Kill Pakistani Minister*, FINANCIAL TIMES, 3 March 2011, at 3.

Baptist to Methodist? There is more leeway here, but the answer depends on the Muslim country in question. In Saudi Arabia, only the *Wah'habi* School is officially condoned. In Brunei, only the *Shāfi'i* School is accepted. These restraints inhibit a Muslim not only from exploring other religions, but also, ironically, from exploring the richness of Islam itself.

These restraints have no basis in Qur'anic teaching. The Qur'an itself clearly forbids compulsion in religion. *Surah 2, ayah 256* states:

<sup>256</sup>There is no compulsion in religion: true guidance has become distinct from error, so whoever rejects false gods and believes in God has grasped the firmest hand-hold, one that will never break.<sup>6</sup>

The first part of *ayah 256* is critical. Sometimes, it is translated as:

Let there be no compulsion in religion.<sup>7</sup>

Phrased as "There is . . ." connotes a statement of fact, and also (albeit somewhat awkwardly) an expression of a rule. Phrased as "Let there be . . ." conveys a sense that notwithstanding the *status quo*, there is not supposed to be compulsion. This phraseology (again, somewhat awkwardly) indicates a rule, as it can be understood as an imperative or command. Either way, the point is clear: religion is not to be imposed by force. That point can have only one implication, namely, there must be freedom of religion.

Lest there be doubt, three further verses clear it up. *Surah 10, ayat 99-100* says:

<sup>99</sup>Had your Lord willed, all the people on earth would have believed. So can you [Prophet Muhammad] *compel* people to believe? <sup>100</sup>No soul can believe except by God's will, and He brings disgrace on those who do not use their reason.<sup>8</sup>

*Surah 2, ayah 62* pronounces:

<sup>62</sup>The [Muslim] believers, the *Jews*, the *Christians*, and the *Sabians* [an early monotheistic religious community] — *all those who believe in God and the Last Day and do good* — will have their rewards with their Lord. No fear for them, nor will they grieve.<sup>9</sup>

Finally, *surah 5 ayat 67-69*:

<sup>67</sup>Messenger [i.e., the Prophet Muhammad], proclaim everything that has been sent down to you from your Lord — if you do not, then you will not have communicated His message — and God will protect you from people. God does not guide those who defy Him. <sup>68</sup>Say [i.e., Prophet, say to the], "People of the Book, you have no true basis [for your religion] *unless you uphold the Torah, the Gospel, and that which has been sent down to*

<sup>6</sup> THE QUR'AN — A New Translation by M.A.S. Abdel Haleem 2:256, at 29 (Oxford, England: Oxford University Press, 2004). [Hereinafter, Q'AN.]

<sup>7</sup> Quoted in JAMILA HUSSAIN, ISLAMIC LAW AND SOCIETY — AN INTRODUCTION 138-139 (Annandale, New South Wales, Australia: The Federation Press, 1999). [Hereinafter, HUSSAIN.]

<sup>8</sup> QUR'AN, *supra*, 10:99-100, at 135 (emphasis added).

<sup>9</sup> QUR'AN, *supra*, 2:62, at 9 (emphasis added).

you from your Lord," but what has been sent down to you [Prophet] from your Lord is sure to increase many of them in their insolence and defiance: do not worry about those who defy [God].<sup>10</sup> The [Muslim] believers, the Jews, the Sabians, and the Christians — those who believe in God and the last Day and do good deeds — will have nothing to fear or to regret.<sup>11</sup>

Manifestly, from the first passage, not even the Prophet can compel belief. Belief, to put the point in Catholic Christian terms, is a gift from God, a matter of grace. And, reason is to be used to encourage belief. *Ayah* 100 is redolent of the famous September 1998 Encyclical Letter of Pope John Paul II, *Fides et Ratio* (Faith and Reason). In his metaphor, faith and reason are two wings of the same bird, without which it cannot fly:

Faith and reason are like two wings on which the human spirit rises to the contemplation of truth . . .<sup>12</sup>

The source of faith is God Himself, and we use (or not) our reason to enhance the breadth and depth of our faith, and *vice versa*.

The second passage is akin to a doctrine of universal salvation. The Qur'an assures that adherents to an Abrahamic faith will be rewarded in an after-life. This assurance, because of the remarkable phrase set off by hyphens, extends beyond Jews, Christians, and Muslims, to anyone who fulfills three prerequisites: belief in God, belief in a Day of Final Judgment, and engagement in good works. The inference is (or ought to be) obvious. Not only is there no place in Islamic practice for trampling on religious freedom, but also there is no need to do so. Believers, broadly construed in line with these prerequisites, will be (to use the Christian term) saved.

The third passage reinforces the second one. It specifically references approvingly the Sacred Texts of Jews and Christians, namely, the Torah and the Gospel (i.e., New Testament), respectively. It exhorts Jews and Christians to follow their Sacred Texts, and also the Qur'an. Anticipating Muhammad will meet "insolence and defiance" in revealing this message, the Qur'an clearly instructs the Prophet "not to worry." Again, belief in God, the Day of Judgment, and the doing of good deeds will lead to an eternal reward.

It may be objected all these passages counsel respect for other faiths, and enjoin compulsory conversions to Islam from a different religion. But, none expressly promulgates a rule Muslims are free to convert, should they choose to do so. That is, the objection is the passages amount to nothing more than poetic statements of a rule saying "leave everyone alone."

This objection is rebuttable. One problem with it is it fails to see the two propositions are two sides of the same coin. If Jews, Christians, and others who meet the three prerequisites are assured of an eternal reward, then there ought to be no need to worry — in an existential sense — about a Muslim who converts. The

<sup>10</sup> Qur'an, *supra*, 5:67-69, at 74 (emphasis added).

<sup>11</sup> Encyclical Letter, *Fides et Ratio*, of the Supreme Pontiff John Paul II to the Bishops of the Catholic Church, On The Relationship Between Faith and Reason, ¶ 1 (14 September 1998), posted at [www.vatican.va](http://www.vatican.va).

keys to Heaven are belief in a monotheistic God, a final reckoning, and good deeds. A second problem with the objection is it is logically inconsistent. There is no express rule granting freedom for Jews to convert to Christianity, or Christians to convert to Judaism. If what is desired is a rule giving Muslims freedom to convert, then surely there also should be such a rule for persons of other faiths. A third problem with this objection is it is logically incomplete. Jews, Christians, and others are to be left alone, but why not Muslims, too? A fourth problem with the objection is it is entirely inconsistent with a basic tenet of Islam itself, namely, free will. Muslims — indeed, all persons — are born with free will. They are not subject to a law of pre-destination, or to a cycle of *karma* (the legacy of past actions from previous lives) and *dharma* (the duty of one in the present life) as Hinduism teaches.

In sum, the Qur'an does not specifically identify apostasy as a *haqq Allāh* crime, nor does it call for a *hadd* punishment in the event of conversion away from Islam. In other words, it is not part of the classical theory of the *Sharī'a* to prohibit free religious inquiry. Rather, the strict rule and severe punishment are, dare it be said, interpretations by rather zealous, intolerant forces. Put bluntly, it is important to distinguish authentic Islamic teaching, and thereby not "blame the religion," from the misguided practice of a minority of hot heads who may be trying to prove their unauthentic puritanical righteousness by suppressing the freedom of conscience of their Muslim and non-Muslim neighbors alike. The hot heads tend to congregate in familiar places, such as movements like the Taliban, or in the ranks of a Ministry of Religious Affairs.

This practice violates international legal commitments made by some Muslim countries. Freedom of conscience, or religion, is a fundamental human right. Other than the right to life (upon which all other rights, such as speech, depend), there is no more fundamental right. This freedom is stated in Article 18 of the United Nations *Universal Declaration of Human Rights*, and guaranteed by Article 18 of the United Nations *International Covenant on Civil and Political Rights*.

That the classical theory of the *Sharī'a* forbids compulsion in matters of religion. That Muslim countries commit to human rights documents demanding religious freedom is for good reason. First, Who does not go through the dry desert of doubt at some point in life? Through doubt comes a yearning to it, and a spiritual quest begins. Second, it is difficult to conceive of a God who desires our love by force. In Islam, like the other Abrahamic faiths, adherents have free will. God wants us to love Him freely, and if we do so, we experience His love in return.

## § 46.03 APOSTASY (RIDDAH AND IRTIDĀD)

### [A] Definitions and Categories

So, then, what is the infamous apostasy rule, as regrettably practiced in some Islamic countries, even contradiction with the classical teachings of the *Sharī'a*? Simply put, to convert from Islam to another religion, is apostasy. That also is true in respect of conversion from Islam to no religion at all, for example, to declare oneself an atheist or an agnostic. Likewise, denial of the fundamental obligations —



the Five Pillars of Islam — is apostasy. That is, it would be apostasy to deny these practices are obligatory in nature for a Muslim. In all instances, the *mens rea* requirement of intent (*niyya*) — that conversion was a conscious choice, a deliberate act — must be present. Perhaps there is no better illustration of the Sacred nature of the *Shar'ia* than the crime of apostasy.

An apostate is called a "*murtadd*," meaning a person who turns his or her back on Islam. There are important technical distinctions between:<sup>12</sup>

- (1) A *murtadd*, who does not convert to another faith —

This person commits *riddah*, in that he or she has converted away from Islam, but to no other faith. The person has fallen into unbelief (known in Arabic as "*kufri*"), or possibly even become an atheist or agnostic. In effect, this person says "Islam is not for me, but I am not choosing another religion, at least not now."

- (2) A *murtadd*, who does convert to another faith —

This person commits *irtidād*, in that he or she not only converts away from Islam, but also converts to another religion. This person says both "Islam is not for me" and (for example) "I am becoming a Christian."

Moreover, there are two categories of "*murtadd*":<sup>13</sup>

- (1) *Murtadd fitri*, who is a person born to Muslim parents and subsequently leaves the Islamic faith.

The adjective "*fitri*" means "natural," "inborn," "innate," or "native." A "*murtadd fitri*" willfully engages in an un-natural act, namely, subverting the natural course of belief, and thereby commits treason against God (Allāh) and betrays the Muslim community. (Salman Rushdie, discussed above, is said to fall into this category.)

- (2) *Murtadd milli*, who is a person not born to Muslim parents, who converts to Islam, but subsequently leaves the Islamic faith.

"*Milli*" comes from the Arabic noun "*milla*," which denotes a "religious community." Thus, a "*murtadd milli*" is a willful traitor to the Muslim community.

Note the dimension of treason, or betrayal, in categorizing a person as a *murtadd fitri* or *murtadd milli*. This dimension is relevant to punishments for apostasy.

## [B] Grounds for Apostasy

A key legal question concerns the grounds for apostasy? What utterances or actions constitute *ridda* or *irtidād*? In his controversial 2003 book, *Leaving Islam*, Ibn Warraq responds with this SYNOPSIS:

<sup>12</sup> See Ibn Warraq, ed., *LEAVING ISLAM — APOSTATES SPEAK OUT 16* (Amherst, New York: Prometheus Books 2003). [Hereinafter, WARRAQ.]

<sup>13</sup> See WARRAQ, *supra*, at 16.

Any verbal *denial* of any principal of Muslim belief is considered apostasy. If one *declares*, for example, that the *universe has always existed* or that *God has material substance*, then one is an apostate. If one denies the *unity of God* or confesses to a belief in *reincarnation*, one is guilty of apostasy. Certain acts are also deemed acts of apostasy: for example, *treating a copy of the Koran disrespectfully*, by burning it or soiling it. Some doctors of Islamic Law claim that a Muslim becomes an apostate if he or she *enters a church, worships an idol, or learns and practices magic*. A Muslim becomes an apostate if he *defames the Prophet's character, morals, or virtues*, and [i.e., or] *denies Muhammad's prophethood and that he was the seal of the prophets*.<sup>14</sup>

There is considerable uncertainty about the boundaries of the elements of apostasy. What is a "denial" or "declaration" as distinct from an expression of doubt? Is it apostasy to believe the universe "always existed" but God created it, because He always was, is, and will be? Is belief in the Holy Trinity of Christianity (God the Father, Son, and Holy Spirit) a denial of the "unity" of God? Is stacking another book on top of the Qur'an, or placing a coffee cup on top of it, an act of "disrespect"? While on holiday, does a visit to the Vatican or a renowned basilica or cathedral in Europe constitute "er try" into a church? Is it defamation to critique actions of the Prophet, or speculate as to whether there were, or might be, individuals through whom God sent, or will send, Prophecies?

Worse than the uncertainty created by these uncertainties is that this list, read expansively, has a "chilling effect" on freedom of inquiry about spiritual matters. That is a shame, particularly in contemporary times. The modern global secular age arrogantly assaults religious belief as outdated, unnecessary, or both, and deems faith a problem to be solved rather than a gift to be explored in conjunction with reason to advance the human project. Not uncommonly, a child is reared in a faith, rejects it as a young adult and explores other faiths, or no faith, yet later in life return to it. Many Roman Catholics tread this journey, only to "come home" to the Church and thereby marry their faith and reason after years, even decades, away from it.

The spiritual journey of each person is unique. The struggle — the *jihād*, as it were — for some people is to make the journey. Are they to be discouraged from the effort through rules on apostasy? Consider the great philosopher of Continental Rationalism, René Descartes (1596-1650 A.D.), the "Father of Modern Philosophy," who developed the Cartesian coordinate system and modern analytic geometry. He approached issues with the skeptical view that "all is to be doubted," or more precisely: "*Dubium sapientiae initium*. [Doubt is the origin of wisdom.]"<sup>15</sup> He also is reputed to have said:

If you would be a real seeker after truth, it is necessary that at least once in your life you doubt, as far as possible, all things.<sup>16</sup>

<sup>14</sup> WARRAQ, *supra*, at 16.

<sup>15</sup> RENÉ DESCARTES, *MEDITATIONS ON FIRST PHILOSOPHY* (1641).

<sup>16</sup> Posted at [www.quotationspage.com](http://www.quotationspage.com).

Ironically, Descartes' skepticism may have been drawn in part from the work of the renowned Persian Islamic theologian, philosopher, and jurist, Al Ghazali (1058-1111). A remark heard in Catholic circles is "there can be no great faith without great doubt." Notably, Mother Teresa — as she revealed in her spiritual diaries — is a beautiful case of the dark night through which a soul goes.<sup>17</sup> Is not the greatest example of doubt and humility Christ himself on the Cross, when Jesus asks the Father why He has forsaken Jesus, but also (beforehand, in the Garden at Gethsemane) agrees to do the Will of the Father, and (on the Cross) calls for forgiveness for those who crucified Him?<sup>18</sup>

### [C] Punishments

What are the attendant punishments for *ridda* (conversion away from Islam) and *irtidād* (conversion from Islam to another religion)? Apostasy is subject to a penal sanction, yet the Qur'an is not specific on the corporal sanctions. Clearly, an apostate condemns himself of herself in the afterlife, He or she willingly has chosen not to seek or submit to the Will of God (Allāh), and may be undeserving of Heaven. That sanction ought to be frightening enough. For some religious and legal scholars (*fukahā'* and *ulema*, respectively), it is. But, exactly what the corporal punishment should be (assuming there is to be one) is a matter of dispute between Traditionists and Modernists.

Traditionally, for a male apostate, the sanction is death.<sup>19</sup> Before that penalty is imposed, it is recommended that the apostate be offered the opportunity to re-convert to Islam. The recommended period of reprieve, before execution, is three days. For a female apostate, the sanction is imprisonment coupled with a beating every three days until the woman re-affirms her Islamic faith. These punishments are not found in the Qur'an, but rather based on a *ḥadīth* recorded by *Imām* Saḥīḥ Muslim. *Imāms* Abū Ḥanīfa and Mālik both focus on this *ḥadīth*, suggesting some degree of approval in the *Ḥanafī* and *Mālikī* Schools for imposing these punishments.

But, there is no recorded instance in which the Prophet Muhammad himself killed an apostate. Moreover, as Professor Hussain explains:

Apostasy is rejection of Islam in favor of another religion or atheism. [Note that the term can apply to rejection of any faith by its previous adherent.] The jurists differ about whether apostasy should be considered a crime liable to [a] *ḥadd* punishment, and whether it should be punished by death in any case. . . .

<sup>17</sup> See MOTHER TERESA, *COME BE MY LIGHT — THE PRIVATE WRITINGS OF THE SAINT OF CALCUTTA* (New York, New York: Image/Random House, 2007, Brian Kolodiejchuk, M.C., ed.).

<sup>18</sup> On this topic, see, e.g., the works of the Spanish mystic and Carmelite friar, Saint John of the Cross (1542-1591), who was a leading figure in the Catholic Reformation, especially his poem *The Dark Night of the Soul* (1585) and his *Commentary to The Dark Night of the Soul* (1586). Notably, for a Doctorate in Sacred Theology (S.T.D.) at the Pontifical University of St. Thomas Aquinas (*Angelicum*) in Rome, Pope John Paul II wrote his dissertation on the mysticism of Saint John of the Cross.

<sup>19</sup> See JOSEPH SCHACHT, *AN INTRODUCTION TO ISLAMIC LAW* 187 (Oxford, England: Oxford University Press (Clarendon Paperbacks) 1982).

The traditionalist jurists rely on *ḥadīth* which indicated that the Prophet [Muhammad] put to death people who resiled [i.e., recoiled, withdrew, or resumed their former beliefs and practices] from Islam during his lifetime. The alternative view is that these were instances when the young Muslim community was in grave danger from its many enemies and changing religion then was a betrayal of the community. This is no longer the situation in the modern world. Holders of the latter view rely also on the *Qur'ānic* verse: "Let there be no compulsion in religion," but the traditionalists say this means only that it is not permissible to convert non-Muslims by force.<sup>20</sup>

As indicated earlier, the Qur'an does not explicitly mentions apostasy as a *ḥaqq Allāh* crime, nor does it call for a *ḥadd* punishment for conversion away from Islam. Rather, the soundest grounds for the severe punishments are rather infirm — namely, obscure *ḥadīths* of Muhammad, which are the subject of controversy among some Islamic religious and legal scholars (the *ulema* and *fukahā'*, respectively). As Professor Hussein suggests, the contemporary approach, dare it be said, interpretation, is to view what happened centuries ago not so much as imposition of the death penalty for apostasy, but rather for treason. If the early community (*umma*) was threatened by enemies near and far, and it was, then changing religion could mean changing political and military allegiance. The former Muslim might thereby imperil the existence of the *umma*.

Thus, it is now reasonably safe to say that most Islamic *ulema* and *fukahā'* agree — there is a majority consensus (*ijma'*) — that putting to death an apostate is justified only if that apostate hurts Islam, or mocks the Islamic faith. That makes apostasy less about religion, and more akin to treason. One problem with this consensus is that it is hardly universal. Moreover, it is unclear whether the same consensus view applies to a woman apostate. Is she to be imprisoned and beaten every three days until she re-converts? Or, is she to be subjected to this sanction only if she hurts or mocks Islam. Still another problem concerns the grounds for triggering the traditional sanction. What does it mean to "hurt" Islam? Must there be an actual injury, like the death or maiming of Muslims? Or, is a threat enough? Likewise, what does it mean to "mock" Islam? Is the publication of a cartoon depicting the Prophet in an unflattering light a mockery? Given the severity of the potential sanctions that can be imposed for apostasy, these questions need clear, and widely (if not universally) accepted answers. That is, if there must be harsh punishments, then justice demands they be accompanied by bright-line rules readily available to all, and about which all persons have notice. Regrettably, Islamic scholars do not yet seem to have produced such rules on apostasy.

One illustration of the debate about these punishments comes from certain scholars in Malaysia (and perhaps other Islamic countries). Anecdotally, they are said to make the argument there is no need to apply the death penalty to a male *murtadd*, nor imprison and beat a female *murtadd*. By rejecting Islam, the *murtadd* has killed his or her own soul. There is no hope of Heaven for the *murtadd*. No punishment, certainly none on earth, can compare to Hell. In brief, the argument goes, the *murtadd* already suffers (or will suffer, on the Day of

<sup>20</sup> HUSSAIN, *supra*, at 138-139.



Judgment) the worst possible sanction, and self-inflicted it.

In considering whether one is guilty of apostasy, there is a key distinction between a *murtadd*, on the one hand, and a "*bughāt*," on the other hand. The latter term means "rebel" (technically, the plural, "rebels"). A Muslim who refuses to obey the relevant *Imām* is a rebel, or put in -Christian terms, a dissenter. Such a person has not rejected the entirety of Islam, just as a dissenter does not gainsay Christianity. Rather, the rebel, or dissenter, disagrees — sometimes openly and vociferously — with an accepted religious authority. A punishment like death, imprisonment, or beatings would be entirely wrongheaded (assuming it ever is appropriate). Without doubt, Christianity — like Islam — has known darker periods when misunderstanding and overzealousness condoned such punishment, even encompassing conversions from Catholic to Protestant Christianity and *vice versa*. (The acclaimed 2007 movie *Elizabeth: The Golden Age* chronicles one such period in English history.) Obviously, the path of mercy is the higher road to take in dealing with a rebel, or dissenter (and, as intimated repeatedly, with an apostate, too).

Accordingly, in the *Shari'a*, *bughāt* are not killed. They are dealt with as leniently and lovingly as possible, and their property is left intact. The goal of merciful treatment — the least severe punishment possible to achieve the end — is for them to cease their disobedience and return to the fold. Such treatment may entail reasoned persuading, gentle chiding, and other non-violent expressions by an *Imām*, and perhaps also by other members of the local community (*ummah*). Anecdotaly, while strolling through the *Old Souk* in Riyadh, Saudi Arabia with your author, one dear friend working in the Kingdom — a non-practicing Muslim who does not deny the truth of Islam, but does not adhere to the Five Pillars — explained cheekily that a small group of devout Muslims, or in the worst case the religious police, might take him to a local mosque, exhort him to follow the precepts of Islam, and arrange for him to get his head shaved. But, they certainly would not put him to death. After all, that hardly would bring him into the fold.

Are there other offenses against Islam, short of apostasy or disobedience of an *Imām*? For example, what about neglecting (as distinct from rejecting) one or more of the Five Pillars of Islam, such as the ritual daily prayer? The *Shari'a* does not prescribe any penalties. Neglect by a Muslim of religious obligations is not an offense under Islamic Penal Law. Why not? The rationale is Allāh will provide the appropriate punishment in the after-world. There is perhaps a loose analogy with the minimal obligations incumbent on a Catholic Christian, namely, to attend Mass weekly and on Holy days of obligation, and to make a good Confession and receive Holy Communion at least once a year, preferably during Lent and Easter, respectively. Failure to attend to these duties with a sincere heart does not trigger a penal sanction under the Criminal Law of a Catholic country, like the Philippines, which in any event is a largely secular legal system. The failure does not trigger a formal penal sanction under Canon Law, either. But, the failure imperils the soul of the person, and the person may well be admonished of the risk and encouraged not to lapse completely by a Priest, Nun, other religious person, or layperson.

There is a contrast, too. There are some offenses against the Islamic faith that may result in a *ta'zir* punishment, that is, a punishment imposed by a *qāḍi* in his

discretion. One example would be failing to perform ritual prayer that is regarded as especially important.<sup>21</sup> Another illustration might be certain acts that arguably are blasphemous or insulting in some manner to the faith or to the Prophet Muhammad.

## § 46.05 ISLAMIC COUNTRIES AND INTERNATIONAL LAW ON RELIGIOUS FREEDOM

### [A] United Nations Instruments

Two international legal instruments, both from the United Nations, tout freedom of conscience and religion as basic human rights: the 1948 *Universal Declaration of Human Rights* (UDHR); and 1966 *International Covenant on Civil and Political Rights* (ICCPR). The United Nations General Assembly adopted the UDHR, of which Eleanor Roosevelt was an author, on 10 December 1948. The General Assembly vote was 48 in favor and 0 against, with 8 abstentions. Of the 8 abstentions, 6 were Soviet bloc countries, and the other two were South Africa and Saudi Arabia. The General Assembly adopted the ICCPR on 16 December 1966, and it entered into force on 23 March 1976.

The UDHR and ICCPR, together with the *International Covenant on Economic Social and Cultural Rights* (ICESCR), which the General Assembly also adopted on 16 December 1966 and which entered into force on 3 January 1976, plus two optional protocols to the ICCPR, make up the so-called "International Bill of Human Rights."<sup>22</sup> The United Nations Human Rights Committee (as distinct from the Human Rights Council) monitors the ICCPR. The United Nations Committee on Economic, Cultural, and Social Rights monitors the ICESCR.

The UDHR is not a legally binding international instrument. It is aspirational in nature, proclaiming a body of rights to be strived for, rather than an obligatory code of individual protection. The UDHR Preamble states:

Now, therefore the General Assembly proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.<sup>23</sup>

<sup>21</sup> See SCHACHT, *supra*, at 187.

<sup>22</sup> See WALTER KALIN & JORG KUNZEL, *THE LAW OF INTERNATIONAL HUMAN RIGHTS PROTECTION* 40 (Oxford, England: Oxford University Press 2009). [Hereinafter, KALIN & KUNZEL.]

<sup>23</sup> *Universal Declaration of Human Rights* (10 December 1948), United Nations General Assembly Resolution 217 A (III) (1948). See also KALIN & KUNZEL, *supra*, at 14 (explaining the UDHR) 14.

Although the *UDHR* is not legally binding, the rights found within it have been codified in *ICCPR* and *ICESCR*, both of which are legally binding instruments under Public International Law.

Some parties to the *ICCPR* and *ICESCR* have taken reservations, or issued understandings or declarations, regarding certain provisions. A reservation, understanding, or declaration allows a state to:

ensure that individual provisions of a treaty are not applicable to it or are applicable only to a limited extent.<sup>24</sup>

Notably, several members of the Organization of the Islamic Conference (OIC) have taken reservations, or issued understanding or declarations, regarding freedom of conscience provisions of the *ICCPR*. Several OIC countries have done so regarding gender equality provisions contained in both the *ICCPR* and *ICESCR*.

As a general proposition, reservations to international legal instruments are fairly common, and are made by many states, not just OIC members.<sup>25</sup> But, the pattern of OIC member states taking reservations to fundamental obligations on freedom of conscience and gender equality is troubling. On these topics, the pattern of reservations by OIC states is clear. In particular, their reservations tend to take one of two forms.

First, an OIC member state might have a reservation declaring the targeted provision is applicable only to the extent to which it conforms to the constitution of the reserving state. The reservations of Algeria regarding the *ICESCR* and the *ICCPR* are an example of this form. Algeria declared that Paragraphs 3 and 4 of Article 13 of the *ICESCR*, regarding the right to education, do not infringe upon its right to organize its educational system. To be sure, Article 13 does not mention freedom of religion. But, depending on the context, religion plays a factor in state sponsored education, and education and respect for different religious and cultural groups (along with gender equality) are synergistically related. Algeria further declared that Paragraph 4 of Article 23 of the *ICCPR*, the rights of spouses in marriage and at dissolution, do not impair "the essential foundations of the Algerian legal system."<sup>26</sup>

Certainly, in neither of these reservations does the Algerian government refer to Islam or Islamic Law. The only obvious connection such declarations have with either Islam or the *Shari'a* is the fact the reserving state, Algeria, is an OIC member. Any further connection between Islam and the Algerian reservations requires external evidence, such as direct, first-hand experience and observations.

The second form of reservation evident among OIC member states are ones that do refer explicitly to Islam or the *Shari'a*. The reservation of Egypt concerning the *ICCPR* and *ICESCR* explicitly refers to the *Shari'a*:

<sup>24</sup> KALIN & KUNELL, *supra*, at 125.

<sup>25</sup> For instance, the United States has a rather lengthy set of reservations, declarations, and understandings regarding the *ICCPR*, which are posted at [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtidg\\_no=IV-4&chapter=4&lang=en&clang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtidg_no=IV-4&chapter=4&lang=en&clang=en).

<sup>26</sup> [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtidg\\_no=IV-3&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtidg_no=IV-3&chapter=4&lang=en).

Taking into consideration the provisions of the Islamic *Shari'a* and the fact that they do not conflict with the text annexed to the instrument, we accept, support and ratify it.<sup>27</sup>

The Egyptian reservation suggests the following: had the international legal instrument been found to conflict with the *Shari'a*, Egypt would not have accepted it.

In addition to Algeria and Egypt, other OIC member countries also have made reservations, understandings, and declarations concerning the International Bill of Human Rights. Tables 46-1, 46-2, and 46-3 list OIC countries and their statements concerning those instruments, along with the text of the affected Article in the pertinent instrument. In effect, they summarize the limitations and derogations of Muslim countries on matters of freedom of religion and gender equality from the International Bill of Rights. Note that the reservations, understandings, and declarations listed deal exclusively with religious freedom and gender equality. The Table does not list reservations to provisions concerning rights other than freedom of conscience and gender equality.

Specifically, Table 46-1 provides the text of provisions within the *ICCPR* that are the subject of reservations, understandings, or declarations made by OIC member states. Table 46-2 sets out the text of provisions within the *ICESCR* that are the subject of reservations, understanding, or declarations of OIC member states. Table 46-3 contains the name of reserving OIC member states, affected provision, and the text of the reservation, understanding, or declaration.

**Table 46-1:**  
**Provisions of the *ICCPR* Affected by Reservations, Declarations, or Understandings of OIC Member States<sup>28</sup>**

Provision	Text of Provision
Paragraph 1, Article 2	Each State Party to the present <i>Covenant</i> undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present <i>Covenant</i> , without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
Article 3	The States Parties to the present <i>Covenant</i> undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present <i>Covenant</i> .
Article 18	1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching. 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

<sup>27</sup> [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtidg\\_no=IV-3&chapter=4&lang=en#EndDec](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtidg_no=IV-3&chapter=4&lang=en#EndDec).

<sup>28</sup> All provisions quoted from *ICCPR*, posted at [www2.ohchr.org/english/law/ccpr.htm](http://www2.ohchr.org/english/law/ccpr.htm).



Provision	Text of Provision
	3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others. 4. The States Parties to the present <i>Covenant</i> undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.
Article 23	1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State. 2. The right of men and women of marriageable age to marry and to found a family shall be recognized. 3. No marriage shall be entered into without the free and full consent of the intending spouses. 4. States Parties to the present <i>Covenant</i> shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.
Article 25	Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; (c) To have access, on general terms of equality, to public service in his country.

Table 46-2:  
Provisions of the ICESCR Affected by Reservations, Declarations, or Understandings of OIC Member States<sup>29</sup>

Provision	Text of Provision
Paragraph 2, Article 2	The States Parties to the present <i>Covenant</i> undertake to guarantee that the rights enunciated in the present <i>Covenant</i> will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
Article 3	The States Parties to the present <i>Covenant</i> undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present <i>Covenant</i> .

<sup>29</sup> All provisions quoted from ICESCR, posted at [www2.ohchr.org/english/law/icescr.htm](http://www2.ohchr.org/english/law/icescr.htm).

Provision	Text of Provision
Paragraphs 3 and 4, Article 13	3. The States Parties to the present <i>Covenant</i> undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions. 4. No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph 1 of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

Table 46-3:  
OIC Member State Reservations, Understanding, or Declarations  
Regarding Provisions of the International  
Bill of Human Rights<sup>30</sup>

OIC Member State	Affected Provisions of International Bill of Human Rights	Text of Reservation, Understanding, or Declaration
Bahrain	ICCPR Articles 3, 18, and 23	The Government of the Kingdom of Bahrain interprets the Provisions of Article 3, (18) and (23) as not affecting in any way the prescriptions of the Islamic <i>Shariah</i> .
Kuwait	ICCPR Paragraph 1, Article 2, and Article 3	Although the Government of Kuwait endorses the worthy principles embodied in article 2, paragraph 2, and article 3 as consistent with the provisions of the Kuwait Constitution in general and of its article 29 in particular, it declares that the rights to which the articles refer must be exercised within the limits set by Kuwaiti law.
Kuwait	ICCPR Article 23	The Government of Kuwait declares that the matters addressed by article 23 are governed by personal-status law, which is based on Islamic law. Where the provisions of that article conflict with Kuwaiti law, Kuwait will apply its national law.

<sup>30</sup> All OIC Member State reservations, declarations, and understandings are quoted from [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtidag\\_no=IV-4&chapter=4&lang=en&clang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtidag_no=IV-4&chapter=4&lang=en&clang=en), or [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtidag\\_no=IV-3&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtidag_no=IV-3&chapter=4&lang=en).

OIC Member State	Affected Provisions of International Bill of Human Rights	Text of Reservation, Understanding, or Declaration
Kuwait	ICCPR Article 25	The Government of Kuwait wishes to formulate a reservation with regard to article 25(b). The provisions of this paragraph conflict with the Kuwaiti electoral law, which restricts the right to stand and vote in elections to males.  It further declares that the provisions of the article shall not apply to members of the armed forces or the police.
Kuwait	ICESR Paragraph 2, Article 2, and Article 3	Although the Government of Kuwait endorses the worthy principles embodied in article 2, paragraph 2, and article 3 as consistent with the provisions of the Kuwait Constitution in general and of its article 29 in particular, it declares that the rights to which the articles refer must be exercised within the limits set by Kuwaiti law.
Maldives	ICCPR Article 18	The application of the principles set out in Article 18 of the <i>Covenant</i> shall be without prejudice to the Constitution of the Republic of Maldives.
Mauritania	ICCPR Article 18	1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching. 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice. 3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others. 4. The States Parties to the present <i>Covenant</i> undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

OIC Member State	Affected Provisions of International Bill of Human Rights	Text of Reservation, Understanding, or Declaration
		The Mauritanian Government, while accepting the provisions set out in article 18 concerning freedom of thought, conscience and religion, declares that their application shall be without prejudice to the Islamic <i>Shariah</i> .
Mauritania	ICCPR Article 23	States Parties to the present <i>Covenant</i> shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.  The Mauritanian Government interprets the provisions of article 23, paragraph 4, on the rights and responsibilities of spouses as to marriage as not affecting in any way the prescriptions of the Islamic <i>Shariah</i> .

Notwithstanding the near-universal acceptance of the International Bill of Human Rights, some Muslims critics argue it reflects a non-Muslim Western conception of human rights that only recently, since the end of the Second World War, has been established. Yet, other Muslim commentators argue Islam always has had a God-given guide to human rights, namely, the *Shari'a*.<sup>31</sup>

### [B] 1990 Cairo Declaration

On 5 August 1990, representatives of the OIC adopted the *Cairo Declaration of Human Rights in Islam* (CDHRI, or *Cairo Declaration*). This agreement is a *Shari'a*-based guide to human rights for OIC member states. It is an Islamic response to the 1948 *UDHR*, which some Muslim countries regard as based on Judeo-Christian, if not secular, principles, and insufficiently attentive to their religious and cultural context.<sup>32</sup>

<sup>31</sup> See Abdullah al-Ahsan, *Law, Religion and Human Dignity in the Muslim World today: An Examination of OIC's Cairo Declaration of Human Rights*, 24 *Journal of Law & Religion* 569, fn. 157 at 594-595. [Hereinafter, Al Ahsan.] The author quotes the Muslim apologist Muhammad Melki Naciri, a member of the Council of Religious Scholars of Morocco, in a discussion of the CDHRI, concerning repressive OIC governments and freedom of expression. This quote should not be taken out of context as reflecting a view with which the author (Al Ahsan) necessarily agrees. It is simply part of his discussion of political rights in OIC countries.

Human rights may be something new for the West, but we in Islam have had it since the beginning. We have no differences between whites, blacks, Jews, Muslims — everyone is free. We never persecuted the Jews here the way they did in France and England. In England and in the US you fight against blacks — why just the other day there were news items about fighting between the police and blacks in London.

*Id.*

<sup>32</sup> See *Cairo Declaration on Human Rights in Islam*, WIKIPEDIA, posted at <http://en.wikipedia.org/>



Perhaps not surprisingly, the International Humanist and Ethical Union (IHEU) argues the *CDHRI* does not conform to the values espoused in the International Bill of Human Rights. It says the *CDHRI* effectively and specifically prohibits freedom of conscience by forbidding conversion away from Islam or apostasy (*riddah*). Article 10 of the *CDHRI* is particularly problematic. The IHEU also contends the *CDHRI* restricts the rights of women and non-Muslim men, as well as limits free expression.<sup>33</sup> The IHEU is not alone. Some Muslims argue that while the *CDHRI* guarantees human rights, the governments of some Muslim countries do not afford them to their citizens.<sup>34</sup>

Below is produced in full the text of the *Cairo Declaration*:

#### THE CAIRO DECLARATION ON HUMAN RIGHTS IN ISLAM<sup>35</sup>

*Keenly aware* of the place of mankind in Islam as vicegerent of Allah on Earth;

*Recognizing* the importance of issuing a Document on Human Rights in Islam that will serve as a guide for Member States in all aspects of life;

*Having examined* the stages through which the preparation of this draft Document has, so far, passed and the relevant report of the Secretary General;

*Having examined* the Report of the Meeting of the Committee of Legal Experts held in Tehran from 26 to 28 December 1989;

*Agrees* to issue the *Cairo Declaration on Human Rights in Islam*, which will serve as a general guidance for Member States in the field of human rights.

#### ANNEX TO RES. NO. 49/19-P

#### THE CAIRO DECLARATION ON HUMAN RIGHTS IN ISLAM

The Member States of the Organization of the Islamic Conference,

*Reaffirming* the civilizing and historical role of the Islamic *Ummah* which God made the best nation that has given mankind a universal and well-balanced civilization in which harmony is established between this life and the hereafter and knowledge is combined with faith; and the role that this *Ummah* should play to guide a humanity confused by competing trends and ideologies and to provide solutions to the chronic problems of this materialistic civilization.

*Wishing* to contribute to the efforts of mankind to assert human rights, to protect man from exploitation and persecution, and to affirm his freedom and right to a dignified life in accordance with the Islamic *Shari'ah*.

*Convinced* that mankind which has reached an advanced stage in materialistic science is still, and shall remain, in dire need of faith to support its civilization and of a self-motivating force to guard its rights;

wiki/Cairo\_Declaration\_on\_Human\_Rights\_in\_Islam.

<sup>33</sup> See [www.iheu.org/node/3162](http://www.iheu.org/node/3162).

<sup>34</sup> See Al Ahsan, *supra*, at 569.

<sup>35</sup> The *CDHRI* is posted at [www.ole-oci.org/english/article/human.htm](http://www.ole-oci.org/english/article/human.htm). It is quoted from this source, with minor formatting changes.

*Believing* that fundamental rights and universal freedoms in Islam are an integral part of the Islamic religion and that no one as a matter of principle has the right to suspend them in whole or in part or violate or ignore them in as much as they are binding divine commandments, which are contained in the Revealed Books of God and were sent through the last of His Prophets to complete the preceding divine messages thereby making their observance an act of worship and their neglect or violation an abominable sin, and accordingly every person is individually responsible — and the *Ummah* collectively responsible — for their safeguard.

*Proceeding* from the above-mentioned principles,

*Declare* the following:

#### ARTICLE 1:

- (a) All human beings form one family whose members are united by submission to God and descent from Adam. All men are equal in terms of basic human dignity and basic obligations and responsibilities, without any discrimination on the grounds of race, color, language, sex, religious belief, political affiliation, social status or other considerations. True faith is the guarantee for enhancing such dignity along the path to human perfection.
- (b) All human beings are God's subjects, and the most loved by Him are those who are most useful to the rest of His subjects, and no one has superiority over another except on the basis of piety and good deeds.

#### ARTICLE 2:

- (a) Life is a God-given gift and the right to life is guaranteed to every human being. It is the duty of individuals, societies and states to protect this right from any violation, and it is prohibited to take away life except for a *Shari'ah* prescribed reason.
- (b) It is forbidden to resort to such means as may result in the genocidal annihilation of mankind.
- (c) The preservation of human life throughout the term of time willed by God is a duty prescribed by *Shari'ah*.
- (d) Safety from bodily harm is a guaranteed right. It is the duty of the state to safeguard it, and it is prohibited to breach it without a *Shari'ah*-prescribed reason.

#### ARTICLE 3:

- (a) In the event of the use of force and in case of armed conflict, it is not permissible to kill non-belligerents such as old man, women and children. The wounded and the sick shall have the right to medical treatment; and prisoners of war shall have the right to be fed, sheltered and clothed. It is prohibited to mutilate dead bodies. It is a duty to exchange prisoners of war and to arrange visits or reunions of the families separated by the circumstances of war.

- (b) It is prohibited to fell trees, to damage crops or livestock, and to destroy the enemy's civilian buildings and installations by shelling, blasting or any other means.

#### ARTICLE 4:

Every human being is entitled to inviolability and the protection of his good name and honor during his life and after his death. The state and society shall protect his remains and burial place.

#### ARTICLE 5:

- (a) The family is the foundation of society, and marriage is the basis of its formation. Men and women have the right to marriage, and no restrictions stemming from race, color or nationality shall prevent them from enjoying this right.
- (b) Society and the State shall remove all obstacles to marriage and shall facilitate marital procedure. They shall ensure family protection and welfare.

#### ARTICLE 6:

- (a) Woman is equal to man in human dignity, and has rights to enjoy as well as duties to perform; she has her own civil entity and financial independence, and the right to retain her name and lineage.
- (b) The husband is responsible for the support and welfare of the family.

#### ARTICLE 7:

- (a) As of the moment of birth, every child has rights due from the parents, society and the state to be accorded proper nursing, education and material, hygienic and moral care. Both the fetus and the mother must be protected and accorded special care.
- (b) Parents and those in such like capacity have the right to choose the type of education they desire for their children, provided they take into consideration the interest and future of the children in accordance with ethical values and the principles of the *Shari'ah*.
- (c) Both parents are entitled to certain rights from their children, and relatives are entitled to rights from their kin, in accordance with the tenets of the *Shari'ah*.

#### ARTICLE 8:

Every human being has the right to enjoy his legal capacity in terms of both obligation and commitment, should this capacity be lost or impaired, he shall be represented by his guardian.

#### ARTICLE 9:

- (a) The question for knowledge is an obligation and the provision of education is a duty for society and the State. The State shall ensure the availability of ways and means to acquire education and shall guarantee educational diversity in the interest of society so as to enable man to be acquainted with the religion of Islam and the facts of the Universe for the benefit of mankind.
- (b) Every human being has the right to receive both religious and worldly education from the various institutions of, education and guidance, including the family, the school, the university, the media, etc., and in such an integrated and balanced manner as to develop his personality, strengthen his faith in God and promote his respect for and defense of both rights and obligations.

#### ARTICLE 10:

Islam is the religion of unspoiled nature. It is prohibited to exercise any form of compulsion on man or to exploit his poverty or ignorance in order to convert him to another religion or to atheism.

#### ARTICLE 11:

- (a) Human beings are born free, and no one has the right to enslave, humiliate, oppress or exploit them, and there can be no subjugation but to God the Most-High.
- (b) Colonialism of all types being one of the most evil forms of enslavement is totally prohibited. Peoples suffering from colonialism have the full right to freedom and self-determination. It is the duty of all States and peoples to support the struggle of colonized peoples for the liquidation of all forms of colonialism and occupation, and all States and peoples have the right to preserve their independent identity and exercise control over their wealth and natural resources.

#### ARTICLE 12:

Every man shall have the right, within the framework of *Shari'ah*, to free movement and to select his place of residence whether inside or outside his country and if persecuted, is entitled to seek asylum in another country. The country of refuge shall ensure his protection until he reaches safety, unless asylum is motivated by an act which *Shari'ah* regards as a crime.

#### ARTICLE 13:

Work is a right guaranteed by the State and Society for each person able to work. Everyone shall be free to choose the work that suits him best and which serves his interests and those of society. The employee shall have the right to safety and security as well as to all other social guarantees. He may neither be assigned work beyond his capacity nor be subjected to compulsion or exploited or harmed in any way. He shall be entitled - without any discrimination between males and females



— to fair wages for his work without delay, as well as to the holiday's allowances and promotions which he deserves. For his part, he shall be required to be dedicated and meticulous in his work. Should workers and employers disagree on any matter, the State shall intervene to settle the dispute and have the grievances redressed, the rights confirmed and justice enforced without bias.

#### ARTICLE 14:

Everyone shall have the right to legitimate gains without monopolization, deceit or harm to oneself or to others. Usury (*riba*) is absolutely prohibited.

#### ARTICLE 15:

- (a) Everyone shall have the right to own property acquired in a legitimate way, and shall be entitled to the rights of ownership, without prejudice to oneself, others or to society in general. Expropriation is not permissible except for the requirements of public interest and upon payment of immediate and fair compensation.
- (b) Confiscation and seizure of property is prohibited except for a necessity dictated by law.

#### ARTICLE 16:

Everyone shall have the right to enjoy the fruits of his scientific, literary, artistic or technical production and the right to protect the moral and material interests stemming therefrom, provided that such production is not contrary to the principles of *Shari'ah*.

#### ARTICLE 17:

- (a) Everyone shall have the right to live in a clean environment, away from vice and moral corruption, an environment that would foster his self-development and it is incumbent upon the State and society in general to afford that right.
- (b) Everyone shall have the right to medical and social care, and to all public amenities provided by society and the State within the limits of their available resources.
- (c) The State shall ensure the right of the individual to a decent living which will enable him to meet all his requirements and those of his dependents, including food, clothing, housing, education, medical care and all other basic needs.

#### ARTICLE 18:

- (a) Everyone shall have the right to live in security for himself, his religion, his dependents, his honor and his property.
- (b) Everyone shall have the right to privacy in the conduct of his private affairs, in his home, among his family, with regard to his property and his relationships. It is not permitted to spy on him, to place him under

surveillance or to besmirch his good name. The State shall protect him from arbitrary interference.

- (c) A private residence is inviolable in all cases. It will not be entered without permission from its inhabitants or in any unlawful manner, nor shall it be demolished or confiscated and its dwellers evicted.

#### ARTICLE 19:

- (a) All individuals are equal before the law, without distinction between the ruler and the ruled.
- (b) The right to resort to justice is guaranteed to everyone.
- (c) Liability is in essence personal.
- (d) There shall be no crime or punishment except as provided for in the *Shari'ah*.
- (e) A defendant is innocent until his guilt is proven in a fair trial in which he shall be given all the guarantees of defence.

#### ARTICLE 20:

It is not permitted without legitimate reason to arrest an individual, or restrict his freedom, to exile or to punish him. It is not permitted to subject him to physical or psychological torture or to any form of humiliation, cruelty or indignity. Nor is it permitted to subject an individual to medical or scientific experimentation without his consent or at the risk of his health or of his life. Nor is it permitted to promulgate emergency laws that would provide executive authority for such actions.

#### ARTICLE 21:

Taking hostages under any form or for any purpose is expressly forbidden.

#### ARTICLE 22:

- (a) Everyone shall have the right to express his opinion freely in such manner as would not be contrary to the principles of the *Shari'ah*.
- (b) Everyone shall have the right to advocate what is right, and propagate what is good, and warn against what is wrong and evil according to the norms of Islamic *Shari'ah*.
- (c) Information is a vital necessity to society. It may not be exploited or misused in such a way as may violate sanctities and the dignity of Prophets, undermine moral and ethical values or disintegrate, corrupt or harm society or weaken its faith.
- (d) It is not permitted to arouse nationalistic or doctrinal hatred or to do anything that may be an incitement to any form of racial discrimination.

## ARTICLE 23:

- (a) Authority is a trust; and abuse or malicious exploitation thereof is absolutely prohibited, so that fundamental human rights may be guaranteed.
- (b) Everyone shall have the right to participate, directly or indirectly in the administration of his country's public affairs. He shall also have the right to assume public office in accordance with the provisions of *Shari'ah*.

## ARTICLE 24:

All the rights and freedoms stipulated in this *Declaration* are subject to the Islamic *Shari'ah*.

## ARTICLE 25:

The Islamic *Shari'ah* is the only source of reference for the explanation or clarification of any of the articles of this *Declaration*.

## § 46.06 BLASPHEMY

## [A] Is There Really an Injunction?

Defining "blasphemy" is tricky, even dangerous, business. Across time and place, the extent to which understanding of the term has been consistent is an open question.<sup>36</sup> In Christianity, in Chapter 12, verse 10 of The Gospel According to Luke, Christ speaks of the only sin that is unforgivable, namely, blasphemy against the Holy Spirit. What is "blasphemy against the Holy Spirit"? A common, modern Catholic understanding is that it is failure to ask God for forgiveness.<sup>37</sup> After all, no sin is unforgivable, assuming the sinner asks for forgiveness. Failure to knock at God's door and ask for forgiveness for whatever reason — pride, fear, disbelief, etc. — renders the sin at issue not forgivable. This understanding is based on the overall context of the passage in Luke, namely, the negative attitude and acts of the Pharisees (adherents to a Jewish school of thought that became prominent in the Second Temple Period of 140-37 B.C.). They so despised Jesus that they wrongly perceived His obviously good actions, like healing the sick, as evil. Even their error was forgivable — as Christ makes clear in Luke Chapter 12, verse 10, when He says that speaking words against Him will be forgiven — if only the intransigence of the Pharisees had not kept them from asking for forgiveness.

<sup>36</sup> See, e.g., ALAIN CARANTON, *BLASPHEMY – IMPIOUS SPEECH IN THE WEST FROM THE SEVENTEENTH TO THE NINETEENTH CENTURY* (1998) (New York, New York: Columbia University Press, 2002, Eric Bauth, trans.) (discussing religious and secular clashes over what constitutes "blasphemy" in Christianity). See also MUHAMMAD HASIM KHALIL, *FREEDOM OF EXPRESSION IN ISLAM* ch. IX (Cambridge, England: Islamic Texts Society, 1997) (discussing the Classical Islamic legal precept that blasphemy, as well as apostasy, is punishable by death, and exploring the definition of "blasphemy" and its distinction from apostasy).

<sup>37</sup> See Archbishop Joseph F. Naumann, *The Only Unforgivable Sin is the One We Don't Confess*, THE LEVEN (Newspaper of the Archdiocese of Kansas City, Kansas), 25 February 2011, at 2.

The Qur'an does not identify blasphemy as a distinct *haqq Allāh* crime, nor does it specify a *hadd* punishment for it. It contains neither a definition of, nor an unequivocal prohibition on, defiling Islam or the symbols of Islam. The provision in the Qur'an that comes nearest to an injunction against blasphemy is *surah* 5, *ayah* 33, which concerns "waging war against Islam" and "spreading corruption in the land," for which the punishment is death by crucifixion, amputation, or exile.

Yet, Arabic contains no word for "blasphemy," thus it is hard to call it a punishable offense.<sup>38</sup> As for disrespectful depictions or utterances about the Prophet, they are insulting, but arguably not "blasphemous," because Muslims expressly disavow the notion that Muhammad was Divine. Christianity is unique in the claim that its head, Jesus, was both fully human and fully divine. As for Muhammad, he was a human, albeit one of utmost piety, dignity, honor, and wisdom — that is standard Islamic catechesis.

## [B] 1989 Rushdie Affair

Probably the most infamous illustration of the oppressive, anti-intellectual reality in many Muslim countries is the *fatwā* issued on 14 February 1989 on Radio Tehran by Iran's former Supreme Leader, *Āyatollah* Ruhollah Khomeini, condemning Salman Rushdie (winner of the 1981 Booker Prize for *Midnight's Children* (1981)) to death for writing *The Satanic Verses* (1988):

To God we belong and to Him we shall return. I inform all zealous Muslims of the world that the author of *The Satanic Verses* — which has been compiled, printed, and published in opposition to Islam, the Prophet, and the Qur'an — and all those involved in its publication who were aware of its content are sentenced to death.

I call on all zealous Muslims to execute them quickly, wherever they may be found, so that no one else will dare to insult the sacred beliefs of Muslims. Whoever is killed on this path is a martyr. In addition, anyone who has access to the author of this book, but is not able to carry out his execution, should inform someone else so that the punishment may be executed.<sup>39</sup>

The *Āyatollah* offered a reward, and the brutal effects of the *fatwā* became apparent quickly. *The Satanic Verses* was burned in India, despite a government ban on the novel, the Japanese translator was killed, and the Italian and Norwegian translators assaulted.<sup>40</sup>

<sup>38</sup> See JOHN BOWKER, *WHAT MUSLIMS BELIEVE* 102-104 (Oxford, England: Oneworld Publications, 2004).

<sup>39</sup> Quoted in Anthony Chase, *Legal Guardians: Islamic Law, International Law, Human Rights Law, and the Salman Rushdie Affair*, 11 AMERICAN UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLICY 375, fn. 1 at 375 (1996), and in *Āyatollah Sentences Author to Death*, BBC NEWS, 15 February 1989, posted at <http://bbc.co.uk>.

<sup>40</sup> See *Anniversary of Rushdie's Book Fatwa*, BBC NEWS, 14 February 2009, posted at <http://bbc.co.uk>; Steven Wiesman, *Japanese Translator of Rushdie Book Found Slain*, NEW YORK TIMES, 13 July 1991.



The *Āyatollāh* called *The Satanic Verses* "blasphemous against Islam." The central issue the novel addresses concerns the identity of Muslim immigrants to India following the 15 August 1947 British Partition of the Subcontinent into India and Pakistan. What does it mean to be a Muslim immigrant to India, confronted with tension between the religion of Islam and culture of the Subcontinent, on the one hand, and the material charms and alluring freedom of the west, on the other hand? The basic story line of novel involves two male characters, both of whom are Muslim immigrants to India:

- Gibreel Farishta, who is a *chai walla* (i.e., tea delivery boy) and gains success as an Indian movie actor playing Hindu gods. Owing to a nearly fatal disease, he loses his Muslim faith. A mental disorder is causing him gradually to lose his mind. He journeys to London to find a lost love, a mountain climber named Alleluia Cone. Farishta is physically transformed supernaturally, with a halo, and essentially is a mentally unstable angel.
- Saladin Chamcha, an Anglophile who has lost not only his links to his homeland, but also his Muslim faith. That is because of his estrangement from his father, and a rape that took place when he was young. He is a successful voice-over actor, marries an English woman, and has an affair with an Indian woman while touring overseas. He is travels to London on the same airplane as Farishta. Chamcha is physically transformed supernaturally, developing two horns, wide thighs, hairiness, and hoofs. In effect, Chamcha is a devil with no cultural identity.

Islamic extremists blow up over the English Channel the aircraft on which the two men are travelling. Farishta and Chamcha fall to earth, clinging and singing rival songs to each other. Chamcha asks Farishta to use his wings to save them. He obliges. Washing up on a snow-covered English beach, they are the only survivors. Throughout, the narrator is a voice that intimates he is God.

What grounds are there for a charge of blasphemy? Arguably, the strongest bases are found in the three "Dream Sequences" in the novel. Each Sequence occurs inside the increasingly deranged mind of Farishta. In all three Sequences, Farishta imagines he is the Archangel Gabriel (Jibreel):

(1) The Mahound Dream (Chapter II) —

Farishta, as the Archangel, imagines that "Mahound," who is a "Prophet of Jahilia," the city of sand, asks him for an *ayah* (verse) to give to the people. The Archangel is uncertain as to the existence, or at least reliability, of God, and seems alarmed by Mahound asking him for assistance. He reveals to Mahound the Satanic Verses. Mahound reads them to the people, but is ashamed. Thereafter, he ignores his wife and sleeps with another woman. There are additional aspects of this Dream Sequence involving the tormenting of Mahound by goddesses (in whom he does not believe), the naming of followers of Mahound after demons, and a brothel of prostitutes named after the wives of Mahound.

(2) The Ayesha Dream (Chapter IV) —

As Archangel, Farishta interacts with Ayesha, an orphan girl on a farm in

India. Often after communing with him, she wanders about naked. Ayesha misinterprets Farishta as commanding her to lead a pilgrimage of her entire village to Mecca. She argues against dissenters, including her father, that the waters of the ocean between India and the Arabian Peninsula will part. Some of the dissenters insist there is no God. The waters do not part, and it appears the pilgrims drown.

(3) The *Imām* Dream (Chapter IV) —

Here, there is a Persian character who is an *Imām* who had lived in exile, only to return to his country to instigate his people to revolt, but without regard to their personal safety, and gain power.<sup>41</sup> The Archangel, Farishta, is said to use the *Imām* as a slave. The *Imām* uses the Archangel as a suicide soldier commanded to kill the Empress Ayesha (a character distinct from the young girl in the second Sequence).

Rushdie does not put forth any of the Dream Sequences as fact or reality.

Certainly, the Dream Sequences are hardly flattering to Islam. The analogies between some aspects of them, on the one hand, and core principles and precepts of Islam, on the other hand, are easy enough to draw. But, do they justify a charge of blasphemy, not to mention a death sentence? Or, are they artistic license in a post-modern secular environment that smack of bad taste and disrespect? Pragmatically,

most Muslims agree that the Ayatollah, an Iranian, had no jurisdiction over Rushdie, an Indian with British citizenship living in Britain, and in any event he should have been given a fair trial, as is required by Islamic law. Furthermore, the best response would have been to boycott Rushdie's works and otherwise ignore him, since the making of the *fatwā* gave him and his publishers enormous publicity, and, no doubt, much greater sales than he otherwise would have had.<sup>42</sup>

Nevertheless, the *fatwā* against Rushdie never has been lifted formally.

Britain withdrew diplomatic recognition of Iran on 7 March 1989, largely because of the *fatwā*. Over a decade later, on 24 September 1998, Britain agreed with Iran, then led by a reformist President, Mohammad Khatami, to restore diplomatic relations. The pre-condition was the Iranian President commit publicly Iran "neither support nor hinder assassination operations on Rushdie," which the President fulfilled.<sup>43</sup> But, traditionalists, including Iran's feared Revolutionary Guards, say the *fatwā* still applies. The Iranian Spiritual Leader *Āyatollāh* Ali Khamenei, successor to *Āyatollāh* Khomeini, proclaimed:

The verdict of Islam would remain unchanged even if Rushdie repented and became the most pious Muslim of the age.<sup>44</sup>

<sup>41</sup> Quoted in Salman Rushdie, WIKIPEDIA, [http://en.wikipedia.org/wiki/Salman\\_Rushdie](http://en.wikipedia.org/wiki/Salman_Rushdie).

<sup>42</sup> HUSSAIN, *supra*, at 139.

<sup>43</sup> Quoted in Salman Rushdie, WIKIPEDIA, [http://en.wikipedia.org/wiki/Salman\\_Rushdie](http://en.wikipedia.org/wiki/Salman_Rushdie).

<sup>44</sup> Quoted in Daniel Pipes, *Rushdie Fails to Move Zenlods*, LOS ANGELES TIMES, 28 December 1990. [Hereinafter, Pipes.]

This proclamation is at variance with the consistent, deep-seated teachings of the *Shari'a* concerning mercy and forgiveness. In declaring the verdict to be rendered by "Islam," the proclamation over-states its support, i.e., the vast majority of Muslims are not in favor of it. Nevertheless, in 2005, *Āyatollāh* Khamenei reaffirmed the order to Muslims making the *Hajj* pilgrimage. But, Iran's official position is that only the authority that issues a *fatwā* can withdraw it, and that person — *Āyatollāh* Khomeini — died in 1989.

As for the author, amidst this saga, Mr. Rushdie nominally converted to (or back to) Islam, possibly to the relief of British officials protecting him from countless death threats. He did so by signing a declaration reaffirming his Muslim faith.<sup>45</sup> Further, he requested the publisher of *The Satanic Verses*, Viking, to cease publication. Yet, the *fatwā* has not silenced Mr. Rushdie. Among his many public engagements was one at the University of Kansas in spring 2006, where he gave an enlightening and amusing speech.

### [C] 2005 Danish Cartoon Affair

Like the Rushdie case, the fall 2005 "Cartoon Affair" shows blasphemy is not a light-hearted matter.<sup>46</sup> This Affair concerned unflattering depictions of the Prophet in cartoons a Danish newspaper published. Perhaps the most infamous of them showed Muhammad wearing a turban in which a bomb was nestled. The Affair highlighted a long-standing tension that exists in all faiths, cultures, and countries between respect for religion (or, more generally, freedom of religion), on the one hand, and freedom of expression, on the other hand. Thus, 10 Ambassadors from Islamic countries wrote to the Danish Prime Minister, Anders Fogh Rasmussen, stressing the first value:

We strongly feel that casting aspersions on Islam as a religion and publishing caricatures of Holy Prophet Muhammad . . . goes against the spirit of Danish values of tolerance and civil society. This is on the whole a very discriminatory tendency and does not bode well with the high human rights standards of Denmark.<sup>47</sup>

The Danish Prime Minister replied with an emphasis on the second value:

The freedom of expression is the very foundation of the Danish democracy. The freedom of expression has a wide scope and the Danish government has no means of influencing the press. However, Danish legislation prohibits acts or expressions of a blasphemous or discriminatory nature.

<sup>45</sup> See Pipes, *supra*.

<sup>46</sup> This discussion draws in part on an unpublished Book Review by Kansas Attorney General and former State Senator and Majority Leader Derek Schmidt, University of Kansas School of Law S.J.D. Candidate, *Rule of Law, Rule of God, or Rule of Man? A Review of the Cartoons that Shook the World* (by Jytte Klausen), 1 December 2009.

<sup>47</sup> Letter dated 12 October 2005 from 10 Ambassadors representing Muslim and Arab Countries, and the Palestinian Representative in Copenhagen, to Prime Minister Anders Fogh Rasmussen, quoted in JYTTE KLAUSEN, *THE CARTOONS THAT SHOOK THE WORLD* 36 (New Haven, Connecticut: Yale University Press, 2009). [Hereinafter, KLAUSEN.]

The offended party may bring such acts or expressions to court, and it is for the courts to decide in individual cases.<sup>48</sup>

What is remarkable about the exchange is neither side seemed concerned about the legal point as to whether "blasphemy" is an offense under the *Shari'a*. Ironically (as the Prime Minister notes in the quote), it is an offense under Danish secular law.

Rather, to both sides in the Danish Cartoon Affair, boundaries are what mattered. For Muslims (and many non-Muslims), freedom of discourse is appropriate, but defamation is not discourse. It is nothing more than disrespect, and intentionally designed as such. The Muslim Ambassadors, and their supporters, argued that the non-Muslim western world is hypocritical in its tolerance for free speech: if Judaism or Christianity is insulted in an Islamic country, non-Muslim westerners profess concern. But, when Islam or its Prophet is the target, non-Muslim westerners encourage Muslims to give space for creativity, even humor. Accordingly, reasonable boundaries not only must be drawn, but also enforced vigorously. Doing so, moreover, will advance the common good, as each faith will enjoy the respect it deserves, and society generally will reach an enhanced degree of appreciation for all faiths.

For non-Muslims (and many Muslims), all but the most egregious hate speech that incites violence must be tolerated. Otherwise, creativity — the process of generating new ideas, along with the ability to criticize institutional and individual authorities — will be squelched. Furthermore, with a well-educated populace participating in a free market of ideas, good ones will rise to the top over disrespectful ones.

Muslims (and many non-Muslims) counter that this free speech theory, which underpins the First Amendment to the United States Constitution, is more myth than reality. Public discourse in much of American society is uncivil, and has been degenerating for decades as the boundaries of free speech have been pushed outwards. And so the debate continues.

<sup>48</sup> Letter dated 21 October 2005 from Prime Minister Anders Fogh Rasmussen to 10 Ambassadors representing Muslim and Arab Countries, and the Palestinian Representative in Copenhagen, quoted in KLAUSEN, *supra*, at 66.



## Chapter 47

### PRIVATE CLAIMS (*ḤAQQĀ DAMĪ*)

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I live in the Managerial Age, in a world of "Admin." The greatest evil is not now done in those sordid "dens of crime" that Dickens loved to paint. It is not done even in concentration camps and labour camps. In those we see its final result. But it is conceived and ordered (moved, seconded, carried, and minuted) in clean, carpeted, warmed and well-lighted offices, by quiet men with white collars and cut fingernails and smooth-shaven cheeks who do not need to raise their voices. Hence, naturally enough, my symbol for Hell is something like the bureaucracy of a police state or the office of a thoroughly nasty business concern.

C.S. Lewis

(1898-1963, Oxford Professor of Literature, Novelist, and Christian Writer)

#### SYNOPSIS

##### § 47.01 CONCEPT OF *JINĀ YĀ T* (TORTS)

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##### § 47.04 SUICIDE

##### § 47.05 BODILY HARM NOT INVOLVING DEATH

##### § 47.06 PROPERTY DAMAGE

##### § 47.07 PERJURY

##### § 47.08 PROTECTED (*MA'SŪM*) OR NOT PROTECTED (*HADR*)?

§ 47.01 CONCEPT OF *JINĀ YĀ T* (TORTS)

## [A] Private Nature of Claim

The Arabic legal term corresponding to what in American Law knows as "Torts," and Roman and Civil Law as "Delicts," is "*jināyāt*." Literally, the term means "offenses." But, *jināyāt* does not refer to offenses in the type of *ḥaqq Allāh*. The term covers offenses not against God (Allāh) or religion, meaning it embraces all wrongful acts against the person or property of another. Put simply, "*jināyāt*" refers to *ḥaqq ādamī* offenses. Consequently, there is no *ḥadd* sanction for *jināyāt*. However despicable the act at issue, the perpetrator has not crossed a limit set by Allāh as to religion.

Not unlike Tort Law in the American Common Law system, in a *jināyāt* case, there is no official representing the state to bring a charge. As with a tort claim, a *jināyāt* claim is a case of one private party against another. There is no official prosecution, nor is punishment implemented on behalf of the public or its protection. Surprisingly to American trained lawyers, these points hold true — under the classical theory of the *Shari'a*, though not necessarily in practice today under modernist legislation — even for a case of homicide (*katl*). The claim is a private one, hence the rubric "*ḥaqq ādamī*." Thus, the party alleging it suffered a wrongful act brings the case. In bringing the case, state action is largely confined to use of the court system and an Islamic judge (*qāḍī*). Unlike the *Imām* (or his representative) who implements a *ḥadd* punishment, liability for a *jināyāt* is enforced by a private party, namely, the victim or next of kin, albeit it is the Islamic judge (*qāḍī*) who "is responsible for the carrying out of *ta'zīr*" (i.e., the discretionary punishment). That is, the *qāḍī* — or, in practice, his agent — implements a discretionary punishment. Moreover, it is the *qāḍī* who "controls the prison."<sup>1</sup> The court, *qāḍī*, agent of the *qāḍī*, or an administrative agency also may make itself available for use by the parties, such as for the prevailing party to collect on a judgment.

[B] Examples of *Jināyāt*

What are examples of *jināyāt* under the classical theory of the *Shari'a*? What are the principal *ḥaqq ādamī* that are actionable as civil wrongs, or torts? The answer is:

- Homicide, called "*katl*."
- Bodily harm.
- Damage to property.<sup>2</sup>

Note what is not on this list, particularly breach of contract. The *Shari'a* treats as conceptually distinct (1) liability for the above-listed "torts" and (2) liability for non-performance of a contract.

<sup>1</sup> JOSEPH SCHACHT, AN INTRODUCTION TO ISLAMIC LAW 197 (Oxford, England: Oxford University Press (Clarendon Paperbacks) 1982). [Hereinafter, SCHACHT.]

<sup>2</sup> See SCHACHT, *supra*, at 177, 181.

In addition to these offenses, there are species of theft that do not give rise to the *ḥadd* punishment for *sarika*. Whenever an essential element of *sarika* is missing, the wrongful act is considered a *ḥaqq ādamī* claim. One example concerns the element of stealth: it is missing if the robbery is open (*naḥb*), or where the property is taken when a person is unaware, such as pick-pocketing (*ikhtilās*). Another example implicates the element of custody. It is lacking if the object is owned by a nearby relative (*mahram*), the thief was invited to enter the premises from which he took the object (*khiyāna*), or the thief does not take custody (*hirz*) of the object, i.e., where he is caught red-handed.

## § 47.02 TA'ZĪR PUNISHMENTS

## [A] Types of Liability

To say that a *jināyāt* offense is a *ḥaqq ādamī* claim, that is, a private claim, is not to suggest the perpetrator "gets off." There always looms the generic, yet most terrifying, punishment: condemnation of the perpetrator at Final Judgment to hell. On this plane of existence, the private claim — if true and successful — gives rise to three kinds of liability of the perpetrator to the victim, or the next of kin of the victim:

- (1) Retaliation (that is, private vengeance), called "*kiṣās*."
- (2) Blood-money, called "*diyyah*."
- (3) Damages.

Exactly which type of liability is triggered depends on facts and circumstances. Here, then, is a clear contrast between the categories of *ḥaqq ādamī* and *ḥaqq Allāh*. A *ḥadd* punishment is fixed under the Qur'an or *Sunnah* for offenses in the latter category. Punishments for *jināyāt* are not fixed. They vary, depending on the case at bar. They may take the form of retaliation, blood money, damages, or some combination thereof.

To be sure, it is not unusual for the Qur'an to identify a behavior or transaction as religiously and morally wrong, but not specify a concomitant punishment. Unlawful sexual intercourse (*zinā*) and drinking (*shurb al-khamr*) are two examples from the category of *ḥaqq Allāh* offenses. Two other prominent illustrations from the world of banking and finance are:

- The game of hazard called "*maysir*." It is forbidden in the Qur'an, as it involves hazard or chance, i.e., *ghavar* (risk or uncertainty). That is, *maysir* is a form of gambling, associated with pagan worship, and the Qur'an forbids such practices.
- Paying or receiving interest, *ribā*, also is forbidden by the Qur'an. Interest is a species of unjustified enrichment — i.e., consuming the property of another for no good reason.

The Qur'an does not lay out a sanction for playing *maysir*, or other forms of gambling, nor for transactions involving *ribā*. Here again, the penal regime in the afterlife — the possibility of condemnation to hell — may well serve to deter some



would-be gamblers and usurious practitioners. In this life, depending on the particularities of the Muslim country in question, the possibility of a judicially-prescribed sanction exists, as does a complete ban via legislation or regulation on gambling and interest. Notably, however, neither *gharar* nor *ribā* gives rise to a *haqq ādamī* offense.

As for *haqq ādamī* offenses, the exact nature and degree of punishment is within the discretion of the presiding Islamic judge (*qāḍī*). Accordingly the sanctions associated with *jināyāt* offenses are called "discretionary," or "*ta'zīr*," punishments. A "*ta'zīr*" punishment is one not specified in the Qur'ān or *Sunnah*, but decided upon and applied according to the sound judgment of a *qāḍī*. Further, Professor Schacht observes in respect of the term "*ta'zīr*":

the *kāḍī* may punish at his discretion any act which in his opinion calls for punishment, whether it infringes the rights of Allah or the rights of humans.<sup>3</sup>

In other words, a *ta'zīr* punishment may be imposed by a *qāḍī* in a case involving a *haqq Allāh* crime, as well as a case of a *haqq ādamī* offense. When used for crimes in the first category, then it is added to the *ḥadd* punishment.

As for the above three types of liability, there is a common denominator: all of them are aimed at repairing injury caused by the wrongdoer. Thus, blood money is not to be equated conceptually with a monetary fine, which is not known in the *Shari'a*.<sup>4</sup> Rather, the dividing line between the second and third types of liability appears to be blood-money is compensation for a loss suffered, whereas damages are a further payment — a distinction redolent of that in American Tort Law between actual damages (the payment of blood-money) and punitive damages (the further payment). Arguably, all three punishments also serve the purposes of specific and general deterrence.

By no means are retaliation, blood money, and damages the exclusive forms of *ta'zīr* punishments. At the discretion of a *qāḍī* are further sanctions:

- Imprisonment, called "*ḥabs*."
- Floggings (i.e., whipping with a certain number of lashes and degree of intensity) or other beatings.

Note that these punishments, as well as monetary fines, are not set by the Qur'ān. Note, too, the purpose of the *ḥabs* sanction is to cause the perpetrator to engage in repentance (*tauba*). A *qāḍī* might choose to base the severity of the punishment on aggravating or mitigating circumstances, such as the socioeconomic status of the guilty defendant.

<sup>3</sup> SCHACHT, *supra*, at 207.

<sup>4</sup> See SCHACHT, *supra*, at 207.

## [B] Settlement and Pardon ('*Afu*)

It always is possible for the victim, or next of kin of the victim, to forego imposition of liability on the perpetrator. The victim or next of kin may elect to:

- (1) Reach an amicable settlement with the perpetrator; or
- (2) To offer a pardon (called "*afu*") to the perpetrator.

Indeed, as a religious matter, the forgiveness and mercy associated with these responses are to be encouraged.

## [C] Umayyad Caliphate Origins of *Ta'zīr* Punishments

What is the origin of *ta'zīr* punishments? They do not appear in pre-Islamic Customary Law, which means the concept pre-dates Islam. Nor are *ta'zīr* punishments called for by the Qur'ān, nor yet even by the *Sunnah*. Professor Schacht declares "the *ta'zīr* stands by itself."<sup>5</sup> He ascribes the origins to the first batch of *qāḍīs* during the *Umayyad* Period (651–750 A.D.). They were called upon to adjudicate cases involving behavior that threatened the peace and security of the emerging Caliphate. These *qāḍīs* had to exercise their discretion to deal with transgressions which did not fit neatly into the standard *ḥadd* punishment categories.

Thus, the *qāḍīs* extended Qur'ānic Penal Legislation, and thereby:

filled a need that was felt in practice, and this need made itself felt sufficiently early for the first specialists of Islamic religious law to incorporate it in its official doctrine.<sup>6</sup>

To use American legal jargon, it might be said *ta'zīr* punishments were established by judicial fiat, or as a result of judicial activism occasioned by the need to engage in interstitial lawmaking. Interestingly, this instance was not the only one of extending Qur'ānic Penal Legislation the *Shari'a* would see in the *Umayyad* and subsequent Caliphates. The creation of a *de facto* public prosecutor — the office of the *ḥisba*, and its occupant, the *muhtasib* — was yet another development affecting Islamic Penal Law.

## [D] Eye-for-An-Eye Justice

There is a clear sense of eye-for-an-eye justice in the theory of *haqq ādamī* offenses and attendant *ta'zīr* punishments. The Qur'ān, in *surah* 5, *ayah* 45, says so:

In the *Torah* We [God (Allāh)] prescribed for them a *life for a life, an eye for an eye, a nose for a nose, an ear for an ear, a tooth for a tooth, an equal wound for a wound*: if anyone forgoes this out of *charity*, it will serve as

<sup>5</sup> SCHACHT, *supra*, at 207.

<sup>6</sup> SCHACHT, *supra*, at 208.

atonement for his bad deeds. Those who do not judge according to what God has revealed are doing grave wrong.<sup>7</sup>

This passage is intriguing. It refers expressly to the Torah. In effect, God (Allāh) is saying eye-for-an-eye justice was part of an earlier revelation, namely, to "them," i.e., the Jewish people, through the Torah. But, He then reveals that forgoing such justice out of charity is beneficial. Why? Not taking retaliatory action against a wrongdoer is a way to atone for bad deeds done the victim did. Forgiveness offsets sin. But, does the passage repeal the eye-for-eye retaliatory approach? That is, is it clear from the passage that this approach is not part of Islamic Law? The answer is "no." Forgiveness is encouraged, but not required. The final sentence calls for following what has been revealed, in the Torah, and later in the Qur'ān, which suggest there is no repeal of this approach.

From an Islamic legal perspective, that there has been no unambiguous repeal is evident from the *ayah* that follow:

<sup>46</sup>We sent Jesus, son of Mary, in their footsteps, to confirm the Torah that had been sent before him: We gave him the Gospel with guidance, light, and confirmation of the Torah already revealed — a guide and lesson for those who take heed of God. <sup>47</sup>So let the followers of the Gospel judge according to what God has sent down in it. Those who do not judge according to what God has revealed are lawbreakers.

<sup>48</sup>We sent to you [Muhammad] the Scripture with the truth, confirming the Scriptures that came before it, and with final authority over them: so judge between them according to what God has sent down. Do not follow their whims, which deviate from the truth that has come to you. We have assigned a law and a path to each of you. If God has so willed, He would have made you one community, but He wanted to test you through that which he has given you, so race to do good: you will all return to God and He will make clear to you the matters you differed about.<sup>8</sup>

Do these *ayah* bespeak a point of contrast between Christianity and Islam? If there is one key teaching all Christians would agree Christ does not represent, then it is eye-for-an-eye judgment. To say (as in *ayah* 46) Jesus was sent "to confirm the Torah" is one thing, but to interpret that phrase as meaning Christ confirms each and every element of the Torah, including eye-for-an-eye retaliation, is a reading with which Christians would take issue. To the contrary, they would argue, a (if not the) dominant message of Christian teaching is forgiveness, hence the story and metaphor of "turning the other cheek."

Yet, *ayah* 47 instructs followers of the Gospel — Christians — to render judgments consistently with the contents of "it," referring to the Gospel. Eye-for-an-eye justice is not expected, at least not among Christians. Further, *ayah* 48 speaks of the Prophet "confirming" the previous revelations, the Sacred Scriptures that came before the Qur'ān, and gives Muhammad some discretion to render

judgments consistent with what God (Allāh) "has sent down." Does this reference mean the Gospel message of forgiveness, which post-dates the Torah message of vengeance, is what the Prophet confirms as part of what has been "sent down"? Not necessarily. The remainder of *ayah* 48 states that God (Allāh) has established "a law and a path to each of you." If by "you" the reference is to the Jewish, Christian, and Muslim peoples (and not individuals), then the statement connotes three different laws for the three peoples. But, the final part of *ayah* 48 is a clarion call for people to do good, indeed, to try and out-do each other in doing good. That call might suggest they ought to focus more on forgiveness than on vengeance.

The "bottom line" is that whether Islamic Penal Law must adhere to a strict, Old Testament-style eye-for-an-eye justice is not entirely clear, at least not from *surah* 5, *ayah* 45–48. The last sentence of *ayah* 48 offers a comforting thought: all the peoples will "return to God," at which point the differences will be sorted out by Him. That suggests that what matters is a best-efforts undertaking is made in respect of discerning and applying rules for judgment. Suppose this undertaking indicates that retaliation is a poor framework for the *Sharī'a*. Perhaps the fact of the effort to figure out the proper framework matters more than getting the "right answer."

There is, of course, a systemic argument against eye-for-an-eye justice. To paraphrase Mahatma Gandhi, it is that such justice does nothing except make the whole world blind. The blindness is not just literal, in the sense of each victim poking out the eye of each perpetrator. It is a blindness of being consumed by rage and vengeance. An endless spiral of retaliation follows. The only escape, one pointed out by Archbishop Desmond Tutu, is indicated by the title of his book — *No Future Without Forgiveness* (2000). Some Islamic countries have acted accordingly, reforming their legal system through modernist legislation that circumscribes or eliminates the use of bodily punishments in *jināyāt* cases. Such legislation criminalizes the *haqq adamī* offenses, and inclines toward the use of imprisonment and fines to penalize wrongdoers. These changes shift the legal system away from a tort-like approach, and render the classification of the wrongful acts at issue, and punishment for their commission, more akin to the treatment in American Criminal Law.

## § 47.03 HOMICIDE (KATL)

### [A] Continuum of Culpability

A major category of *jināyāt* under the classical *Sharī'a* theory is homicide, or "*katl*." As in American Criminal Law, not all homicides are alike. Intent (*niyya*) is a key factor distinguishing culpable acts. There is a range, generally from premeditated murder with aggravating circumstances to manslaughter that involves an accidental or unintended death. By no means was this range developed first in the United Kingdom or the United States, or put differently, the distinction between *actus reus* (culpable act) and *mens rea* (culpable mental state) did not first arise in the legal systems of these countries.

Rather, the *Sharī'a* always has viewed *katl* in terms of a continuum of possibilities. Islamic Penal Law establishes a continuum of culpability, whereon the

<sup>7</sup> THE QUR'AN — A New Translation by M.A.S. Abdel Haleem 5:45, at 72 (Oxford, England: Oxford University Press, 2004) (emphasis added). [Hereinafter, QUR'AN.]

<sup>8</sup> QUR'AN, *supra*, 5:46–50, at 72–73 (emphasis added).



more culpable a perpetrator is, the more severe the *ta'zīr* punishment that may be imposed on that wrongdoer.<sup>9</sup> Here then, along with concepts from Property and Contract Law, is another opportunity for humility: some ideas taken for granted in the everyday study and practice of Criminal Law in the non-Muslim western world have origins, or at least analogs, in the far older system of Islamic Law.

The continuum, which Table 47-1 summarizes, is part of *Hanafi* School jurisprudence. It is widely accepted, except that the *Māliki* School does not distinguish between the first two categories of intent (*niyya*). Rather, the *Māliki* School aggregates deliberate intent (*'amd*) and quasi-deliberate intent (*shibh al-'amd*). At the outset, it is important to comprehend what is not on this continuum — negligence. As Professor Schacht states directly, “[t]he concept of negligence is unknown to Islamic law.”<sup>10</sup> Here lies an important distinction between the *Shari'a* and American Criminal Law and Tort Law. Criminally negligent homicide (or some variant thereof) is a substantive criminal offense, and negligence is a major ground for bringing a tort claim, in many jurisdictions that follow or are influenced by the American system.

Note, however, that negligence crimes are recognized in the contemporary legal systems of several Muslim countries, pursuant to modernist legislation. They are considered offenses meriting *ta'zīr* punishments. Accordingly, the discretion as to the remedy in a particular case is left to the appropriate judicial authority.

#### [B] Claimant: Next-of-Kin of Victim (*Walī al-Dam*)

As is consistent with the nature of a *jināyāt* case and meaning of a *haqq ādamī* offense, at all points on the continuum, the identity of the claim holder is a private party. That is, a private party holds the entitlement to prosecute the claim. The private party, in the case of homicide (*katl*), is the next-of-kin of the victim. The next-of-kin is called the “*walī al-dam*.” Literally, the term means “avenger of the blood.” It refers to the individual who is the next-of-kin of the victim who has the right to demand retaliation.

<sup>9</sup> See SCHACHT, *supra*, at 181.

<sup>10</sup> SCHACHT, *supra*, at 182.

Table 47-1:  
Continuum of Culpability for Homicide (*Katl*)  
According to the *Hanafi* School with *Māliki* School Variations

Degree of Culpability	Distinguishing Feature	Physical Retaliation? (Punishment Under Right of Retaliation)	Alternative Blood Money ( <i>Diyyah</i> ) Amount	<i>Māliki</i> School Variations
Highest	Deliberate Intent, with deadly weapon ( <i>'Amd</i> )	Yes, death (execution by sword) of the killer.  However, waiver of retaliation is recommended.	Heavier blood money ( <i>diyyah mughallaza</i> ) of 100 high-quality camels, or normal blood money of 100 lesser quality camels plus money (e.g., 1,000 <i>dinārs</i> or 10,000 <i>dirhams</i> ). Blood money amount for a female victim is half that for a male victim. Also, religious expiation ( <i>kaffāra</i> ), disinheritance.	No difference between Highest and Second Highest Degrees of culpability (i.e., these two categories are collapsed into one). Minimum punishment of 100 lashes plus one year imprisonment, even if right of retaliation is waived.
Second Highest	Quasi-Deliberate Intent, no deadly weapon ( <i>Shibh al-'Amd</i> )	Yes, death (execution by sword) of the killer, but only if the killer acted with the intent to kill. However, waiver of retaliation is recommended.	Heavier blood money ( <i>diyyah mughallaza</i> ).  Blood money amount for a female victim is half that for a male victim. Also, religious expiation ( <i>kaffāra</i> ), disinheritance.	As above.
Second Lowest	Mistake ( <i>Khaṭa'</i> ) as to purpose or in the act	No, because killer did not act with the intent to kill, and thus is not fully responsible.	Normal blood money ( <i>diyyah muḥakkaka</i> ). Blood money amount for a female victim is half that for a male victim. Also, religious expiation ( <i>kaffāra</i> ), disinheritance.	None.

Degree of Culpability	Distinguishing Feature	Physical Retaliation? (Punishment Under Right of Retaliation)	Alternative Blood Money (Diyah) Amount	Mālikī School Variations
Lowest	Indirect Homicide ( <i>Katl bi-Sabab</i> )	No, because killer did not act with the intent to kill, and thus is not fully responsible.	No liability for authorized actions. For unauthorized actions, blood money, including heavier blood money ( <i>diyyah muḥakkaka</i> ) in certain cases. Blood money amount for a female victim is half that for a male victim.	None.

The *wali al-dam* is the nearest male ascendant or descendant relative (agnate, or “*ʿasabā*”) of the victim. In a case of *katl*, the *wali al-dam* is the person who carries out any retaliation, or who chooses to waive the right of retaliation for a settlement of blood-money, or gratuitously as a pardon. It is the *wali al-dam* to whom blood money is paid, or who waives any claim to that payment. What about a case not involving a homicide, i.e., in which the victim remains alive? Then, it is the injured party — the victim-in-chief, as it were — who is entitled to prosecute the claim and demand retaliation.

### [C] Highest Degree: Deliberate Intent (*ʿAmd*)

The highest degree of culpability for homicide (*katl*) exists when commission of the offense occurs with deliberate intent, which is called “*ʿamd*.” In this instance, the perpetrator intended both the action he or she committed, and meant to kill. Deliberate intent may be proved by the use of a deadly weapon. Indeed, the most severe form of *katl* is that which occurs with deliberate intent using a deadly weapon.

The punishment for *katl* with deliberate intent (*ʿamd*) is retaliation. Specifically, the life of the killer (or killers) may be taken. The execution is to be carried out using a sword. The next-of-kin (*wali al-dam*) of the murder victim holds the right to demand retaliation. If retaliation is taken, then no religious expiation, called “*kaffāra*,” is called for. (That accords with common sense.) It must be stressed that the *Shariʿa* authorizes retaliation only if the killer (or killers) clearly acted with deliberate intent, and was (were) fully responsible for the resulting death.

To many non-Muslims, and Muslims as well, retaliation by taking the life of the killer is barbaric. It is, and there is no getting round that fact. However, a principled stand against retaliation would include opposition to the death penalty, particularly when life imprisonment with no possibility of parole is an available sanction, in jurisdictions not governed by Islamic Law. Note, however, that it is helpful to put this right of retaliation in its historical context. In pre-Islamic times,

Bedouin tribes on the Arabian Peninsula got into upward-spiraling cycles of wrongful act and retaliation. Any member of the tribe of a killer could be killed by the tribe of the victim.<sup>11</sup> More than one life could be taken to avenge a single homicide. The ineluctable result often was a blood feud.

Hence, Professor Schacht opines reasonably that “[t]he considerable restriction of blood feuds was a great merit of Muhammad’s.”<sup>12</sup> In other words, the *Shariʿa* limits retaliation to one life, namely that of the killer and no one else, following a homicide. Moreover, the target of the retaliation must have acted with deliberate intent (*ʿamd*). Once retaliation occurs, that is the end of the case. It is a complete remedy.

Still another improvement on the pre-Islamic situation is the fact that the right of retaliation can be waived. The next-of-kin of the victim can choose to forego retaliation, either for free or for a consideration. In fact, it is recommended, but not required, that the *wali al-dam* waive his right of retaliation, and instead accept payment of blood money. “Recommended,” in this sense, refers to the Scale of Religious and Legal Qualifications (*Al Ahkām Al Khamsa*): obligatory (*waajib*)/ recommended (*mandub* or *mustahabb*)/ indifferent (*mubāh*)/ reprehensible (*makrūh*)/ forbidden (*ḥarām*).

An obvious rebuttal exists to this historical argument. The fact Islamic Law “improves” matters in comparison with pre-Islamic times is not a justification for the “improvement” in light of higher modern standards. What occurred on the Arabian Peninsula before the first revelation in 610 A.D. is hardly a good benchmark for whether a rule or sanction is justified today. In turn, that it was “better” 1,500 years ago to avoid escalating blood feuds by limiting retaliation to a single killing does not mean taking a life for a life is “better” in view of the substitutes available today.

In any event, the *wali al-dam* possesses the exclusive authority to waive retaliation, without any demand for a reciprocal payment. Indeed, as a general principle, Islam encourages waiver of retaliation. It is viewed as an act of magnanimity and mercy. Waiving retaliation means granting a pardon, which is called “*ʿafw*” in Arabic. Alternatively, the *wali al-dam* has the exclusive authority to choose to agree on a settlement in lieu of retaliation. The settlement is called “*ṣulh*,” the same term used in the context of Islamic Contract Law. The settlement is “blood money,” or “*diyyah*” — a rubric that is apt in both a conceptual and literal sense. Renouncing retaliation, i.e., not killing the murderer, and accepting blood money instead, does not technically qualify as an *ʿafw*, but otherwise is considered a waiver.

In the event of a *ṣulh*, what is the appropriate amount of blood money (*diyyah*)? There are two basic categories of figures:<sup>13</sup>

- The so-called “heavier” blood money for more serious *jināyāt* cases. The “heavier” blood money is called “*diyyah muḥallaḥa*.” Traditionally, it was

<sup>11</sup> See SCHACHT, *supra*, at 185.

<sup>12</sup> SCHACHT, *supra*, at 185.

<sup>13</sup> See SCHACHT, *supra*, at 185.



100 high-quality camels.

- The so-called "normal" blood money, for all other cases. The "normal" blood money is called "*diyyah muḥakkaka*." Traditionally, it was 100 regular camels, 1,000 *dīnārs*, or 10,000 *dirhams*.

Significantly, traditionally, the blood money for a female victim was one-half the amount for a man. In other words, if a woman is the victim of a *haqq ādamī* offense, and the claim against the perpetrator is settled through a payment, the figure is 50 percent of that which would be agreed upon had the victim been a man. It cannot go without comment that this differential connotes a lesser value on the life based on gender, which in modern times (if not throughout the ages) is unacceptable.

Traditionally, liability for blood money is not incurred by the perpetrator himself or herself, but by the "*ākila*." This group consists of paid members of a Muslim army to which the perpetrator belongs, the male members of the tribe to which the perpetrator belongs (or, if there are too few of them to make the payment, then of the nearest related tribes), the co-workers of the perpetrator, or the confederates of the perpetrator. But, the expansion of the circle to include the latter two categories was an insufficient adaptation to the urbanization of Islamic societies, and the institution of "*ākila*" has fallen into disuse.<sup>14</sup> The inference from this report is that liability for blood money, in modern times, tends to be put on the perpetrator. Payment of blood money is made to the next-of-kin of the victim, particularly, the *walī al-dam*.

Either way, as a pardon (*ʿafw*) or with a settlement (*ṣulḥ*), the perpetrator must engage in religious expiation (*kaffāra*). That is, a waiver by the *walī al-dam* of the right to retaliation must be accompanied by expiation on the part of the wrongdoer. Obviously, in a religious sense, *kaffāra* is due only where a sin has been committed. Killing with deliberate intent certainly qualifies. Of what does *kaffāra* consist? Traditionally, it involved the manumission of a Muslim slave, or fasting for two straight months.

Being liable for a *jināyāt* offense has consequences for inheritance rights. Simply put, they are lost. Suppose the perpetrator is an heir of the victim, or is a beneficiary named in the will of the victim. A perpetrator against whom retaliation has been waived is disqualified from eligibility for any inheritance from the victim.

There is an important variation in *Mālikī* School doctrine on the punishment for homicide if retaliation does not occur.<sup>15</sup> The *Mālikī* School calls for the punishment of 100 lashes, plus imprisonment of one year, in the event the *walī al-dam* waives the right of retaliation. The School considers this sanction neither a *ḥadd* punishment nor a *taʿzīr* punishment. It amounts to a minimum sentence for certain homicide cases, ensuring that no murderer escapes a penal sanction. The term name "*ukāba*," which essentially is a generic term for punishment, can refer to this particular sanction.

<sup>14</sup> See SCHACHT, *supra*, at 185.

<sup>15</sup> See SCHACHT, *supra*, fn. 1 at 185.

## [D] Second Highest Degree: Quasi-Deliberate Intent (*Shibh al-ʿAmd*)

The second most serious case of homicide (*katl*) occurs when quasi-deliberate intent is involved. Such intent is known in Arabic as "*shibh al-ʿamd*." Quasi-deliberate intent exists whenever commission of the act was intended, but the perpetrator did not mean to kill, i.e., the act but not the result was intended. Such an instance may be inferred from a killing that occurs without a deadly weapon: the perpetrator meant to punch the victim, or hit the victim with a stick, but not to take the life of the victim.

Retaliation is permissible in cases of homicide with quasi-deliberate intent (*shibh al-ʿamd*). Again it must be stressed that the *Shariʿa* authorizes retaliation only if the killer (or killers) acted with clear, deliberate intent and was (were) fully responsible for the death. Further, these cases also allow for an alternative punishment, namely, payment of heavier blood money, plus religious expiation (*kaffāra*). Of course, it is the perpetrator who must perform the expiation.

As for the payment, traditionally it is the responsibility of male members of the tribe, co-workers, or the like of the perpetrator — the *ākila* — though now it appears to be the obligation of the perpetrator. The blood money amount for a female victim is one-half the amount for a man. Payment is made to the *walī al-dam*. As a further sanction, the perpetrator is disqualified from eligibility for any inheritance from the victim.

Note the same *Mālikī* School variation that applies to homicide with deliberate intent (*ʿamd*) exists for cases of *shibh al-ʿamd*, as that School does not differentiate between the two categories. For the *Mālikī* School, the key point seems to be the murderer operated with deliberate intent. Given that state of mind — that *mens rea* — it does not matter whether the murderer used a deadly weapon.

## [E] Second Lowest Degree: Mistake (*Khaṭaʾ*)

Killing with deliberate intent (*ʿamd*) or quasi-deliberate intent (*shibh al-ʿamd*) lie at one pole of the continuum of homicide possibilities — obviously, the more serious end. At the other end lie the two lowest degrees of culpability for homicide, the first of which is killing by mistake. The Arabic term for mistake is "*khaṭaʾ*."

Retaliation is not permissible in instances of homicide by error (*khaṭaʾ*). By definition in these cases, the killer (or killers) did not act with clear, deliberate intent (and, possibly, was not fully responsible for the consequence). But, such cases trigger as a punishment the payment of blood money, though of a lesser amount — the normal blood money — than where the perpetrator acted with quasi-deliberate intent. The amount is even lesser if the victim is a woman, as it is one-half the figure of that for a male victim. In addition, religious expiation (*kaffāra*) is required, at least because the perpetrator should express genuine sorrow for the error that caused the death of the victim. Here again, the perpetrator is disqualified from eligibility for any inheritance from the victim.

Not all mistakes are the same. Consider the case in which former American Vice President Dick Cheney was involved.<sup>16</sup> While quail hunting on a ranch in Texas on 11 February 2006, the Vice President shot (but fortunately did not kill) his friend, a 78-year old Texas lawyer named Harry Whittington. (On February 14, Mr. Whittington had a non-fatal silent heart attack and atrial fibrillation, which apparently were linked to one lead-shot pellet lodged in or near his heart.) Both the Vice President and the victim called the shooting an accident, and no charges were pressed. What kind of "mistake" occurred?

The *Shari'a* draws distinctions based on type of mistake. There may be mistake as to purpose, known as "*fil-kaṣd*." Or, there may be a mistake as to action, called "*fil-fi'l*." A mistaken purpose would be where a person shoots a human being thinking him or her to be an animal.<sup>17</sup> The analogy to the Vice President's case would be a mistake as to the identity of Mr. Whittington — he was mistaken for a quail, not a person. A mistaken act would be where a person shoots at a target, misses, and hits a man, mortally wounding him. The analogy would be a mistake as to accuracy: a quail was aimed at, but Mr. Whittington was hit. It is this mistake that appears to have occurred, and the Vice President was cleared by the relevant county sheriff of all criminal wrong-doing. Additionally, under the *Shari'a*, there are cases where an action is (debatably) considered a mistake, as where a man rolls over in his sleep and suffocates his wife to death.

#### [F] Lowest Degree: Indirect Homicide (*Ḳatl bi-Sabab*)

At the opposite end of the continuum of homicide (*ḳatl*) from killing with deliberate intent and a deadly weapon (*ʿamd*) is indirect homicide, or "*ḳatl bi-sabab*." The first three categories on the continuum (*ʿamd*, *shibh al-ʿamd*, and *khata'*) involve a direct action by the perpetrator on the body of the victim. However, with *ḳatl bi-sabab* that relationship is indirect. The general concept is that a person is liable for an action that he or she commits, and that was unauthorized, if it leads to the death of another person. The key inquiry concerns causation: how long may the causal chain be to hold a person liable, before the chain becomes too long to link the perpetrator with the death?

The answer to this question depends on the facts and circumstances of a particular case. Assuming liability is found, the punishment is payment of the normal amount of the blood money. No religious expiation (*kaffāra*) is required. And, the perpetrator remains eligible for an inheritance from the decedent.

Setting aside questions of causation, how does the *Shari'a* identify *bona fide* cases of indirect homicide? The key device regulating the scope of actions considered indirect homicide is authority. So long as the behavior at issue is authorized, the perpetrator is free from liability, and the case is not one of indirect homicide. A substantial number of actions are considered authorized.<sup>18</sup> Some

prominent illustrations of authorized behavior are:

- A person can dig a well on his own property, or on the property of another with the permission of that owner, or on public property with the permission of the *imām*. In all three cases, if a third party falls in the well and dies, then the digger of the well is not liable for indirect homicide.
- Performance of ritual ablution (i.e., cleansing before prayer) is authorized. Suppose a person performs this act in an area that he or she owns or co-owns. But, a third party slips from the water used in the ablution, falls, and dies. (This mishap could occur in a blind alley that the property of the person performing ablutions abuts, with the water running from his or her property into the alley.) The person who performed the ablutions is not liable for indirect homicide.
- Consider a person who builds a bridge on public property. A person falling from that bridge, and dying as a result, will not trigger liability for indirect homicide on the part of the builder. That is true, even if the bridge was built without the permission of the *imām*. With or without such permission, the construction is considered "authorized."
- Suppose a wall collapses, and crushes a person to death. The owner of the fallen wall is not liable for indirect homicide, unless the owner of adjoining property had asked the owner of the fallen wall to remove or repair that wall. Note the relevance of knowing whether a purported property owner actually owns property that kills or injures another person.
- Continuing from the previous example, suppose the owner is asked to tear down the wall, because it is in danger of collapsing. Instead of doing so, the owner sells the wall, and the buyer is not asked to tear down the wall. After the sale is complete, the wall collapses and kills an innocent victim. The seller is not liable, because he did not own the wall when it collapsed. The buyer is not liable, because he was not asked to demolish the wall.

One question in respect of *ḳatl bi-sabab* is liability of a parent for a child, or an owner of an animal for the animal. Is a parent liable for acts of a child (or, more generally, a guardian for the act of a minor)? Is the owner of an animal liable for acts of the animal?

The general answer under the *Shari'a* to these questions is affirmative.<sup>19</sup> At least in cases of animals, an owner has a successful defense where the victim intentionally enraged or frightened the animal. Similarly, an owner cannot be held liable for the death of a person to whom the owner lent his or her animal (say, a camel, donkey, or horse), where the person who hired the animal fell off it.

Observe that even in the above illustrations, the correspondence between degree of culpability and attached liability is general. Cases can give rise to differences in liability, as Professor Schacht points out:<sup>20</sup>

<sup>16</sup> See Dick Cheney Hunting Incident, Wikipedia, posted at [http://en.wikipedia.org/wiki/Dick\\_Cheney\\_hunting\\_incident](http://en.wikipedia.org/wiki/Dick_Cheney_hunting_incident).

<sup>17</sup> See SCHACHT, *supra*, at 182.

<sup>18</sup> See JOSEPH SCHACHT, AN INTRODUCTION TO ISLAMIC LAW 182-183, 204 (Oxford, England: Oxford University Press (Clarendon Paperbacks) 1982).

<sup>19</sup> See SCHACHT, *supra*, at 183.

<sup>20</sup> See SCHACHT, *supra*, at 182.



- Suppose a person kills his or her descendant (or, in older times, a master killed a slave). The liability is for the heavier blood-money (*diyyah mughallaḡa*), not retaliation.
- Suppose a person kills someone who is insane, or a minor, but claims self-defense. Because neither an insane person nor a minor is accountable for his or her behavior, the *Shari'a* does not recognize the case as one of *bona fide* self-defense. Liability is imposed on the perpetrator, but for *diyyah mughallaḡa*, not retaliation.
- Suppose there are several perpetrators, and one is exempt from liability for retaliation (e.g., for the reason the victim was his or her descendant). Then, all the perpetrators are exempt from retaliation too, yet all are liable for *diyyah mughallaḡa*.

These three examples suggest some boundaries on liability for indirect homicide, but unlike the earlier illustrations, they do involve legal accountability of the perpetrator to the victim or the next of kin. As in all other instances of homicide, at least traditionally, the blood money amount for a female victim is one-half the amount for a man.

As in the *Shari'a*, the problem of indirect homicide is a standard one in American Criminal and Tort Law. Sadly, everyday in Muslim and non-Muslim jurisdictions, killings with an extended causal nexus between perpetrator and victim happen. It might even be broached that the discussion in Islamic Law as to how to treat such cases presaged, and informed, the American system. Under both systems, the problem begs a foundational issue: how far downstream is it justifiable to impose liability for indirect homicide? Put conversely, how far upstream is it justifiable to require a party to take reasonable precautions against injury?

In the American legal system, the issue is one of policy. Debate centers on concepts of justice, analysis of parties in terms of relative ability to bear loss, realities of cost imposition, and (especially in a global marketplace) consequences of different liability regimes for the international competitiveness of businesses. This debate covers two further problems: First, must all precautions be taken, or only reasonable ones, and if the latter, then how is "reasonable" gauged? Second, must all injuries be guarded against, or only foreseeable ones, and if the latter, then what is the test for "foreseeability"?

Islamic Law does not bar this kind of debate. But, as a sacred legal system, its over-arching considerations are religious and moral. Therefore, consider to what extent is liability for *katl bi-sabab* imposed when concepts of justice — aside from those sourced in the Qur'ān or *ḥadīth* — suggest it is unfair to do so? To what extent is liability imposed when it is clearly economically inefficient to do so, or disadvantages Muslim businesses in the international marketplace?

#### § 47.04 SUICIDE

In most American jurisdictions, suicide (and assistance provided to another to commit suicide) is a criminal offense. All religions counsel against killing oneself and generally would agree with the Catholic Christian precept that:

We are stewards, not owners, of the life God has entrusted to us. It is not ours to dispose of.<sup>21</sup>

In Catholic Christianity, the intentional taking of one's own life is prohibited under the 5th Commandment, and "seriously contrary to justice, hope, and charity."<sup>22</sup> It is "gravely contrary to the just love of self," "offends love of neighbor," and "contrary to love for the living God."<sup>23</sup> By extension, direct euthanasia is gravely wrong. It also is appreciated that some persons who commit suicide suffer from serious mental illnesses, or are gravely fearful of hardship, suffering, or torture.<sup>24</sup> They are not fully in control of their thoughts and actions, or their circumstances may diminish their responsibility for committing suicide. Their souls are entrusted to the merciful judgment of God, who by means known only to Him can provide the chance for "salutary repentance" and thereby salvation.

The approach taken in Islam is both similar and different. Killing oneself is religiously unwise, to say the least. But, it is not a *jināyāt*. Thus, an attempted but unsuccessful suicide triggers no liability. Whether that result is because Islamic Criminal Law does not focus on attempts, a religious injunction against suicide, or both, is unclear.

#### § 47.05 BODILY HARM NOT INVOLVING DEATH

Another everyday occurrence, unfortunately, in Islamic and non-Islamic jurisdictions is that of bodily harm. Accidents happen, people are hurt — but not killed. Are their injuries truly a result of an unforeseeable, unpreventable accident that ought not to give rise to liability? Or, is the bodily harm suffered the result of culpable behavior, to which liability attaches?

The *Shari'a* addresses these questions in nearly the same manner as it does questions of homicide (*katl*). For *jināyāt* cases of bodily harm not involving death, the same system — the same continuum — for categorizing degrees of culpability is used as for cases of *katl*, but with two key changes. First, the first and second categories (deliberate and quasi-deliberate intent) are lumped together. That is, the *Māliki* School view on homicide is the majority position in respect of non-fatal injury. Second, the standard liability for bodily injury is blood money. Retaliation is authorized only in certain cases.

The intriguing question, then, is in which instances is retaliation authorized? The answer involves the proportionality principle: only those cases in which it is possible to ensure retaliation is exactly proportional to the bodily harm inflicted. In such cases, retaliation is against specific body parts — a hand, foot, tooth, and so forth.<sup>25</sup> A special boundary on retaliation exists in respect of head injuries: retaliation for a wound to the head occurs only if the perpetrator lays bare the skull of the victim.

<sup>21</sup> CATECHISM OF THE CATHOLIC CHURCH ¶ 2280 at 550 (United States Catholic Conference, Inc., Washington, D.C.: Libreria Editrice Vaticana, 2nd ed. 1997). (Hereinafter, CATECHISM.)

<sup>22</sup> CATECHISM, *supra*, ¶ 2325 at 558.

<sup>23</sup> CATECHISM, *supra*, ¶ 2281 at 550. See also *id.*, ¶ 2282.

<sup>24</sup> See CATECHISM, *supra*, ¶ 2382 at 550.

<sup>25</sup> See SCHACHT, *supra*, at 185.

In the literal eye-for-an-eye justice case, retaliation for an eye is permissible only if the perpetrator causes the victim to lose sight in an eye. Retaliation is performed with a red-hot needle.

What about a case in which the perpetrator causes multiple injuries to the victim, or an injury to each of two (or more) victims — is retaliation permissible? The answer depends on the facts and circumstances. Professor Schacht cites the instance of a perpetrator acting with deliberate intent (*'amd*) to cause the loss to two persons of the same hand.<sup>26</sup> Then, one of the perpetrator's hands is cut off. The rest of the punishment takes the form of payment of the appropriate amount of blood money.

What is the blood money in cases of non-fatal bodily harm? It is similar to that for homicide with deliberate intent (*'amd*), particularly where the harm is grave.<sup>27</sup> It is the heavier amount (*diyyah mughallaza*). Grievous injury includes loss of an organ, especially where there is only one such organ, such as a tongue. Oddly, perhaps, loss of the beard or the head of hair qualifies as a grievous injury. Overall, the organ lost is the starting point, as it were, for calculating the blood money in other instances.

Thus, if there is only one of the kind of organ that is lost, then the blood money amount is the heavier amount (*diyyah mughallaza*). But, if there are two such organs (e.g., kidneys), and one of them is lost, then the blood money is half of what it would be for an organ that exists singly. Likewise, the blood money figure is calculated mathematically in proportion to fingers and toes — for the loss of a finger or toe, one-tenth the amount of a single organ, for a tooth, one-twentieth the amount (on the dentally incorrect presumption that a normal adult has twenty teeth). As in all cases of homicide (*katl*), in cases of non-fatal bodily injury, the blood money figures are reduced by 50 percent if the victim is a female.

Professor Schacht offers yet another example, namely, the case of unintentional mutilation of a boy during circumcision.<sup>28</sup> Circumcision is practiced among Muslim males. According to the *Shāfi'i* and *Ḥanbali* Schools, male circumcision is obligatory. It is recommended according to the *Māliki* and *Ḥanafī* Schools. (The issue of female circumcision, or female genital mutilation (FGM), which occurs in some Muslim countries — particularly in Africa — is not one of Islamic Law, but rather local custom. That practice, of course, is a hideous one that violates International Human Rights Law.) Assume the boy lives, despite the mutilation.

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In the literal eye-for-an-eye justice case, retaliation for an eye is permissible only if the perpetrator causes the victim to lose sight in an eye. Retaliation is performed with a red-hot needle.

What about a case in which the perpetrator causes multiple injuries to the victim, or an injury to each of two (or more) victims — is retaliation permissible? The answer depends on the facts and circumstances. Professor Schacht cites the instance of a perpetrator acting with deliberate intent (*'amd*) to cause the loss to two persons of the same hand.<sup>26</sup> Then, one of the perpetrator's hands is cut off. The rest of the punishment takes the form of payment of the appropriate amount of blood money.

What is the blood money in cases of non-fatal bodily harm? It is similar to that for homicide with deliberate intent (*'amd*), particularly where the harm is grave.<sup>27</sup> It is the heavier amount (*diyyah mughallaza*). Grievous injury includes loss of an organ, especially where there is only one such organ, such as a tongue. Oddly, perhaps, loss of the beard or the head of hair qualifies as a grievous injury. Overall, the organ lost is the starting point, as it were, for calculating the blood money in other instances.

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## § 47.07 PERJURY

In a criminal or civil case, it is possible that an Islamic judge (*qāḍī*) may end up rendering a decision based on — as it is later discovered — false evidence. That judgment, nevertheless, remains valid. Professor Schacht gives the example of a woman who gives false testimony to support her claim she is married to a particular man. A *qāḍī* renders a judgment in support of that claim. The judgment is valid and, therefore, the sexual intercourse between the woman and her “husband” is lawful.<sup>31</sup>

Suppose further that the woman (or other witness) who provides false testimony retracts it. The judgment still remains valid. However, the woman (or witness) could be held liable for damage caused by the judgment. (In the specific example, repudiation of a marriage that has been consummated would not be considered a remedy.)

There is no *hadd* penalty set forth for perjury (other than for false accusation of unlawful sexual intercourse, *kadhf*). Nor is there such a sanction for submitting false evidence. In other words, no *hadd* punishment is prescribed for lying in a legal proceeding. Unfortunately, this fact has led more than a few prejudiced observers to write off Muslim testimony or other evidence, as untrustworthy, or even to think of Islamic legal culture as not valuing truth.

In fact, the *Shari'a* does not condone mendacious behavior in court. It does not allow a liar on the witness stand, or a provider of false documents, to get off. Rather, three kinds of sanctions exist for perjury or otherwise providing false evidence:<sup>32</sup>

- (1) The perjured testimony (or other false evidence) is publicly exposed — it is broadcast, in a sense. This public exposure is called “*ta'rīf*.”
- (2) According to at least some *Shari'a* scholars (*fukahā*), a perjurer (or provider of false evidence) is (or should be) imprisoned and beaten.
- (3) In some cases, if damage results from perjury (or other false evidence), then the perjurer (or provider of the evidence) is held liable for the damage.

In enforcing rules against perjury and false evidence, elements similar to those found in American Criminal Law exist. In particular, the testifier or evidence-provider must have known, at the time of speaking or submitting documents, that what he or she said or submitted was false. Further, the falsity must be about an important, or material, point.

## § 47.08 PROTECTED (MA'ŠŪM) OR NOT PROTECTED (HADR)?

All of the defenses are relevant to cases involving a *ḥaqq ādamī* offense. In addition, whether a sanction is imposed for a criminal transgression may depend on the nature of the victim. In particular, liability for a civil wrong (tort), or *jinayā*,

<sup>31</sup> See SCHACHT, *supra*, at 196.

<sup>32</sup> See SCHACHT, *supra*, at 187.

exists only if the victim is protected by Islamic Criminal Law. There is no liability for an offense, including homicide (*katl*), committed against an unprotected person. Those persons whose blood is protected are called “*ma'šūm*.” Those persons whose blood is not protected are called “*hadr*.”

Only if the victim is within the category of “*ma'šūm*” is liability visited on the perpetrator. Who would be considered unprotected (“*hadr*”)? There are several examples offered by Professor Schacht:<sup>33</sup>

- An enemy alien, that is, a “*harbi*.”
- A perpetrator-victim, that is, one who died or was injured as a result of another person acting in self-defense.
- A perpetrator who is executed through the carrying out of a *hadd* punishment. Similarly, a perpetrator who dies from the infliction of a *ta'zir* punishment.
- A victim of a crime of passion (to use the Civil Law term), *e.g.*, a wife and her lover killed by the husband who was surprised to find them engaged in unlawful sexual intercourse. (That is, traditionally under the *Shari'a*, a husband is not liable for killing his wife and her lover whom he is surprised to find together in unlawful intercourse.)

These examples, and the threshold distinction between protected and unprotected persons, are the antithesis of a principle of American Law: equal justice under law.

To be sure, that principle is not always followed perfectly, sometimes to the detriment of Muslim minorities living in the United Kingdom and United States. Nevertheless, the principle — inscribed in the front of the United States Supreme Court — is perhaps the most defining characteristic of American legal culture. Ironically, given the secular nature of American Law, equal justice under law is based on a yet more fundamental axiom: all persons are entitled to equal human dignity because they are created in the image and likeness of God.

<sup>33</sup> See SCHACHT, *supra*, at 184.

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## Chapter 48

### LAW OF WAR

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[A]n excessive increase in military expenditure risks accelerating the arms race, producing pockets of underdevelopment and desperation, so that it can paradoxically become a cause of instability, tension and conflict. As my venerable Predecessor [Pope] Paul VI wisely observed [in the Encyclical Letter, *Populorum Progressio*, at 87], “the new name for peace is development.” *States are therefore invited to reflect seriously on the underlying reasons for conflicts, often provoked by injustice, and to practice courageous self-criticism.*

Message of His Holiness Pope Benedict XVI for the Celebration of the World Day of Peace, *Fighting Poverty to Build Peace*, 1 January 2009, ¶ 6 (emphasis added)

#### SYNOPSIS

##### § 48.01 CONFLICTING QUR'ĀNIC PASSAGES ABOUT CONFLICT?

- [A] Three Sword Verses and Orientalist Fallacy
- [B] Other Aggressive Passages
- [C] Passages Championing Non-Violence and Reason
- [D] Bottom Line and Just War Theory

##### § 48.02 OVERVIEW

- [A] Shaybānī's 8th Century *Siyar*, But an Inchoate Scheme
- [B] Bifurcation and Framework Questions

##### § 48.03 BIFURCATION OF WORLD

- [A] *Dār al-Islām* (Abode of Peace — Muslims)
- [B] *Dār al-Ḥarb* (Abode of War — Non-Muslims)

##### § 48.04 ANSWERS TO FRAMEWORK QUESTIONS

- [A] Who Must Fight?
- [B] When Must Muslims Fight? Against Whom Must They Fight?
- [C] How May The Enemy Be Dealt With?
- [D] Where Do Muslims Find The Enemy?
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##### § 48.05 TREATMENT OF CONQUERED PEOPLES (*DHIMMĪS*) UNDER TREATY OF SURRENDER (*DHIMMA*)

- [A] Basic Obligations

[B] Problem of Religious Freedom

[B] Equality and Inequality

#### § 48.06 REBELLION (BAGHI)

### § 48.01 CONFLICTING QUR'ĀNIC PASSAGES ABOUT CONFLICT?

#### [A] Three Sword Verses and Orientalist Fallacy

An Islamic legal perspective on International Law is not easily distilled from the Qur'ān. Islamic Law contains a number of rules on the subject of what in the Anglo-American characterization of International Law would be called the "Law of War." These rules, and the Qur'ānic passages on which they purportedly are based, are controversial.

Like radicals in other faiths, Muslim extremists resort to and distort the letter, spirit, and context of key verses of their sacred text. Like the fanatics they are, they focus unceasingly and uncompromisingly on what are known as the "Sword Verses," using them to justify terrorism.<sup>1</sup> These Verses also are cited by some non-Muslim authors to support their claim that Islam is inherently prone to violence, or Islam condones terrorist actions. Read and interpreted carefully, however, that claim is parlous, if not specious.

The first Sword Verse is specifically known as the "Taxation" or "*Jizyah*" Verse, and is *surah* 9, *ayah* 29:

Fight those of the People of the Book who do not [truly] believe in God and the Last Day, who do not forbid what God and His Messenger have forbidden, who do not obey the rule of justice until they pay the tax [*jizyah*] and agree to submit.<sup>2</sup>

One way to interpret the *Jizyah* Verse is to examine the operative imperative verb: "fight." Does it mean a violent struggle? It can mean reasoned argumentation. If People of the Book (*ahl al kitāb*) violate the law or do not pay *jizyah*, the rational response might be to treat infractions as law enforcement matters, prosecuting individual violators under the *Shar'ā*, rather than launching a holy war against the entire community.

Another way to look at the *Jizyah* Verse, which is not inconsistent with the first approach, is to see it in historical context. It speaks directly to the time period when Islam was expanding out from the Hejaz to the rest of the Arabian Peninsula. At the time, the Prophet and his Companions (*Ṣaḥābah*) gave the Jews and Christians of

<sup>1</sup> See, e.g., MARY R. HARECK, KNOWING THE ENEMY: JIHADIST IDEOLOGY AND THE WAR ON TERROR 43–44 (New Haven, Connecticut: Yale University Press 2006). See also MICHAEL A. PALMER, THE LAST CRUSADE: AMERICANISM AND ISLAMIC REFORMATION 30 (2007) (discussing how the Qur'ān, with a misunderstanding of the greater *jihād*, provides the option of violence towards non-believers).

<sup>2</sup> THE QUR'ĀN — A New Translation by M.A.S. Abdel Haleem (Oxford, England: Oxford University Press, 2004), 9:29 at 118. [Hereinafter, QUR'ĀN.]

Arabia two choices: war, or protected submission to the rule of the Muslims.<sup>3</sup>

For this protection, the nascent Islamic state taxed every able-bodied male non-Muslim. "*Jizyah*," a noun which means "compensation," was used to fund the Muslim army and state.<sup>4</sup> Every Muslim was required to pay *zakāt* (one of the Five Pillars of Islam), which went directly to the funding of the Muslim state. Non-Muslims had no religious obligation to pay *zakāt*. They paid the *jizyah* in lieu of *zakāt*, as a tax for living in the state. Professor Abdel Haleem explains:

Etymologically, "*jizya*" means "payment in return," related to "*jaza*," meaning "reward," i.e., in return for the protection of the Muslim state with all the accruing benefits and exemption from military service, and such taxes on Muslims as *zakah*.<sup>5</sup>

The *jizyah* cannot be analogized to a federal or state tax on working citizens in the United States today, because that tax is imposed in a religiously neutral manner. But, the idea of paying a levy in exchange for government services, including defense, is the same.

Accordingly, the *Jizyah* Verse can be circumscribed to its historical context. It is not a general command to force all non-Muslims to convert, nor to pay the tax. Before the *jizyah* can even be implemented, the existence of a true Islamic state is necessary. Most Islamic scholars believe no such state exists today, i.e., the prerequisite is missing. So, it would be entirely wrong-headed to "fight" non-Muslims until they pay *jizyah*. Would it be mistaken to humiliate non-Muslims when they pay the tax? In the past, some Muslim scholars have advocated this kind of obloquy. But, Professor Abdel Haleem counters: "it is clear from the context that they were unwilling to pay, and the clause simply means they should submit to paying the tax."<sup>6</sup>

The other two Sword Verses are collectively referred to as the "Slaying Verses."<sup>7</sup> They are found in two different passages of the Qur'ān, the first of which is *surah* 9, *ayah* 5. However, a proper rendition of this Slaying Verse requires an appreciation of the textual context, that is, of the two *ayah* immediately following it:

"When the [four] forbidden months are over, wherever [i.e., inside or outside the sanctuary in Mecca] you find the polytheists, kill them, seize them, besiege them, ambush them — but if they turn [to God], maintain the prayer, and pay the prescribed alms, let them go on their way, for God is most forgiving and merciful. <sup>6</sup>If any one of the polytheists should seek your

<sup>3</sup> See John L. Esposito, *Jihad: Holy or Unholy War?*, posted at United Nations Alliance of Civilization, [www.unaoc.org/repository/Esposito\\_Jihad\\_Holy\\_Unholy.pdf](http://www.unaoc.org/repository/Esposito_Jihad_Holy_Unholy.pdf). [Hereinafter, Esposito, *Jihad*.]

<sup>4</sup> See Wikipedia, *Jizya*, posted at <http://en.wikipedia.org/wiki/Jizya>.

<sup>5</sup> See QUR'ĀN, *supra*, fn. e at 118.

<sup>6</sup> See QUR'ĀN, *supra*, fn. f at 118.

<sup>7</sup> The discussion of the Slaying Verses is drawn in part from (1) a telephone interview by Jomana Qaddour with Hamed Ghazali, Ph.D., Adjunct Professor at the American Muslim University, Chairman of the Muslim American Schools (MAS) Council of Islamic Schools, and Director of the Houston Qur'an Academy (29 March 2009), and (2) About.com: Islam, posted at [http://islam.about.com/od/terrorism/t/terrorism\\_verse.htm](http://islam.about.com/od/terrorism/t/terrorism_verse.htm).



protection [Prophet], grant it to him so that he may hear the word of God — then take him to a safe place — for they are people with no knowledge. What sort of treaty could these polytheists make with God and His Messenger? As for those with whom you made a treaty at the Sacred Mosque, so long as they remain true to you, be true to them; God loves those who are mindful of Him.<sup>8</sup>

The Slaying Verse refers to the time period after the conquest of Mecca. Thus, it may be read in the context of a peace treaty between Muslims and polytheists (in effect, pagans).<sup>9</sup>

After that period, Muslims may pursue them “wherever” they are found, meaning inside or outside the Sanctuary at Mecca. But, if any polytheist accepts a monotheistic God, prays to Him, and pays alms, then Muslims are to leave them alone, recalling that God Himself is “most forgiving and merciful.” To infer from *surah* 9, *ayah* 5 that Muslims in contemporary times are supposed to launch offensive battles against monotheists of other faiths (e.g., Jews and Christians), or polytheists (who have nothing to do with a peace treaty of 1,400 years ago), is more than just a stretch.

Muslims believe that once Mecca was under Islamic control, God (Allāh) ordered the Prophet and his Companions (*Ṣaḥābah*) to allow only Muslims to live near the *Haram*, or Sacred Mosque. The location long had been considered a holy one, particularly since the time of the Abraham. All non-Muslims were asked to live in an area outside that location, even though some of them likely regarded the location as sacrosanct, too. But the order is said to have been issued and carried out in a peaceful manner. Pagan Meccans, some of whom had fought Muslims and expelled them from their homes previously, resented the Muslims presence in Mecca. Muslims further believe that out of concern violence might erupt, Allāh ordered non-Muslims to leave the *Haram* area. Non-Muslims were given a specific time period to leave the area. Only after that period expired were Muslims permitted to remove them physically.

Specifically, Muslims were not allowed to physically expel them until the passage of the so-called “forbidden months” (*Al-Ashhur Al-Hurum*). This reference may be interpreted in two ways. It could be a specific, historically-contextual period: a cease-fire period spelled out in the peace treaty between Muslims and polytheists. Only after the passage of these months could Muslims forcefully remove non-Muslims, if necessary. Alternatively, the “forbidden months” could be a general, ahistorical period during which fighting is prohibited for Muslims everywhere, every year, unless it is defensive warfare and measures must be taken for the protection of life. The difference between the two readings is irrelevant in respect of one key point. Whether the hiatus in combat was a one-off event, or is a timeless instruction, this Slaying Verse does not provide either the context or reasoning for terrorist attacks, or offensive war, against non-Muslims.

<sup>8</sup> See Qur'an, *supra*, 9:5-7 at 116-117.

<sup>9</sup> See Qur'an, *supra*, fn. c at 116.

The second of the two Slaying Verses, which is the third of the three Sword Verses, is in *surah* 2, *ayah* 191. To understand it properly, it must be read in conjunction with the two *ayah* preceding it, and the two *ayah* following it:

<sup>190</sup>Fight in God's cause against those who fight you, but do not overstep the limits: God does not love those who overstep the limits. <sup>191</sup>Kill them wherever you encounter them, and drive them out from where they drove you out, for persecution is more serious than killing. Do not fight them at the Sacred Mosque unless they fight you there. If they do fight you, kill them — this is what such disbelievers deserve — <sup>192</sup>but if they stop, then God is most forgiving and merciful. <sup>193</sup>Fight them until there is no more persecution, and [your] worship is devoted to God. If they cease hostilities, there can be no [further] hostility, except toward aggressors. <sup>194</sup>A sacred month for a sacred month: violation of sanctity [calls for] fair retribution. So if anyone commits aggression against you, attack him as he attacked you, but be mindful of God, and know that He is with those who are mindful of Him.<sup>10</sup>

Ostensibly, the italicized *ayah* 191 justifies terrorist acts and random slaying of infidels. That is precisely the egregiously erroneous meaning many extremists impart. However, the vast majority of Muslims argue the verse was not intended to be plucked out of context and read in isolation. Islamic scholars have repeatedly emphasized the verse must be read in conjunction with *ayah* 190 and 193-194 for its intended meaning to be clear.

The scholars generally agree that *ayah* 190 sanctions only defensive killing, based on the plain meaning of its language, “fight . . . those who fight you.” Additionally, this *ayah* may be said to grant Muslims a permission that is historically time-bound. They can defend themselves forcefully, as a last resort, against the attacks of the *Quraysh* tribe, which kicked them out of their Meccan homes, stole their property, and took their goods as their own. Indeed, Muslims believe that before the revelation of this *ayah*, God (Allāh) had not given Muslims the right to strike back. Muhammad prohibited them from doing so until he had authority from Allāh to authorize a defensive struggle.

The next *ayah*, which extremists misunderstand and manipulate, reinforces the point that God (Allāh) sanctioned defensive attacks by Muslims, and allowed them the right to regain their liberty and property rights after they had been expelled from Mecca. In this same verse though, Allāh mentions that fighting opponents in the Sacred Mosque (the *Ka'ba*) is prohibited, unless absolutely necessary and the aggressors, the *Quraysh*, attack them there. Muslims believe Allāh despises oppression and injustice. Removal of these conditions is important, but so too are the means for removal. In the historical context of early Islam and Mecca, Muslims were not asked to sit and sulk at their situation. They were called to preach against it, and if peaceful measures failed, to take back physically their property. Muslims further believe if they had not been confronted with resistance, then surely Allāh would not have ordered their retaking of property by force. That is, only because they endured violence could they resort to force themselves.

<sup>10</sup> See Qur'an, *supra*, 2:190-194 at 21-22.

Despite the permission granted in *ayah* 191 to fight a defensive battle, *ayah* 192 immediately follows with an important message: if they do not fight you or resist your right to take back your property, then you are not allowed to fight them back. Herein lies a hallmark principle of justice — the rule of proportionality: only engage in force that is commensurate and sufficient to regain lost rights. (This rule is repeated in *surah* 22, *ayah* 60.) *Ayat* 193-194 conclude by emphasizing eradication of injustice, specifically defined here to mean religious persecution against the then-emerging Islamic faith and nascent Islamic state. Muslims are instructed not be hostile toward anyone who was not actively hostile and oppressive towards them. Further, Muslims believe that at no point during the life of the Prophet did Muslims force non-Muslims to convert from another faith.<sup>11</sup>

In sum, *surah* 2, *ayah* 190-194 are set in the context of religious persecution against Muslims in the early days of Islam. The counsel this passage offers is to:

- (1) Fight in self-defense, i.e., in defense of the faith, if there is no peaceful means to counter the aggression,
- (2) Follow a rule of proportionality in such a fight,
- (3) Cease fighting, and thereby discontinue defensive attacks, when the oppression is eliminated or the aggressor sues for peace.

This second of the Slaying Verses is not a timeless, universal invitation for Muslims to kill non-Muslims.

Overall, understanding the true letter, context, and spirit of the Sword Verses highlights the distortion rendered to them by Islamic extremists. Perverting the message of Islam, they turn these passages into a call for "*jihad*," which itself is a term they torture. In truth, the narrative understood and accepted by most Muslims about the Sword Verses is a historically contextual one: early Muslims were not permitted to attack members of the *Quraysh* tribe without justification. It was that tribe, from which the Prophet hailed, which declared Muhammad an enemy of their society once he began to preach Islam openly. The *Quraysh* made life in Mecca so miserable as to force Muhammad and his followers to leave for Medina, in the *Hijra*. They treated harshly Muslims who lacked the financial means to migrate, or whose health would not permit a move. Thus, the majority of Muslims believe in these unique circumstances, God (Allāh) permitted the first Islamic community (*ummah*) and their fledgling state, led by Muhammad, to fight those who fought them. Even if the Sword Verses are taken out of historical context, and applied to modern times, the prerequisites they embody are critical. A Muslim state is not allowed to wage war offensively against non-Muslims. Any defensive struggle can occur only within the limits set by the Verses. Even further from the Sword Verses are violent actions by extremists to kill innocent non-Muslims.

Is there a problem with interpreting the Sword Verses, or indeed any Qur'anic passage, in its historical context and restricting it to a particular time and place? The question suggests the answer: yes, because this mode of interpretation detracts from the timeless and universality of the sacred text. To explain away a controver-

sial passage as pertinent only to unique circumstances of yesteryear is to call into question the enduring value of the text and its appeal to humanity. It also is to commit the Orientalist Fallacy, that is, to view the revelation of God (Allāh) to the Prophet as a response to particular cultural, political, religious, and social problems during the time of Muhammad.

Moreover, if the Sword Verses are to be explained contextually, then why not other passages, too? Where is the line between an *ayah* circumscribed by time and place and an *ayah* for all times and places? What criteria should be used to make this delineation? Who should establish the criteria and make it? These questions are especially troublesome if the Qur'an is understood to be the literal, inerrant Word of Allāh. They provoke thought, debate, and even disagreement, all of which can challenge a literalist approach. Catholic Christians are familiar with this problem, namely, a slippery slope of exegesis of Biblical passages with insufficient structure, connection, and guidance. The result is deviant, and sometimes dangerous, interpretations. However, Catholic Christianity holds that while the Bible contains the inspired Word of God, not every verse in it is the literal Word of God. It is correct to delimit some Biblical passages according to historical time and geographic place, but to appreciate others as boundless.

## [B] Other Aggressive Passages

Aside from the controversial Sword Verses, there are a number of aggressive verses in the Qur'an that relate to the Islamic Law of War. They are as follows:

- *Surah* 2, *ayah* 216:

[Say, Prophet:] "Fighting is ordained for you, though you dislike it. You may dislike something although it is good for you, or like something although it is bad for you: God knows, and you do not."<sup>12</sup>

- *Surah* 2, *ayah* 217:

They ask you [Prophet] about fighting in the prohibited month [*Ramadhān*]. Say, "Fighting in that month is a great offense, but to bar others from God's path, to disbelieve in Him, prevent access to the Sacred Mosque, and expel its people, are still greater offenses in God's eyes: persecution is worse than killing." They will not stop fighting you [believers] until they make you revoke your faith, if they can. If any of you revoke your faith and die as disbelievers, your deeds will come to nothing in this world and the Hereafter, and you will be inhabitants of the Fire, there to remain.<sup>13</sup>

- *Surah* 5, *ayah* 33-34:

<sup>33</sup>Those who wage war against God and His Messenger and strive to spread corruption in the land should be punished by death, crucifixion, the amputation of an alternate hand and foot, or banishment from the land: a disgrace for them in this world, and then a terrible punishment in the

<sup>11</sup> See JOHN L. ESPOSITO, *UNHOLY WAR: TERROR IN THE NAME OF ISLAM* 66 (New York, New York: Oxford University Press, 2002).

<sup>12</sup> QUR'AN, *supra*, 2:216 at 24.

<sup>13</sup> QUR'AN, *supra*, 2:217 at 24.



Hereafter, <sup>34</sup>unless they repent before you overpower them: in that case bear in mind that God is forgiving and merciful.<sup>14</sup>

- *Surah 5, ayat 36-37:*

<sup>36</sup>If the disbelievers possessed all that is in the earth and twice as much again and offered it to ransom themselves from torment on the Day of Resurrection [Judgment], it would not be accepted from them: they will have a painful torment. <sup>37</sup>They will wish to come out of the Fire but they will be unable to do so: theirs will be a lasting torment.<sup>15</sup>

- *Surah 5, ayah 51:*

You who believe, do not take the Jews and Christians as allies: they are allies only to each other. Anyone who takes them as an ally becomes one of them — God does not guide such wrongdoers. . . .<sup>16</sup>

- *Surah 8, ayat 12-14:*

<sup>12</sup>Your Lord revealed to the angels: "I am with you: give the believers firmness; I shall put terror into the hearts of the disbelievers. Strike above their necks and strike their fingertips." <sup>13</sup>That was because they opposed God and His Messenger, and if anyone opposes God and His Messenger, God punishes them severely — <sup>14</sup>That is what you get! Taste that!" — and the torment of the Fire awaits the disbelievers.<sup>17</sup>

- *Surah 8, ayat 38-40:*

<sup>38</sup>[Prophet], tell the disbelievers that if they desist their past will be forgiven, but if they persist, they have an example in the fate of those who went before. <sup>39</sup>[Believers], fight them until there is no more persecution, and [your] worship is devoted to God alone: if they desist, then God sees all that they do, <sup>40</sup>but if they pay no heed, be sure that God is your protector, the best protector and the best helper.<sup>18</sup>

- *Surah 8, ayat 60-62:*

<sup>60</sup>Prepare whatever forces you [believers] can muster, including warhorses, to frighten off God's enemies and yours, and warn others unknown to you but known to God. Whatever you give in God's cause will be repaid to you in full, and you will not be wronged. <sup>61</sup>But if they incline towards peace, you [Prophet] must also incline towards it, and put your trust in God: He is the All Hearing, the All Knowing. <sup>62</sup>If they intend to deceive you, God is enough for you: it was He who strengthened you with His help.<sup>19</sup>

- *Surah 8, ayah 65:*

<sup>14</sup> Qur'an, *supra*, 5:33-34 at 71.

<sup>15</sup> Qur'an, *supra*, 5:36-37 at 71.

<sup>16</sup> Qur'an, *supra*, 5:51 at 73.

<sup>17</sup> Qur'an, *supra*, 8:12-14 at 111.

<sup>18</sup> Qur'an, *supra*, 8:38-40 at 112.

<sup>19</sup> Qur'an, *supra*, 8:60-62 at 114.

Prophet, urge the believers to fight: if there are twenty of you who are steadfast, they will overcome two hundred, and a hundred of you, if steadfast, will overcome a thousand of the disbelievers, for they are the people who do not comprehend.<sup>20</sup>

- *Surah 22, ayat 39-40:*

<sup>39</sup>Those who have been attacked are permitted to take up arms because they have been wronged — God has the power to help them — <sup>40</sup>those who have been driven unjustly from their homes only for saying "Our Lord is God." If God did not repel some people by means of others, many monasteries, churches, synagogues, and mosques, where God's name is much invoked, would have been destroyed. God is sure to help those who help His cause — God is strong and mighty. . . .<sup>21</sup>

- *Surah 47, ayat 4-5:*

<sup>4</sup>When you meet the disbelievers in battle, strike them in the neck, and once they are defeated, bind any captives firmly — later you can release them by grace or ransom — until the toils of war have ended. That [is the way]. God could have defeated them Himself if He had willed, but His purpose is to test some of you by means of others. He will not let the deeds of those who are killed for His cause come to nothing; <sup>5</sup>He will guide them and put them into a good state. . . .<sup>22</sup>

- *Surah 61, ayah 4:*

. . . God truly loves those who fight in solid lines for His cause, like a well-compacted wall.<sup>23</sup>

Like the Sword Verses, the above-quoted passages contribute to a widespread belief, or prejudice that Islam is an inherently violent religion, or at least prone to violence.

However, bifurcation of the world into two camps did not first begin with the rhetoric of President George W. Bush's administration following the terrorist attacks of 11 September 2001. Self-evidently, the tone of the above-quoted Qur'ānic passages, like the Sword Verses, is harsh. There is a clear division of "us-versus-them," an unmistakable line that "if you are not for us, then you are against us." The contrast between these passages, on the one hand, and the New Testament on the other, is stark and troubling. Even in respect to the Old Testament, none of the above Qur'ānic passages has an optimistic prophecy like that of Isaiah, of nations beating their swords into plowshares, their spears into pruning hooks, and not training for war anymore.<sup>24</sup> The contrast adds fuel to the stereotypical fire concerning Islam and violence. A similar contrast can be drawn with the scriptures

<sup>20</sup> Qur'an, *supra*, 8:65 at 114.

<sup>21</sup> Qur'an, *supra*, 22:39-40 at 212.

<sup>22</sup> Qur'an, *supra*, 47:4-5 at 331.

<sup>23</sup> Qur'an, *supra*, 61:4 at 370.

<sup>24</sup> See *The Book of Isaiah*, 2:4, in *THE CATHOLIC STUDY BIBLE* 881 (New York, New York: Oxford University Press, 1990, New American Bible trans.). [Hereinafter, *BIBLE*.]

of Buddhism, in which there is no delineation between "you" and "me," because there is no concept of the "self" (i.e., the "self" has no permanent identity). Rather, there is a oneness to beings, all of whom are related, and consequently, each person must guard against attachment to the material world and avoid the illogic of hating another. In brief, the sense of peace, harmony, and tranquility conveyed by the New Testament or Buddhist texts simply is lacking in the passages.

Yet, without apologizing for the Qur'anic passages, the analysis of them must not end here; otherwise, the stereotype remains without a full assessment. First, there is an irony that the same misimpression would be conveyed about Catholic Christianity if certain passages were plucked out of the Old Testament. "Isn't Catholicism a violent religion?" it would be asked, if all the stories of battles and conquest, and spears and swords (without the ploughshares), were the end of the story. But, they are not. The above-quoted Qur'anic passages, if read literally, blindly, and in isolation, present a one-sided picture of the Islamic Law of War. That is no less true of certain Old Testament passages, which if read strictly, uncritically, and out of context, convey a misleading sense of the Christian approach to war.

Second, devoting a modicum of modern legal construction skills to the Qur'anic passages suggests how they can be misconstrued.<sup>25</sup> *Surah 2, ayah 217*, and *surah 47, ayat 4-5* are not incitements to Muslims to commence offensive attacks against non-Muslims. *Surah 2, ayah 217* is a declaration about the risk of apostasy. This verse also reinforces a message in one Sword Verse, *surah 2, ayah 191*. As Professor Abdel Haleem states:

To persecute people for believing in God is a worse offense than for the aggrieved party to fight back in the prohibited month. This further explains verse 191.<sup>26</sup>

Similarly, *surah 47, ayah 4* assumes a battle with disbelievers, but does not say Muslims should start the fight. And, it specifies release of conquered disbelievers first, as a preferred method for dealing with them, over release by ransom.<sup>27</sup> *Surah 8, ayat 38-40* and *ayah 60-62* may be understood in a similar vein. The context is persecution and preparation for it, and *surah 8, ayah 39* is redolent of one of the Sword Verses, *surah 2, ayat 191-193*.<sup>28</sup> These passages suggest persuasion, not

<sup>25</sup> A number of other passages in the Qur'an, not quoted above, simply do not amount to anything close to a call to arms for Muslims to engage in violent campaigns against non-Muslims. See, e.g., 9:111, 9:113, 21:11-15, 48:29, 55:46-58, 61:11-13, and 111:1-3. Such passages tend to be strong admonitions against disbelief and/or doing evil, reminders of a basic tenet of the Qur'an, namely, which is that a Day of Judgment is coming, or metaphorical descriptions of Paradise for believers. Arguably, they are especially addressed to pagans at the time they were revealed. *Surah 33, ayah 50*, explains that Muhammad is permitted to marry a slave God (Allah) assigned to him as a result of a war. Plainly, it is circumscribed to that context, and on certain occasions such marriages were done to bolster peace with other tribes. Additionally, *surah 8, ayah 67* is an outright bar for any prophet to take captives before conquering a territory, from which the inference may be drawn that hostage-taking in the territory of another is wrong.

<sup>26</sup> See Qur'an, *supra*, fn. a to 2:217 at 24.

<sup>27</sup> See Qur'an, *supra*, fn. a to 47:4 at 331.

<sup>28</sup> See Qur'an, *supra*, fn. b to 8:39 at 112.

violence, as a first-best solution. Notably, they exhort Muslims to put their trust not in armaments, but in God (Allah).

*Surah 2, ayah 36-37* and *surah 8, ayah 12-14* are not calls to arms, but hellfire-and-brimstone warnings against atheism in general, and — arguably — disbelief in Islam. Both passages explicitly presume it is God (Allah) who judges. By inference, man is not to put himself in an equal position. As for *surah 2, ayah 216*, "fighting" that is "ordained" for Muslims can refer to the *jihād al akbar*, i.e., the struggle to discern the Will of God (Allah) and conform to it, which is an internal struggle with one's own emotions and passions. The same remark holds for *surah 61, ayah 4*, and *surah 8, ayah 65*. Additionally, *surah 61, ayah 4* may be read as a metaphor not to lose courage in the internal struggle. The gist of *surah 8, ayah 65* is that Truth prevails. It is redolent of the Catholic Christian adage that the Truth is the Truth even if only one person believes it, and falsehood is falsehood even if 100 people believe it. Similarly, *surah 5, ayah 33-34* is not about war in the conventional sense. It is akin to a Criminal Law statute establishing crimes against society (*hirabah*), particularly highway robbery (*kat' al-tariq*).

Read according to the plain meaning of the word "ally" rendered in modern times, the language of *surah 5, ayah 51* suggests Muslims cannot be "allies" with Jews and Christians. However, the reference is to "those who are against the Muslim camp," and bases his conclusion on the subsequent *ayah* up to verse 59.<sup>29</sup> Moreover, *ayah 51* is a rule of non-discrimination, which is made clear by *surah 4, ayah 144*. Muslims are not to become allies with Jews and Christians in preference to other Muslims. Even as such, the *surah 5, ayah 51* is not an incitement to wage war with the other faiths. As for *surah 22, ayat 39-40*, plainly this passage is about self-defense. Moreover, *ayah 40* specifically refers favorably to "churches" and "synagogues," including them with mosques as places where God is invoked, and therefore indicating why they are not "destroyed."

### [C] Passages Championing Non-Violence and Reason

No doubt the language and tone of the above-quoted passages are harsh. But, to use an American colloquial expression, that does not make them "fighting words." Moreover, these passages ought to be juxtaposed with other Qur'anic verses that champion non-violence and reason. They include:

- *Surah 2, ayah 62*:

The [Muslim] believers, the Jews, the Christians, and the Sabians [a monotheistic religious community] — all those who believe in God and the Last Day and do good — will have their rewards with their Lord. No fear for them, nor will they grieve.<sup>30</sup>

- *Surah 2, ayah 256*:

<sup>29</sup> See Qur'an, *supra*, fn. a to 5:51 at 73.

<sup>30</sup> Qur'an, *supra*, 2:62 at 9.



There is no compulsion in religion: true guidance has become distinct from error, so whoever rejects false gods and believes in God has grasped the firmest hand-hold, one that will never break.<sup>31</sup>

- *Surah 5, ayah 69:*

The [Muslim] believers, the Jews, the Sabians, and the Christians — those who believe in God and the Last Day and do good deeds — will have nothing to fear or to regret.<sup>32</sup>

- *Surah 10, ayah 99-100:*

<sup>99</sup>Had your Lord willed, all the people on the earth would have believed. So can you [Prophet] compel people to believe? <sup>100</sup>No soul can believe except by God's will, and He brings disgrace on those who do not use their reason.<sup>33</sup>

- *Surah 16, ayah 125-128:*

<sup>125</sup>[Prophet], call people to the way of your Lord with wisdom and beautiful teaching. Argue with them in the most courteous way, for your Lord knows best who has strayed from His way and who is rightly guided. <sup>126</sup>If you [people] have to respond to an attack, make your response proportionate, but it is best to stand fast. <sup>127</sup>So [Prophet] be steadfast: your steadfastness comes only from God. Do not grieve over them; do not be distressed by their scheming, <sup>128</sup>for God is with those who are aware of Him and who do good.<sup>34</sup>

- *Surah 41, ayah 34-36:*

<sup>34</sup>Good and evil cannot be equal. [Prophet], repel evil with what is better and your enemy will become as close as an old and valued friend, <sup>35</sup>but only those who are steadfast in patience, only those who are blessed with great righteousness, will attain to such goodness. <sup>36</sup>If a prompting from Satan should stir you, seek refuge with God: He is the All Hearing and All Knowing.<sup>35</sup>

- *Surah 52, ayah 44-45:*

<sup>44</sup>Even if they [the disbelievers] saw a piece of heaven falling down on them, they would say, "Just a heap of clouds," <sup>45</sup>so leave them, Prophet, until they face the Day when they will be thunderstruck.<sup>36</sup>

- *Surah 52, ayah 47-48:*

<sup>31</sup> Qur'an, *supra*, 2:256 at 29.

<sup>32</sup> Qur'an, *supra*, 5:69 at 74.

<sup>33</sup> Qur'an, *supra*, 10:99-100 at 135.

<sup>34</sup> Qur'an, *supra*, 16:125-128 at 174.

<sup>35</sup> Qur'an, *supra*, 41:34-36 at 309.

<sup>36</sup> Qur'an, *supra*, 52:44-45 at 346.

<sup>47</sup>Another punishment awaits the evildoers, though most of them do not realize it. <sup>48</sup>Wait patiently [Prophet] for your Lord's judgment: you are under Our watchful eye.<sup>37</sup>

- *Surah 73, ayah 9-14:*

<sup>9</sup>He is Lord of the east and west, there is no god but Him, so take Him as your Protector, <sup>10</sup>patiently endure what they [the disbelievers in Mecca] say, ignore them politely, <sup>11</sup>and leave to Me those who deny the truth and live in comfort. Bear with them for a little while. <sup>12</sup>We have fetters, a blazing fire, <sup>13</sup>food that chokes, and agonizing torment in store for them <sup>14</sup>on the Day when the earth and the mountains will shake. . . .<sup>38</sup>

Evidently, these passages are humble and pacifist in tone. True, there is still a bifurcation of the world into believers and non-believers. But, the universe of believers is not an exclusively Islamic one. And, the strategy for dealing with this division is non-violent.

*Surah 2, ayah 62* and *surah 5, ayah 69* are inclusive. They assure Muslims, Christians, and Jews that if they follow their monotheistic faith and do good works, they will be rewarded with eternal life. None of these verses provides any basis for attacking the other faiths. *Ayah 256* from that *surah* is the famous statement against forcible conversion. *Surah 10, ayah 100* expressly signifies the importance of reason, going so far as to indicate God (Allāh) will punish those who fail to use this faculty.

The strategy of non-violence is clear in *surah 16, ayah 125-128*. This beautifully-worded passage stresses courtesy in discourse, a non-judgmental attitude, and violence only in self-defense — and then only in keeping with the rule of proportionality. In *surah 41, ayah 34-36*, God (Allāh) tells the Prophet not to return evil for evil, but rather evil for good, a precept in the New Testament, in *The Letter to the Romans* from Saint Paul:

<sup>17</sup>Do not repay anyone evil for evil. . . . <sup>21</sup>Do not be conquered by evil but conquer evil with good.<sup>39</sup>

Muhammad is promised that following the path of goodness leads to the conversion of an enemy to a trusted friend, and admonished that taking this course means resisting devilish temptations. Along with *surah 10, ayah 100*, *surah 16, ayah 125-128* and *surah 41, ayah 34-36* are firm textual bases for the proposition Islam has space for both faith and reason.

Likewise, in *surah 52, ayah 44-45* and *47-48*, and in *surah 73, ayah 9-14* God (Allāh) instructs Muhammad to be "patient" and "polite" with people who do not believe in the authenticity of the Message, and to leave Final Judgment to the Almighty. The non-violent counsel of *surah 52, ayah 44-45* is a response to a

<sup>37</sup> Qur'an, *supra*, 52:47-48 at 346.

<sup>38</sup> Qur'an, *supra*, 73:9-14 at 395.

<sup>39</sup> See *The Letter to the Romans*, 12:17, 21, in BIBLE, *supra*, at 246. See also *id.*, *The Third Letter of John*, 1:11 at 395 (stating: "Beloved, do not imitate evil but imitate good.")

challenge Meccans made to the Prophet: "to bring the heavens down on them, if he were truly God's Messenger."<sup>40</sup>

### [D] Bottom Line and Just War Theory

From the above-quoted passages, and considering the Sword Verses in light of them, an obvious question arises: in aggregate, how are they to be understood, i.e., what is the "bottom line"? This same question can be asked of Biblical passages on war and violence. The Old Testament is replete with aggressive verses, but the New Testament is not. Put in contemporary American legal parlance, it is clear to Catholic Christians that the latter supersedes the former to the extent of a true inconsistency. Put in religious terms, the New Covenant of the Gospels, namely, the Two Great Commandments, to love God, and to love one's neighbor, obviously call for non-violence in all but the most extreme, defensive cases. It replaces all the old covenants. Accordingly, Catholics are exhorted to know their faith with clarity, defend it with dignity, and share it with charity. Violence, particularly when it is offensive in nature, is antithetical to dignity and charity.

To be sure, there are cases in which violence, used defensively, may be legitimate. But, such cases require rigorous analysis under what is known as "Just War Theory" (*Bellum Iustum*), as worked out by Saint Augustine (354-430 A.D.), Saint Thomas Aquinas (1225-1274), and others. The *Catechism of the Catholic Church* synthesizes the criteria for the morally legitimate use of self-defense by military force:

- the damage inflicted by the aggressor on the nation or community of nations must be lasting, grave, and certain;
- all other means of putting an end to it must have been shown to be impractical or ineffective;
- there must be serious prospects of success;
- the use of arms must not produce evils and disorders graver than the evil to be eliminated. The power of modern means of destruction weighs very heavily in evaluating this condition.<sup>41</sup>

Thus, the analysis from a Catholic Christian perspective typically boils down to whether defense of the faith by violent means is necessary as a last resort, or whether there other non-violent means that can be pursued, and assurance that any violence is proportionate to the initial infraction and enough to end it.

The question about what is the "bottom line" is not so easy to resolve in Islamic Law. There is no analogous "old" and "new" covenant, nor any clear indication in the Qur'an itself that one verse is an exception to another, or circumscribes another. Forgiveness and mercy are prime virtues. But, the Qur'an contains no unequivocal injunction to "turn the other cheek" in the context of persecution. Weighing all of the relevant verses becomes a matter of Qur'anic interpretation.

<sup>40</sup> Qur'an, *supra*, fn. c to 52:44 at 346.

<sup>41</sup> CATECHISM OF THE CATHOLIC CHURCH § 2309 at 556 (United States Catholic Conference, Inc., Washington, D.C.: Libreria Editrice Vaticana, 2d ed. 1997).

Different Muslim *ulema* and *fukahā'* have different opinions. That is not to say all such opinions are equally good and well-reasoned, any more than views on Just War Theory among Catholic scholars are equally persuasive. To add to the scope and difficulty of the enterprise, the Qur'anic passages need to be read in light of non-prophetic utterances of Muhammad (*hadith*).

## § 48.02 OVERVIEW

### [A] Shaybānī's 8th Century *Siyyar*, But an Inchoate Scheme

The teachings of Islam do not provide an all-encompassing picture of International Law. The *Shari'a* does not cover certain topics that would be found in a conventional, contemporary, non-Muslim textbook on Public International Law, such as treaty interpretation, statehood, jurisdiction among states, and international organizations. International Law traditionally involves sovereign state actors, a topic largely unaddressed by the *Shari'a*. To be sure, recent developments in International Relations (IR) theory highlight the increasingly prominent role of non-state actors, such as multinational corporations and non-governmental organizations, and challenge the idea of sovereignty itself. But, even IR theory acknowledges the often pre-eminent role of state actors. There is a body of theory in the *Shari'a* on Constitutional Law matters. But, this theory has not been translated extensively into actual organization and operation. Thus, as a practical matter, Islamic Law has not dealt much with the nature and operation key of constituent elements in the international legal order — sovereign states.

However, the *Shari'a* does deal with a key topic covered in a conventional text, namely, the Law of War. That coverage is noteworthy because war is the oldest and most challenging problem in the international legal arena. It also is significant because it long pre-dates scholarship in Europe, including by Alberico Gentili (1552-1608 A.D.), Hugo Grotius (1583-1645), and Francisco de Vitoria (1492-1546), who are conventionally credited with laying the foundations for Public International Law.<sup>42</sup> Indeed, a provocative 2005 book, *How the Catholic Church Built Western Civilization*, notes Francisco de Vitoria, a Catholic Priest and Professor, "earned the title of father of international law."<sup>43</sup> Yet, in the 8th century, an eminent *Hanafi* School scholar, Muhammad ibn al Hasan al Shaybānī (749/50-805), wrote the first major treatise on the Islamic Law of Nations.

The title of Shaybānī's treatise is "*Kitab Al Siyyar Al Kabir*," or simply "*Siyyar*," and this work has been translated into English with commentary.<sup>44</sup> Shaybānī was a student of Imām Hanīfa and Abū Yusuf. The *Siyyar* carefully considers the conditions of war and peace, sets out principles for the conduct of military action and peace negotiations, and elaborates on the rules for treating non-Muslims in

<sup>42</sup> See, e.g., Hugo Grotius, WIKIPEDIA, posted at [http://en.wikipedia.org/wiki/Hugo\\_Grotius](http://en.wikipedia.org/wiki/Hugo_Grotius) (saying the three scholars "laid the foundations for international law, based on natural law").

<sup>43</sup> THOMAS WOODS, *HOW THE CATHOLIC CHURCH BUILT WESTERN CIVILIZATION* 5-6 (Washington, D.C.: Regenery, 2005).

<sup>44</sup> See THE ISLAMIC LAW OF NATIONS — SHAYBĀNĪ'S *SIYYAR* (8th century A.D., Baltimore, Maryland: The Johns Hopkins Press, 1966) (Majid Khadduri, trans.).



Muslim-governed areas. Thus, as in many other fields of law, in Public International Law, European and American scholars are in considerable debt to their Muslim predecessors.

The impulse for Shaybānī to write the treatise was an evolution in Islam itself, from enlargement to consolidation. From inception, Islam was an expansionist religion, with adherents thinking of a permanent state of war between the Islamic and non-Islamic world. But, following the *Rashidun* Era and *Umayyad* Caliphate, it became apparent constant combat was not sustainable. Thus, writing during the *Abbasid* Caliphate, Shaybani set out to systematize rules of war and peace for a consolidated Islamic Empire.

Accordingly, the focus of the *Shari'a* in respect of International Law is on the Law of War, particularly wars of conquest. There are, of course, many other kinds of wars or armed conflict, such as defensive wars, civil wars, insurgencies, and rebellions. Significantly, Islamic Law does not envision war between Muslim countries.<sup>45</sup> True, Muslim countries have gone to war with one another. The 1980-88 Iran—Iraq War is one of several instances. Nevertheless, Islam foresees only a holy war (*jihād*). From the Islamic Law of War, a number of important doctrines arise. Most fundamentally, the Islamic perspective begins with the bifurcation of the world into *dār-al-Islām* (abode of peace) and *dār al-harb* (abode of war). As these two spheres of peace and war are unraveled, the principles of war and governance of conquered peoples begin to shape the landscape of what is now commonly called "Public International Law."

### [B] Bifurcation and Framework Questions

Obviously, war is hardly the only controversy in the international legal arena. The *Shari'a* is inchoate in that it "comes at" International Law from one particular angle, albeit an important one. One irony here should be noted at the outset: despite the attention Islamic Law pays to wars of conquest, the *Shari'a* rules on war have not always been applied in practice.<sup>46</sup> (Or, to put the point more charitably, application of the rules has not always been uniform.) Some wars have witnessed respect for the rules, while others revealed grave breaches of them. During the Crusades, Saladin gave medical help to his opponent, Richard the Lionheart of England. In the Iran-Iraq War, each side treated the other in the cruelest of manners. In fairness to orthodox Islamic doctrine, what set of rules is without exception, and when is a set of rules followed so rigidly to make circumnavigation impossible or impracticable? Further, some concepts in the *Shari'a* have succumbed to modernity in the face of issues not envisioned during their formation.

Ostensibly, the classical approach of Islam to the Law of War is straightforward. The *Shari'a* divides the world into just two categories:

- *Dār-al-Islām* (land of peace), and

- *Dār al-harb* (land of war).

Here, as with some Qur'anic passages, is an unequivocal separation of "us" from "them." Another irony is the mirror image of fundamentalist Islamic and certain neo-conservative American thinking: both convey the message that one is either "for us" or "against us."

However, carefully delving into the spheres of peace and war reveals that the rules — and their application — are not susceptible to a simple division. Moreover, there are contemporary Muslim scholars, like Tariq Ramadan in *Western Muslims and the Future of Islam* (2004), who argue Islam must move past this centuries-old bifurcation. Professor Ramadan says it is foolishly confrontational and stupidly simplistic in an era of globalization. Rather, Muslims should embrace the religious freedoms and protections guaranteed in western democracies. His thesis meets with resistance from some *ulema* and *fukahā'* who believe modification of the substance or application of rules is heresy. These purists believe Islam should not evolve with an ever-changing world. Rather, the ever-changing world should evolve to conform to true Islamic teachings.

A set of questions, when answered, yields a framework in which to organize, clarify, and synthesize the Islamic Law of War and appreciate its subtleties. These questions reflect the methodology of Professor John Kelsay, in *Islam and War* (1993):

- Who must fight?
- When must Muslims fight?
- Against whom must Muslims fight?
- How may the enemy (non-Muslims, or possibly Muslim rebels) be dealt with?
- Where do Muslims find the enemy (e.g., outside in the *dār al-harb*, or within the ranks in *dār-al-Islām*)?
- By what means is it permissible to pursue military success?<sup>47</sup>

Perhaps a final question, which no doubt receives some treatment in answering the preceding questions is: How is success defined?

In response to these questions, the common denominator is Qur'anic legislation seeks to put the Law of War on a religious and ethical footing. This legislation establishes moral norms, according to which certain kinds of behavior in the extreme conditions of war are allowed (*mubāh*), and other actions or omissions are forbidden (*ḥarām*).

<sup>45</sup> See JOSEPH SCHACHT, AN INTRODUCTION TO ISLAMIC LAW *id.* 2 at 130 (Oxford, England: Oxford University Press (Clarendon Paperbacks) 1982). [Hereinafter, SCHACHT.]

<sup>46</sup> See SCHACHT, *supra*, at 76.

<sup>47</sup> JOHN KELSAY, ISLAM AND WAR 60 (Knoxville, Tennessee: Westminster/John Knox Press, 1993). [Hereinafter, KELSAY.]

### § 48.03 BIFURCATION OF WORLD

The starting point for the Islamic Law of War is to recall that Islam divides the entire world into two parts. This division follows logically from, but is not specifically laid out in, certain Qur'anic passages, nor is it explicit in the *hadith*. Rather, it was *Imām* Abū Hanīfa who first suggested the division, and later Ibn Taymiyya who elaborated on it (through a treatise and edict) in response to Mongol invasions of the 13th and 14th centuries. In other words, the division crystallized during the early Islamic era, when the Gate to *Ijtihād* indisputably was open, and a few centuries thereafter.

The bifurcation is between abodes of peace and war, or Muslims and non-Muslims, respectively. But, it must be emphasized some contemporary Muslim scholars reject this distinction as having no firm foundation in the two primary sources of Islamic law. They argue it is irrelevant in an era of globalization, with protections afforded by International and Human Rights Law, and shudder at its sinister potential for violence.

#### [A] *Dār al-Islām* (Abode of Peace — Muslims)

The "*dār al-Islām*" is the abode, or home, of Muslims. Sometimes, the term used is "*dār es-salam*," which means "household of peace." In these geographical areas (i.e., countries, lands, or regions), Muslims can be confident of security and protection. However, in the *dār al-Islām*, there are three kinds of non-Muslims, too:

- (1) *Dhimmis* (sometimes called "Zimmis"). These people are "those in custody." In particular, they are persons in custody who agree to pay the "*jizyah*," or tax (tribute), which is based on *surah* 9, *ayah* 29 of the Qur'ān, and the *hadith*.
- (2) People of the *Hudna*. "*Hudna*" literally means a "truce," "armistice," or "cease fire" of a temporary nature. The term also can mean "calm" or "quiet." Thus, People of the *Hudna* are ones who signed a peace treaty with Muslims after being defeated by them in War.
- (3) A *Musta'min*, or Protected One. This person technically is an enemy alien, but he or she has been given a temporary safe-conduct, or safe-passage, permit (*amān*). Typically, a *musta'min* is one who comes into an Islamic country as a messenger, merchant, visitor, or student wanting to learn more about Islam.

The legal rights and obligations of a *musta'min* are the same as those of a *dhimmi*, with one exception. A *musta'min* need not pay any tribute to the appropriate Muslim government for one year. However, if a *musta'min* stays in the Islamic territory for longer than a year, he or she becomes a *dhimmi*, and thus is liable for the *jizyah*.

### [B] *Dār al-Ḥarb* (Abode of War — Non-Muslims)

The *dār al-ḥarb* is the home of non-Muslims. Literally, it is the abode of war, that part of the world hostile to Muslims. In these geographical areas (again, countries, lands, or regions), non-Muslims govern Muslims, whereas in the *dār al-Islām*, it is the reverse. Worse yet, from an Islamic perspective, in the *dār al-ḥarb*, non-Muslims exercise authority over Muslims in a way that does not ensure the safety and security of Muslims. Thus, the *dār al-ḥarb* is any realm in which people resist or otherwise stand in opposition to the legitimate goals of Islam.<sup>48</sup> Historically, this opposition has led to "war with a view [to] compelling nonbelievers to embrace [Islamic] doctrine. . . ."<sup>49</sup>

### § 48.04 ANSWERS TO FRAMEWORK QUESTIONS

#### [A] Who Must Fight?

Each Muslim has the duty to fight for Islamic values. The urgency of the situation defines the level of participation expected, i.e., what "fight" means in practice. It could be a *jihād al-akbar*, connoting an internal struggle to discern the Will of God, or it could be a *jihād* in the sense of a holy war. After all, in the realm of *dār al-ḥarb*, a set of values and obligations offensive and antithetical to Islam exists and conflict may ensue.

The relevant concept, in response to the question "Who must fight?" is "*farḍ kifāya*." This term means collective obligation, or a duty imposed on the *ummah*. This communal obligation is to provide necessary manpower (defined as adult males only) in the event of a conflict. Not all men are required to actually fight. Rather, some may (and are often encouraged) to take the role of sponsor. A sponsor, able-bodied or not, may do his part by providing supplies, weapons, horses and other necessities for war. The roles of sponsor and warrior are equally necessary functions and thus are equally praised.

Significantly, when an attack is from the outside and affects the realm of *dār al-Islām*, a stringent set of defensive values applies. In these situations, the obligation is that of *farḍ ayn*. This individual obligation is literally to do anything and everything for the sake of Islam. There is no division between warrior and sponsor. Everyone should serve as both in whatever capacity he or she can. Here, then, is another important distinction. Whereas, with a *farḍ kifāya* only adult male Muslims are required to act, with a *farḍ ayn* men and women are called on for whatever they can provide.<sup>50</sup> In effect, *farḍ kifāya* is relevant in an offensive operation, while *farḍ ayn* applies to a defensive struggle.

<sup>48</sup> See KELSAY, *supra*, at 61.

<sup>49</sup> ANDREW G. BOSTOM, M.D., *THE LEGACY OF JIHAD 282* (Amherst, New York: Prometheus Books, 2006). [Hereinafter, BOSTOM.]

<sup>50</sup> See KELSAY, *supra*, at 61.



### [B] When Must Muslims Fight? Against Whom Must They Fight?<sup>51</sup>

The questions of when, and against whom, Muslims must fight are inextricably linked. To some extent, these questions are answered through the concepts of *fard kifaya* and *fard ayn*. Defensive situations are more easily recognizable, making the question of when a Muslim must fight moot. The answer necessarily is "now." Also, when under attack, the issue of "who" Muslims must fight is readily apparent.

Non-defensive contexts present greater difficulties. *Fard kifaya* obligations are triggered by an offensive push of Muslims into new territory. What happens, or what is supposed to happen, is that Muslim forces make an offering to the enemy to embrace Islam as a religion, or in the alternative to accept Islam and pay *jizyah*. Otherwise, war ensues (or resumes) within the sphere of *dār al-ḥarb*, in which case Muslims are called upon to fulfill the obligations of *fard kifaya*.

Anyone in the territory of war who refuses the options presented is considered an enemy (*ḥarbī*), with two exceptions. Intuitively, an enemy does not include a Muslim already living in *dār al-ḥarb*. Additionally, women and children are added to the category of the protected.<sup>52</sup> These protections are not a blanket one. Rather, they are limited to protection from intentional killing. Note also that even in the case of a Muslim living in the territory of war, if that person was killed unintentionally, or the killing was merely coincidental to the main object of the battle (so-called "collateral damage"), then the killing was justified, or at least not prohibited.<sup>53</sup>

To take a hypothetical example, suppose Pakistan attacks India, as it has done four times since the two countries were created by the British Partition on 15 August 1947.<sup>54</sup> Suppose further that Pakistani troops penetrate the Wagah Border in Punjab, which they have never done, and capture Amritsar. Assuming Pakistan applied the traditional *Shari'a* rules, women, children, and Muslims living in Amritsar would be protected from intentional killing. Sikhs, Hindus, Christians, and all other non-Muslims would not be protected. Their choice would be to convert to Islam, acquiesce to the Pakistani authority and pay a tax to it, or be treated as an enemy (meaning death).

### [C] How May The Enemy Be Dealt With?

The response to this question is, perhaps, the most important aspect of the Islamic Law of War. The response shapes how the Muslim community views non-Muslims. The starting premise is there are two categories of enemies:

<sup>51</sup> Professor Kelsay does not combine these questions as is done above, but it is reasonable to organize and synthesize them conceptually, as they overlap.

<sup>52</sup> Traditionally, slaves also are protected.

<sup>53</sup> See Kelsay, *supra*, at 63.

<sup>54</sup> The resulting wars date from October 1947–December 1948 (the First Kashmir War), April–December 1965 (the Second Kashmir War), December 1971 (the Bangladesh War), and May–July 1999 (the Kargil War).

- Persons who have not received an invitation to embrace Islam.
- Persons who have received an invitation to embrace Islam.

For the first category, war is not justified until the enemy in this category is offered (1) the chance to embrace Islam, or (2) acquiesce to its authority and pay *jizyah*. War is permissible only when both options are refused. In effect, before engaging in conflict, Muslims must give persons in the first category a simple choice: conversion, subjugation, or (except for other Muslims, or women and children) death.

Suppose non-Muslims in the first category refuse to convert to Islam or be governed by a Muslim authority and pay taxes to it. They have put themselves in the second category. Muslims have extended to them an invitation to convert and they have rebuffed it. Hence, they are an enemy (*ḥarbī*), and Muslims are entitled to declare open war on them. Should Muslim forces do so, there are no restrictions on how these forces deal with the enemy, save for the protection against intentional killing that covers Muslims, and enemy women and children, who happen to reside in enemy territory.

To continue the hypothetical Indo-Pakistani example, Pakistan would have to offer residents of Amritsar the choice to become Muslim. They would do so by bearing witness (reciting the *Shahada*, the First Pillar of Islam) with sincerity in front of an *imām*. Sikhs, Hindus, and Christians could opt to keep their faith, but would have to accept the sovereignty of Pakistan over them, and pay the *jizyah*. Failure to take up either alternative would mean Pakistan would treat them as enemies. Only Muslims, women, and children living in Amritsar would be free from intentional killing by Pakistani troops.

To be more specific, the *Shari'a* identifies three areas concerning treatment of, and infliction of damage upon or destruction to, the enemy:

- (1) Life
- (2) Liberty
- (3) Property

(This division is redolent of categories for protections under the United States Constitution.) There is a continuum, or sliding scale, from top to bottom, with the greatest protection for life, and least for property.

Yet, even the protection for life is minimal. An enemy soldier has no real protection from damage to or destruction of his or her life. He or she may be killed in combat, or taken and killed in captivity. As a general rule in Islamic history, a male prisoner of war (POW) may be killed with or without justification.<sup>55</sup> Again, the only substantive protection for life is afforded to Muslims, women, and children, but then only from deliberate killing, not loss of life as an unintended or incidental effect of conflict.

However, this general rule needs elaboration. Over the centuries, Islamic jurisprudence has developed legal principles governing the treatment of POWs

<sup>55</sup> See Boston, *supra*, at 287.

consistent with the *Shari'a*. Critically, a Muslim military leader has the discretion to decide whether a POW may be freed, ransomed, exchanged for one or more Muslim prisoners held by the other side, or kept in bondage. This discretion is sourced in both the Qur'an and *Sunnah*. For example, while *surah* 47, *ayah* 4 encourages Muslims to keep POWs until the cessation of hostilities, *surah* 76, *ayah* 8 clearly specifies that POWs must be fed and otherwise maintained in a dignified manner. Further, the Battle of Badr in 624 A.D., the first battle in Islamic history, reveals how the *Sunnah* operates in conjunction with the relevant Qur'anic verses. While the Prophet ordered some prisoners to be executed for their earlier crimes in Mecca, thereby enforcing *surah* 2, *ayah* 194 and *surah* 16, *ayah* 126, he offered the rest of the POWs options to secure their freedom: (1) convert to Islam, as suggested by *surah* 8, *ayah* 70; (2) pay ransom, as suggested by *surah* 47, *ayah* 4; or (3) teach 10 Muslims to read and write, and hence win their freedom.

The general rule is not invariant. The 1965 Indo-Pakistan War furnishes an example. Pakistan shot down Indian Air Force pilot, Nanda Cariappa, a Hindu and son of one of India's renowned military officers, Field Marshal Kodandera (Kipper) Madappa Cariappa, Order of the British Empire (OBE) (1899-1993). The Field Marshall was the first Chief of Staff and Commander-in-Chief of the Indian Military under Prime Minister Jawaharlal Nehru (1889-1964). The Pakistanis interned the pilot with other Indian POWs. Pakistan's first military ruler and second President, General Muhammad Ayub Khan (1907-1974) learned who his forces had in custody and ordered the pilot be given better quarters and treatment than other POWs. The President and Field Marshall had worked together before the British Partition. The son declined politely, saying every soldier in the Indian Army is the son of the Field Marshal, so he could not take special privileges.

#### [D] Where Do Muslims Find The Enemy?

Muslims classically encounter the enemy in the land of *dār al-harb*. After all, that is enemy territory. By logical inference, such an encounter means confrontation and conflict occurs because of the expansion of Muslim populations into new territory. Much of early Islamic history, particularly the rapid spread of Islam under the *Rashidun*, *Umayyad* Caliphate, and *Abbasid* Caliphate, fits within this scenario.

On occasion, Muslims may find the enemy within the *dār-al-Islām*. Such an enemy is a "*harbi*." This scenario, from the perspective of modern-day Islamic extremists, including Osama Bin Laden and his *Al Qaeda* terrorist network, fits the description of American and other non-Muslim forces in Muslim lands such as the Persian Gulf region and Afghanistan. The laws of war in this situation are the same as those in the classical scenario. The enemy has three choices: conversion, subjugation, or death. Note, then, that if a Jewish or Christian male soldier is captured, and argues to his Islamic captors that he is one of the People of the Book (*ahl al kitāb*) with whom Muslims share much in common, and to whom the Qur'an gives special recognition, the argument — depending on the disposition of the captors — may fall on deaf ears.

#### [E] By What Means May Military Success Be Pursued?

The strict, traditional answer to pursuing military victory is simple. A non-Muslim must be converted, subjugated (and agree to pay the *jizyah*), or killed. The non-Muslim is to be killed only upon refusal of conversion and subjugation, with exceptions for women and children. This position is harsh. But, there are sound reasons why it is not accurate to conceive of these options as widely accepted among or applied by Muslims.

That is, the strict, traditional answer hardly accords with the thinking of the vast majority of Muslims today. First, they read *surah* 2, *ayah* 256 of the Qur'an to prohibit forcible conversions. Second, they see that Muslim communities exist in many sovereign nations, as do many non-Muslim communities in Islamic nations. With the exception of some extreme factions, the co-existence is a peaceful one, without a fear of Muslims initiating a holy war. Thus, it would be entirely wrong, and indeed nefarious, to intimate that most Muslims look at non-Muslims as targets for conversion, subjugation, or death. They do not. Indeed, the vast majority would align themselves with *ulema* and *fukahā'* who say such intolerance is not authentically Islamic. They energetically and sometimes courageously risk their lives to distance themselves from the small minority of extremists who toe a different, evil line.

The question for the future is whether the peace not only will hold, but also expand. The answer depends on more than just the outcome of the War on Terror (as the administration of President George W. Bush labeled it), or the battle against extremist ideologies (as the administration of President Barack H. Obama prefers to dub it). The answer hinges critically on how Muslims view their own faith in an increasingly globalized world characterized not only by religious pluralism, but also secularism.

#### [F] How Is Success Defined?

According to the traditional Islamic Law of War, a war between Muslims and non-Muslims can end in only one of four ways:

- (1) The enemy converts to Islam.
- (2) There is a total conquest by Muslim forces of the territory of the enemy.
- (3) The two sides sign a truce.
- (4) There is a peace agreement between the two sides.

Note that defeat at the hands of non-Muslim forces is not an anticipated outcome.

The first scenario should be the least likely outcome. Even though holy war (*jihād*) is a "struggle to implement the Will of God,"<sup>96</sup> forcible conversions are not lawful under the *Shari'a*. Religion is central to the identity of many individuals, and not given up easily. Martyrdom among Christians at the hands of the pagan Ancient Romans is a well-known example. Therefore, without force, an enemy will

<sup>96</sup> See KELSAN, *supra*, at 46.



not all convert to Islam, but using compulsion to do so is contrary to *surah* 2, *ayah* 256 of the Qur'an.

In the second scenario, when there is total conquest of enemy territory, there often are remaining enemies who have either not been converted or subjugated through a peace agreement. A non-Muslim who is not protected by a treaty is a "*harbi*, i.e., one who is in a state of war, or an enemy alien. A *harbi* has no protection under the *Shari'a*. His life, liberty, and property are unprotected from damage or destruction.

Yet, a *harbi* is not without options. He can request, and be granted, a temporary safe conduct guarantee (*amān*). Any Muslim man or woman can issue an *amān*, as long as that Muslim is "*mukallaf*," meaning that he or she has full legal capacity. In the *Shari'a*, traditionally, *amān* is a right that can be given by a private party, and imposes duties on other private parties. In contrast, in American Law, a public authority would provide such a guarantee, which would put obligations of restraint on the government. A *harbi* who has been granted an *amān* by a *mukallaf* technically is no longer a "*harbi*." He has a new legal status — a "*musta'min*."

The third scenario, a truce, effectively is a cease-fire. It tends to carry little weight in making the decision to pursue war at a later date. The 20th and 21st century history of conflict between Palestinians and Israelis is replete with made and broken ceasefires.

The fourth scenario requires the bulk of attention. Usually when a war is concluded, a treaty of surrender, or peace agreement, is agreed. The treaty of surrender is the legal basis for treatment of conquered non-Muslims, including POWs. This treaty is called a "*dhimma*," which means an engagement, obligation, responsibility, or care as a duty of conscience.<sup>57</sup> Under it, non-Muslims surrender to the Muslim authority.

Traditionally, the Islamic Law of War has influenced Muslim attitudes toward non-Muslims.<sup>58</sup> Because that Law envisages a holy war (*jihād*) against non-Muslims, any POW presumptively is an unbeliever. How, then, are POWs and other conquered peoples to be treated, according to traditional *Shari'a* precepts? The *dhimma* provides the answer.

#### § 48.05 TREATMENT OF CONQUERED PEOPLES (DHIMMIS) UNDER TREATY OF SURRENDER (DHIMMA)

##### [A] Basic Obligations

A treaty of surrender (*dhimma*) assigns conquered non-Muslim peoples (*dhimmis*) certain duties. In particular, they must:

- (1) Pay taxes and tributes, i.e., the *jizyah*.

<sup>57</sup> See SCHACHT, *supra*, at 130-31, 144.

<sup>58</sup> See SCHACHT, *supra*, at 130.

- (2) Wear distinctive clothing.
- (3) Mark their homes with distinctive signs.
- (4) Agree not to build their homes higher than those of Muslims.
- (5) Agree not to bear arms or ride horses.
- (6) Agree to yield the way to Muslims.
- (7) Agree not to create a scandal among Muslims by, in particular, open performance of their own non-Muslim forms of worship or customs (including drinking alcohol). However, non-Muslims are not subject to the Muslim prohibition on pork and alcohol (which they may do in private).
- (8) Agree not to build new churches or synagogues.

In return for these undertakings, the victorious Muslim power agrees to safeguard the life, liberty, and property of these non-Muslims, pursuant to their coverage under the treaty. Note that while the first duty is the only one clearly deriving from the Qur'an or *Sunnah*, the rest were developed across Muslim History.

As for POWs, aside from the option of conversion, there are a variety of possibilities. Which one is selected depends on the discretion of an appropriate *imām*:

- (1) POWs may be enslaved, which in effect means formal subjugation.
- (2) Exchanged for Muslim POWs from the other side.
- (3) Left alive as free "*dhimmis*," and thereby protected as non-Muslims under the treaty of surrender.

Victors in a war are entitled to take the women of the vanquished forces as concubines, and it generally does not matter whether those women are married or not. On the Arabian Peninsula, this practice pre-dates Islam, and continued through into the *Shari'a*. Its source is the Qur'an, specifically *surah* 4 *ayah* 24.

There is controversy regarding the effect of marriage: should it matter whether a woman from the vanquished side is married? The Ancient School at Medina said "no," on the ground that "captivity . . . dissolved the marriage tie."<sup>59</sup> The Ancient Schools of Iraq took a different view: no dissolution of marriage results from captivity. Accordingly, the Iraqi Schools advocated safeguards to protect captured married women, though *Imām* Al Awzā'i, a prominent scholar from Syria (88-157/158 A.H.), endorsed the practice.

##### [B] Problem of Religious Freedom

Professor Schacht writes generally regarding the legal autonomy of all non-Muslims living in Muslim territories:

Islamic law interferes with non-Muslims only in so far as Muslims, too, are concerned directly, and very occasionally indirectly, for instance in so

<sup>59</sup> See SCHACHT, *supra*, at 42.

far as the punishment of theft constitutes a religious interest of the Muslims. Apart from this, non-Muslims are left complete legal freedom, provided no Muslim . . . is concerned; freedom in matters of religion is guaranteed explicitly.<sup>60</sup>

However, this observation grossly understates the reality of freedom of worship for religious minorities in many Muslim countries. Conquered peoples are entitled to practice their religion. They just cannot do so too openly.

That is why, for example, Catholic Churches in many Muslim countries are discrete in their location and architecture, lacking a beaming spire atop which sits a crucifix, and in which are bells. Evangelization is forbidden. Importing clergy can be difficult. For instance, in the Sultanate of Brunei, no foreigner can be brought in as a Priest. Rather, only a citizen of Brunei — of which there are few — can become a Priest. A compelling 2005 book, *The Myth of Islamic Tolerance: How Islamic Law Treats Non-Muslims*, brings together 58 essays by 17 authors from around the world about Islamic inequality and oppression of non-Muslims in Islamic societies.<sup>61</sup> The sum and substance is that these societies are characterized by a religious caste system.

Thus, notwithstanding the doctrine that mitigates in favor of allowing religious minorities in a *Shari'a* jurisdiction to continue with their ways of life, the realities for these minorities often are incongruous with the precepts. For example, following the 1967 Arab-Israeli War, Jewish communities in Syria and Egypt faced persecution, and many families emigrated from Damascus and Cairo where they had been for generations. As another illustration, from time to time international human rights organizations, including non-governmental organizations (NGOs), chronicle the plight of religious minorities in Muslim countries such as Saudi Arabia — where all forms of public worship outside of Islam are forbidden. Such reports also emanate from the United States government under the 1998 *International Religious Freedom Act*.<sup>62</sup> This statute created a Commission to monitor respect for freedom of conscience around the world, and has openly criticized that Kingdom, among other Muslim countries, for breaches.

The question is whether some Muslim governments fail to adhere to the general tolerance and understanding embedded in the *Shari'a* toward religious minorities. (This question is related to, but technically distinct from, the Islamic Criminal Law rules on apostasy (*riddah*.) To what degree is the theory of tolerance and understanding not always manifest in practice? Over the broad course of Islamic history, up to the modern Arab-Israeli conflict and the even more modern phenomenon of *Al Qaeda* and its commission of terrorist attacks such as on 11 September 2001, the impression is one of inconsistency between theory and

<sup>60</sup> See SCHRAG, *supra*, at 133.

<sup>61</sup> See ROBERT SPENCER ED., *THE MYTH OF ISLAMIC TOLERANCE: HOW ISLAMIC LAW TREATS NON-MUSLIMS* (Amherst, New York: Prometheus Books, 2005).

<sup>62</sup> See *International Religious Freedom Act of 1998*, Public Law 105-292, as amended by Public Law 106-55, Public Law 106-113, Public Law 107-228, Public Law 108-332, and Public Law 108-458, codified at 22 U.S.C. §§ 6401-6402, 6411-6417, 6431-6436, 6441-6450, 6461, 4028, 50 U.S.C. § 402, as well as 8 U.S.C. § 1182(a)(2), 22 U.S.C. §§ 262d, 2151(n) note, (n), (n)(e), 2304(a), 2452(b), 3965(d), 4013, 6202(a), 6471-6474, 6481.

practice. Muslims and non-Muslims have lived and co-existed peacefully, in close proximity, in *Shari'a* and *non-Shari'a* jurisdictions alike.

## [B] Equality and Inequality

Broadly speaking, a *dhimmi* has nearly equal rights and duties as those of a Muslim. For instance:

- The rights of a *dhimmi* under Contract Law and Property are essentially the same as those of a Muslim.
- The rights of a *dhimmi* under Business Associations Law are nearly the same as those of a Muslim. The exception concerns an unlimited mercantile partnership (*sharikah al-mufawadah*). A Muslim and *dhimmi* cannot enter into this form of partnership. Only Muslims can come together in a *mufawadah* enterprise.
- Regarding liability under Criminal Law, a *dhimmi* may be subjected to *hadd* and *ta'zir* punishments, as long as those punishments are not specifically reserved for Muslims. Some *hadd* or *ta'zir* punishments are specific to Muslims, and thus ones to which a *dhimmi* would not be liable. For example, the *hadd* punishments for drinking wine and for unlawful sexual intercourse (*zinā*) are only applicable to Muslims.
- In terms of protection by the Criminal Law, a *dhimmi* is protected just as is a Muslim. There is one notable exception, which is the crime of *kadhif* (false accusation of unlawful sexual relations). The punishment for accusing a *dhimmi* of *kadhif* is a *ta'zir*, not the otherwise prescribed *hadd*, punishment. This exception is made because a *dhimmi* has lesser criminal responsibility for the crime of unlawful sexual relations (*zinā*): he or she is subject to a lesser punishment (*ta'zir* instead of *hadd*). Thus, if a *dhimmi* is subject to a lesser punishment for perpetrating *zinā*, then it is only fair the *dhimmi* is protected to a lesser degree, in the form of a lesser punishment, for being the victim of a false charge leveled at him for that crime.
- With respect to Torts (*jināyāt*), specifically, a private right of retaliation for a wrongful act committed against oneself or one's family, there is a question as to whether a *dhimmi* has that right to the same extent as a Muslim. The Four *Sunni* Schools are divided. The *Hanafi* School says a *dhimmi* has the full right of retaliation, as does a Muslim, in all cases. The *Shāfi'i* and *Hanbali* Schools say a Muslim who kills a *dhimmi* is not subject to retaliation by a *dhimmi* for having committed the murder (*katl*). The *Māliki* School says that in most, but not all cases, a *dhimmi* does have the right of retaliation against a Muslim who committed the murder.

Arguably, the matters of a *mufawadah* partnership, certain punishments, and retaliation are modest distinctions.

Yet, there are other, and arguably more significant, differences in the legal rights of *dhimmis* and Muslims. They include:



- In the area of Evidence, a *dhimmi* cannot be a witness, except in a matter concerning another *dhimmi*. Interestingly, a *dhimmi* could serve as a witness in a matter involving a *dhimmi* of another religion. Thus, only a Muslim can serve as a witness in a matter involving a Muslim.
- A *dhimmi* cannot be the legal guardian of his own child if that child is a Muslim. For example, suppose a Muslim man marries a *dhimmi* woman who is *ahl al kitāb* (a Person of the Book — a Jew or Christian). The child is Muslim. The wife-mother can take care of the child, but she cannot be the legal guardian.
- A *dhimmi* cannot inherit from a Muslim under Inheritance Law. The *Shari'a* does not list *dhimmis* in the inheritance chain. But, a *dhimmi* can receive assets through a legacy (i.e., a specific bequest of the testator-decedent, limited to one-third the size of the estate).
- Also concerning Inheritance Law, a *dhimmi* cannot be the executor for the estate of a Muslim.

Obviously, from an American legal perspective, these distinctions are profoundly troubling. They cut against the national motto: *e pluribus unum* (out of many, one). American Constitutional Law is well-developed on the topic of equal protection, and categorizations of persons by religion, or race, are inherently suspect and receive the highest degree of judicial scrutiny. Likewise, in Catholic Christian teaching, there is a powerful emphasis on equal dignity of the human person, regardless of faith.

On balance, the "*dhimma*" doctrine, as a theoretical contract in which non-Muslims are granted special status, has evolved through Muslim history. Consequently, the legal rules governing *dhimmis* have differed from time to time, in proportion with the level of tolerance in Muslim society. For instance, sometimes *dhimmis* are permitted to practice their faiths and consume alcoholic beverages in public, while at other times they cannot do so. Thus, in some historical periods, there is legal discrimination against *dhimmis*, but at other times it is outright persecution of them.

#### § 48.06 REBELLION (*BAGHI*)

Depending on the facts, the principles of the Islamic Law of War are somewhat distinct with regards to rebellion. Rebellion, specifically, rebellion against a government, or a transgression by one group of a population against another group, is known as "*baghi*" in Arabic. Three of the Four *Sunni* Schools (*Hanafi*, *Hanbali*, and *Shāfi'i*) do not regard *baghi* as a Criminal Law matter, whereas the *Māliki* School treats *baghi* as a distinct *ḥaqq Allāh* offense that triggers a *ḥadd* punishment.

Consider, first, a situation in which rebel forces are solely comprised of *dhimmis* or other non-Muslims living within the *dār-al-Islām*. On these facts, the rebels are treated according to the Law of War principles explained earlier. A *dhimma* is not broken even by offences committed by subjugated non-Muslims against individual Muslims. Even if the *dhimmis* refuse to pay *jizyah*, murder a Muslim, or violate

some other rule of the treaty, these behaviors do not lead to an abrogation of the *dhimma*. The only way *dhimmis* breach the treaty is if they (1) join enemy territory, or (2) wage war against the Muslims in their own country.<sup>63</sup> However, rebellious *dhimmis* face the possibility of enslavement, if captured and detained essentially as POWs.

Second, in contrast, suppose the rebellion is a conflict between two groups of Muslims. The rules change drastically. The repelled Muslim group may not be killed in retreat. And, members of the losing or retreating rebel party may not be taken as slaves as a result of the conflict. But, there is no rule against taking these Muslims as slaves.

What explains the difference in the two scenarios? Surely, it is religion. In the second case, both parties to the conflict were observing Muslims before clashes erupted. In the first case, slaves taken in a rebellion of non-Muslims against Muslims are by definition of another faith, unless they agree to convert to Islam.

One other scenario, a variation of the second one, is noteworthy. Suppose there is a conflict between two groups of Muslims, and *dhimmis* join on the side of the rebelling Muslims. These *dhimmis* are not viewed to have broken the peace treaty that exists between the rest of the *dhimmis* and the Muslim authority. This outcome reinforces the principle that only in the event *dhimmis* wage their own war against Muslims do they breach the *dhimma*.

<sup>63</sup> See SCHACHT, *supra*, at 131.

## Chapter 49

### *JIHĀD* (STRUGGLE)

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Christians as minorities are, generally speaking, well-educated professionals and compared to their numbers they have an important influence in each of the countries in which they live. And that's a contribution. I also feel that the Christians can be a sort of bridge because in most of the countries they are Arabs, but they are not Muslims. They can be a connection between the modern societies of the Western world and emerging societies in the Islamic world because they are Arabs and they are Christians.

Monsignor Robert L. Stern, Secretary General, Catholic Near East Welfare Association (CNEWA), 9 December 2008, Interview with Rome Reports, *posted at* [www.cnewa.org](http://www.cnewa.org).

#### SYNOPSIS

##### § 49.01 DEFINITION OF “*JIHĀD*”

- [A] Basic Meaning
- [B] Critical Distinction between Greater and Lesser *Jihād*

##### § 49.02 CONTEXTS FOR USE OF “*JIHĀD*”

- [A] Putting God First
- [B] Remaining Steadfast on the Straight Path
- [C] Striving To Do Righteous Deeds
- [D] Freeing People from Tyranny

##### § 49.03 EMPHASIS ON PEACE

- [A] Relations with Non-Muslims
- [B] Love Your Enemies?

##### § 49.04 *JIHĀD* AS WAR?

- [A] Distinction between “*Jihād*” (Struggle) and “*Katl*” (Killing)
- [B] *Jus Ad Bellum*, *Jus In Bello*, and Power to Declare War
- [C] Fighting in Self-Defense
- [D] Fighting for Cause of Allāh and Four Caveats

##### § 49.05 *KHARIJITES* AND ASSASSINS



## § 49.01 DEFINITION OF “JIHĀD”

## [A] Basic Meaning

The Arabic word “*jihād*” is a noun that means “struggle.” It can apply to any person or situation in which an effort or exertion is required.<sup>1</sup> The verb forms of *jihād* are *yujāhidu* (male) or *tujāhidu* (female). Thus, a general definition of “*jihād*” is that it:

refers to the obligation incumbent on all Muslims, individuals and the community, to follow and realize God’s will: to lead a virtuous life and to extend the Islamic community through preaching, education, example, writing, etc. *Jihād* also includes the right, indeed the obligation, to defend Islam and the community from aggression.<sup>2</sup>

However, it is insufficient to stop with this generic definition. There are in fact two “*jihāds*”: the “greater *jihād*” and the “lesser *jihād*.”<sup>3</sup>

[B] Critical Distinction between Greater and Lesser *Jihād*

The “greater *jihād*” is known in Arabic as “*jihād al-akbar*.” It is necessary to avoid being ruled by passions, i.e., it demands allowing the heart to be governed by reason, rather than drowned by emotion, and developing a better knowledge of, and closer union with, God (Allāh).<sup>4</sup> By the consensus (*ijmaʿ*) of the *ulema*, the “greater *jihād*” is the struggle to follow Allāh. It is an internal struggle to discern the Will of God and submit to it by conforming one’s thoughts and behavior appropriately. In this respect, there are two particular strivings:<sup>5</sup>

- (1) Away from the devil, in terms of temptations. This aspect of the “greater *jihād*” sometimes is called the “*jihād* of the tongue.”
- (2) Away from failings of oneself. This aspect involves a “*jihād* of the heart,” i.e., charitable donations, “*jihād* of the hands,” i.e., doing good works, and a “*jihād* of the mind,” i.e., self-improvement.<sup>6</sup>

<sup>1</sup> See M. Amir Ali, Ph.D., *Jihad Explained, Institute of Islamic Information and Education* (Chicago, Illinois), posted at [www.irshad.org/islam/iiie/iiie\\_18.htm](http://www.irshad.org/islam/iiie/iiie_18.htm). [Hereinafter, Ali.]

<sup>2</sup> John L. Esposito, *Jihad: Holy or Unholy War?*, posted at United Nations Alliance of Civilization, [www.unaoc.org/repository/Esposito\\_Jihad\\_Holy\\_Unholy.pdf](http://www.unaoc.org/repository/Esposito_Jihad_Holy_Unholy.pdf). [Hereinafter, Esposito, *Jihad*.]

<sup>3</sup> See Mary R. Habeck, *Knowing the Enemy: Jihadist Ideology and the War on Terror* 1-2, 4-5, 7, 117 (New Haven, Connecticut: Yale University Press, 2006).

<sup>4</sup> As Dr. Laleh Bakhtiar puts it,

[t]here are two basic causes of the need for this greater struggle within the self: Either a person is ruled by passion rather than reason, or a person does not know God.

LALEH BAKHTIAR, *THE SUBLINE QURAN — ENGLISH TRANSLATION, REVISED EDITION*, Introduction at xxxi ([www.sublinequran.org](http://www.sublinequran.org): Laleh Bakhtiar, trans., 6th ed., 2009).

<sup>5</sup> See REUVEN FIRESTONE, *JIHAD: THE ORIGIN OF HOLY WAR IN ISLAM* 16-17 (Oxford, England: Oxford University Press, 1999).

<sup>6</sup> See ANONYMOUS, *IMPERIAL HUBRIS: WHY THE WEST IS LOSING THE WAR ON TERROR* 6-8 (Dulles, Virginia, Brassey’s Inc., 2004). [Hereinafter, *IMPERIAL HUBRIS*.] After publication of this book, “Anonymous” was revealed to be Michael Scheuer, a national security expert on Afghanistan and South Asia with 22 years

Manifestly, the greater *jihād* leads to different kinds of struggles. The “greater *jihād*” is comparable to the Catholic Christian concept of resisting sin and fighting temptation, doubt in belief, and worldly desires. Both involve strenuous efforts to deepen one’s faith and ability to control worldly desires.

In contrast, the “lesser *jihād*” is an external struggle with other men and women to bring the truth of Islam to all humankind. The enemy is visible. This struggle sometimes is called the “*jihād* in the path of God,” or even “*jihād* of the sword.” This struggle involves an active defense of Islam, and propagation of the faith. While it bears some resemblance to the Catholic Christian concept of evangelization, the analogy breaks down when the struggle becomes violent. As Saint Francis of Assisi (1181/1182-1226 A.D.) said: “Preach the Gospel at all times; if necessary use words.” That is, evangelization is practiced by peaceful, non-violent example.

Regrettably, extremists acting in the name of Islam define “*jihād*” only in terms of the lesser *jihād*. They wrongly elevate its importance above the greater *jihād*. They wrongly believe that to establish the sovereignty of Allāh, it is appropriate to wage continuous, offensive, and violent operations against non-Muslims. The consequences are, of course, monstrous.

It is important to distinguish the word “*jihād*” from the word “*harb*” or *qital* (nouns), which are the Arabic words for war.<sup>7</sup> During the time of the Prophet, the word *jihād* and words such as *harb* or *qital* were not used interchangeably.<sup>8</sup> Neither the Qur’ān nor any *hadiths* mention “*jihād*” as holy war. In fact, “holy war” in Arabic is translated as “*al-harbu al-muqaddasatu*” (noun).<sup>9</sup> Many scholars believe the use of the term *jihād* to mean “holy war” was a phenomenon that began during the Crusades as a result of the Christian use of the term “Holy War.”<sup>10</sup> Yet, this argument is jejune, amounting to nothing more than “two wrongs make a right.”

## § 49.02 CONTEXTS FOR USE OF “JIHĀD”

*Jihād* is mentioned in several Qur’anic passages and *hadiths*, revealing various meanings. The primary contexts in which the word is used are as follows.<sup>11</sup>

## [A] Putting God First

Three Qur’anic verses connote the struggle to put love for the Creator and recognition of His existence above worldly ambition, wealth, and even family.<sup>12</sup>

- Surah 9, ayat 23-24:

of experience with the Central Intelligence Agency (CIA).

<sup>7</sup> See Ali, *supra*.

<sup>8</sup> See Ali, *supra*.

<sup>9</sup> See Ali, *supra*.

<sup>10</sup> See Ali, *supra*.

<sup>11</sup> See Ali, *supra*.

<sup>12</sup> See Ali, *supra*.

<sup>23</sup>Believers, do not take your fathers and brothers as allies [i.e., against Muslims] if they prefer disbelief to faith: those of you who do so are doing wrong. <sup>24</sup>Say [Prophet], "If your fathers, sons, brothers, wives, tribes, the wealth you have acquired, the trade which you fear will decline, and the dwellings you love are dearer to you than God and His Messenger and the struggle in His cause, then wait until God brings about His punishment." God does not guide those who break away.<sup>13</sup>

- *Surah 25, ayah 52:*

... [S]o do not give into the disbelievers: strive [*jahidhum*] hard against them with this Qur'an.<sup>14</sup>

- *Surah 29, ayah 8:*

We have commanded people to be good to their parents, but do not obey if they strive [*jahadaka*] to make you serve, beside Me, anything of which you have no knowledge: you will all return to Me, and I shall inform you of what you have done.<sup>15</sup>

To analogize, this struggle is to follow the first of the Ten Commandments. To use a Catholic Christian phrase, it is to put God above all things.

By no means is it easy to resist pressures from modern culture, or from family and friends, to avoid that which Allāh forbids and act according to what He encourages. Yet, remaining steadfast in the way of Allāh is considered an honorable struggle.

## [B] Remaining Steadfast on the Straight Path

The term "jihād" is used in Qur'anic passages to exhort Muslims to follow their faith in practice, particularly by practicing the Five Pillars.

- *Surah 22, ayah 78:*

Strive [*jahidu*] hard for God as is His due: He has chosen you and placed no hardship in your religion, the faith of your forefather Abraham. God has called you Muslims — both in the past and in this [message] — so that the Messenger can bear witness about you and so that you can bear witness about other people. So keep up the prayer, give the prescribed alms, and seek refuge in God: He is your protector — an excellent protector and an excellent helper.<sup>16</sup>

- *Surah 29, ayah 6:*

Those who exert [*jahada, yujahidu*] themselves do so for their own benefit — God does not need his creatures. . . .<sup>17</sup>

In these verses, the Qur'an praises Muslims who struggle steadfastly in the path of Islam. Concomitantly, Muslims are encouraged to migrate and seek places that are more tolerant and peaceful than the land in which they currently reside, if in that land they are persecuted for their belief.<sup>18</sup> Thus, the Qur'an says in *surah 2, ayah 218*:

But those who have believed, migrated, and striven [*jahadu*] for God's cause, it is they who can look forward to God's mercy: God is most forgiving and merciful.<sup>19</sup>

From this verse, it may be deduced that escaping persecution, and finding a place that allows one to strive to please Allāh and live a peaceful life, is a good idea.

However, no matter where a Muslim finds himself or herself, his or her belief will be tested. Why? The answer is to enkindle and rekindle his or her spirituality and trust in Allāh. Thus, the Qur'an states:

- *Surah 3, ayah 142:*

Did you think you would enter the Garden without God first proving which of you would struggle [*jahadu*] for His cause and remain steadfast?<sup>20</sup>

- *Surah 2, ayat 153-157:*

<sup>153</sup>You who believe, seek help through steadfastness and prayer, for God is with the steadfast. <sup>154</sup>Do not say that those who are killed in God's cause are dead; they are alive, though you do not realize it. <sup>155</sup>We shall certainly test you with fear and hunger, and loss of property, lives, and crops. But [Prophet], give good news to those who are steadfast, <sup>156</sup>those who say, when afflicted with a calamity, "We belong to God and to Him we shall return." <sup>157</sup>These will be given blessings and mercy from their Lord, and it is they who are rightly guided.<sup>21</sup>

Both Muslims and Catholic Christians would agree that true belief is discovered and cemented through challenges and tribulations.

## [C] Striving to Do Righteous Deeds

The Companions of the Prophet (*Sahābah*) asked about *jihād*. They sought to understand what Allāh and Muhammad regarded as the most beloved acts of *jihād*.<sup>22</sup> Imām Bukhari relates:

<sup>17</sup> Qur'an, *supra*, 29:6 at 252.

<sup>18</sup> See Ali, *supra*.

<sup>19</sup> Qur'an, *supra*, 2:218 at 24.

<sup>20</sup> Qur'an, *supra*, 3:142 at 44.

<sup>21</sup> Qur'an, *supra*, 2:153-157 at 17-18.

<sup>22</sup> See Ali, *supra*.

<sup>13</sup> THE QUR'AN — A New Translation by M.A.S. Abdel Haleem 9:23-24 at 118 (Oxford, England: Oxford University Press, 2004). See also *id.*, fn. a to 9:23 (concerning "allies"). [Hereinafter, QUR'AN.]

<sup>14</sup> Qur'an, *supra*, 25:52 at 230.

<sup>15</sup> Qur'an, *supra*, 29:8 at 252.

<sup>16</sup> Qur'an, *supra*, 22:78 at 214.



Narrated 'Ā'isha, the mother of the faithful believers . . . : I said, "O Allāh's Apostle! We consider *jihād* as the best deed." The Prophet . . . said, "The best *jihād* (for women) is *Hajj-Mabrūr* [i.e., an accepted *Hajj* in the sense of righteous, sinless, or in effect, perfect *Hajj*]." <sup>23</sup>

This response is significant. The Prophet says performance of the pilgrimage, the Fifth of the Five Pillars of Islam, not violent campaigns against non-Muslims, is the most sublime form of struggle. The difficulty, of course, is whether this *ḥadīth* is read narrowly to apply only to women, or expansively to apply to men, too.

On a different occasion, Muhammad was approached by a man who was the only son in his family. <sup>24</sup> At the time, the *Ṣaḥābah* were heading off to a defensive battle. The *ḥadīth* states:

A man came to the Prophet . . . asking his permission to take part in *jihād*. The Prophet . . . asked him, "Are your parents alive?" He replied in the affirmative. The Prophet . . . said to him, "then exert [*jihād*] yourself in *their* service." <sup>25</sup>

Manifestly, serving one's parents has priority over defending the Muslim community (*ummah*) against aggression.

On yet another occasion, the Prophet clarified his view on the true meaning of "*jihād*." In response to a question posed to him as to what is the best kind of *jihād*, Muhammad replied:

The best kind of *jihād* is a word of truth in front of an oppressive ruler. <sup>26</sup>

Obviously, Muhammad could have replied in terms of combat against oppression. He did not, instead suggesting that truth prevails over tyranny.

In a highly pertinent *ḥadīth*, Muhammad defines a "*mujahid*" as follows:

Shall I inform you of who the believer is? He is the one who is entrusted by people with their lives and wealth. The Muslim is the one who people are safe from (harm) from his tongue and his hand. The *Mujahid* (the one who carries out *jihād*) is he who strives against himself for the sake of Allāh, and the *Muhajir* (one who emigrates) is he who abandons evil deeds and sin. <sup>27</sup>

<sup>23</sup> THE TRANSLATION OF THE MEANINGS OF SAHIH AL-BUKHARI, ARABIC-ENGLISH by Dr. Muhammad Muhsin Khan, vol. II, book XXVI (The Book of *Hajj* (Pilgrimage)), p. 347, *ḥadīth* no. 595 (Dar Ahya U's-Sunnah, Al Nabawiya, March 1978) (emphasis added). (Hereinafter, *BUKHARI*.)

<sup>24</sup> See Ali, *supra*.

<sup>25</sup> *BUKHARI, supra*, at vol. IV, book LII (*Jihād* (Fighting for Allāh's Cause)), p. 153, *ḥadīth* no. 248 (emphasis added).

<sup>26</sup> Narrated by Abu Saeed Alkhouḍarī, Ibn Hujr Al-Asqalanī, AL-AMALI ALMUTLAQA, 196, posted at [www.dorar.net/enc/hadith/%D9%83%D9%84%D9%85%D8%A9+%D8%AD%D9%82+%D1%2A%D9%82+%D8%A7%D9%84%D9%85%D8%A7%D8%AC%D8%B1+%D1%2C2+w](http://www.dorar.net/enc/hadith/%D9%83%D9%84%D9%85%D8%A9+%D8%AD%D9%82+%D1%2A%D9%82+%D8%A7%D9%84%D9%85%D8%A7%D8%AC%D8%B1+%D1%2C2+w) (original in Arabic, translated by Jomana Qaddour). This *ḥadīth* also is recorded as:

"What kind of *jihād* is better?" a man once asked the Prophet. The Prophet replied, "A word of truth in front of an oppressive ruler."

Compilation of *Ḥadīth* by Tirmidhī, *Sunan Al-Nasa'i*, *ḥadīth* no. 4209 (emphasis added). (Original in Arabic, translated by Jomana Qaddour.)

<sup>27</sup> Narrated by Fudalah ibn Ubayd Al-Ansālī, Al-Albānī, AL-SILSILAH ALSAHIH, 549, posted at

The unequivocal reference here is to the significance of internal struggle against temptation. Lest there be any doubt as to whether this struggle is of the highest importance, the Qur'ān defines "true believers." They are willing to struggle financially and physically for the sake of Allāh, as *surah* 49, *ayah* 15 of the Qur'ān indicates:

The true believers are the ones who have faith in God and His Messenger and leave all doubt behind, the ones who have struggled [*jahadu*] with their possessions and their persons in God's way: they are the ones who are true. <sup>28</sup>

In other words, reading the *ḥadīth* defining a *mujahid* together with the Qur'ānic passage defining true believers, it may be argued a *mujahid* is a true believer, and the hallmark of these interchangeable terms is an internal struggle to follow God.

In sum, these *ḥadīth*s and verse impel a conclusion: the most virtuous form of *jihād* had nothing to do with taking up arms or fighting a battle. Mohammed sought to exhort Muslims to strive against themselves, to avoid giving into worldly desires, such as adultery and fornication, drinking, jealousy, pride, and selfish consumption of wealth. Even when confronted with an oppressive ruler or circumstances, the best form of *jihād* is to struggle not with swords but with words of truth.

## [D] Freeing People from Tyranny

The Qur'ān highlights the importance of eradicating injustice and oppression. <sup>29</sup> Muslims are to strive to equitable treatment for all mankind. However, as in the case of war itself, the sacred text does not use the word "*jihād*" to endorse this kind of striving. Rather, most *ulema* and *fukahā* emphasize that in some situations Muslims who live under oppressive rule can strive to endorse positive laws, politicians, and ideas. Only when these non-violent means fail can Muslims take up arms, but only to defend themselves if their safety is threatened. <sup>30</sup>

Like 20th century leaders of peaceful struggles, such as Mahatma Gandhi and the Reverend Dr. Martin Luther King, Muhammad in the 7th century consistently preached non-violent methods to establish the Muslim state in Medina, and later in Mecca. His authority was no less than the Qur'ān, which in *surah* 16, *ayah* 125-128 states:

<sup>125</sup>[Prophet], call people to the way of your Lord with wisdom and beautiful teaching. Argue with them in the most courteous way, for your

[www.dorar.net/enc/hadith/%D8%A7%D9%84%D9%85%D8%AC%D8%A7%D9%87%D8%AF+%D8%A7%D9%84%D9%85%D9%87%D8%A7%D8%AC%D8%B1+%D1%2C2+w](http://www.dorar.net/enc/hadith/%D8%A7%D9%84%D9%85%D8%AC%D8%A7%D9%87%D8%AF+%D8%A7%D9%84%D9%85%D9%87%D8%A7%D8%AC%D8%B1+%D1%2C2+w) (original in Arabic, translated by Jomana Qaddour). This *ḥadīth*, in which Muhammad defines a "*mujahid*," also is related by Saḥīḥ Ibn Ḥazīm:

The *Mujahid* (the one who carries out *jihād*) is he who strives against himself for the sake of Allāh, and the *Muhajir* (one who emigrates) is he who abandons evil deeds and sin.

SAHIH IBN HAZIM, *Ḥadīth* no. 4862 (original in Arabic, translated by Jomana Qaddour).

<sup>28</sup> QUR'AN, *supra*, 49:15 at 339.

<sup>29</sup> See Ali, *supra*.

<sup>30</sup> See Ali, *supra*.

Lord knows best who has strayed from His way and who is rightly guided.<sup>126</sup> If you [people] respond to an attack, make your response proportionate, but it is best to stand fast.<sup>127</sup> So [Prophet] be steadfast: your steadfastness comes only from God. Do not grieve over them; do not be distressed by their scheming,<sup>128</sup> for God is with those who are aware of Him and who do good.<sup>31</sup>

In addition to reasoned discourse, the Qur'an emphasizes patience with oppressors, always putting forth good, even in the face of evil. *Surah* 41, *ayat* 34-35 explains:

<sup>34</sup>Good and evil cannot be equal. [Prophet], repel evil with what is better and your enemy will become as close as an old and valued friend,<sup>35</sup> but only those who are steadfast in patience, only those who are blessed with great righteousness, will attain to such goodness.<sup>32</sup>

Read carefully, there is a stark and depressing reality embedded in this passage. The independent clause (*ayah* 35) is basically a recognition not everybody is sufficiently patient or righteous to repel evil with good. People are weak, and prone to retaliate in a like, or even more dreadful, manner than the initial causal event. Thus, it is up to Muhammad to set a good example, and for Muslims to follow his *Sunnah*.

Historically, the establishment of Medina and eventual conquering of Mecca are said to have been peaceful. Muhammad ordered Muslims to enter Mecca with mercy. For Muslims, the years in Mecca before the *Hijra* of 622 A.D. had been extremely difficult. Muslims had withstood nearly 13 years of oppression (610-622), three of them under economic sanctions during which no tribes in Arabia were permitted to trade with them.<sup>33</sup>

Despite this unpleasant history, Muhammad counseled forgiveness.<sup>34</sup> Again, his textual basis for this counsel is strong. *Surah* 3, *ayah* 134 of the Qur'an states that the best descriptions of the "righteous," for whom Allāh has prepared a "Garden as wide as the heavens and earth,"<sup>35</sup> are those who not only:

give, both in prosperity and adversity, [but also] who *restrain their anger and pardon people*. . . .<sup>36</sup>

<sup>31</sup> Qur'an, *supra*, 16:125-128 at 339.

<sup>32</sup> Qur'an, *supra*, 41:34-35 at 339.

<sup>33</sup> See Hamed Ghazali, Ph.D., *Islam for Peace and Justice*, 3 THE AMERICAN MUSLIM MAGAZINE 110, 1, 20-22 (March 2002). [Hereinafter, Ghazali.] Dr. Ghazali is an American Muslim scholar, Adjunct Professor at the American Muslim University, Chairman of the Muslim American Schools (MAS) Council of Islamic Schools, and Director of the Houston Qur'an Academy.

<sup>34</sup> See Ghazali, *supra*.

<sup>35</sup> See Qur'an, *supra*, 3:133 at 44.

<sup>36</sup> Qur'an, *supra*, 3:134 at 44 (emphasis added).

Additionally, the Qur'an contains several passages emphasizing the peaceful nature of Islam and, in one context or another, calling on Muslims not to rule over others harshly, nor to judge and condemn those around them. See, e.g., 4:58 (concerning judging with justice), 4:181 (on acting justly), 5:8 (warning against hatred leading away from justice), and 16:90 (on doing good, being generous, and avoiding oppressive actions).

Ten years after leaving Mecca, the Muslims finally returned to their home city.

Before entering the city, Saad Ibn Obadah, one of four military leaders and a Companion of the Prophet (*Ṣaḥābiyy*) said:

Today is the day of the battle, today Quraish is humiliated!<sup>37</sup>

Saad had suffered in Mecca for many years before migrating to Medina, and it was with that suffering in mind that he chose his ill-tempered words. Upon hearing them, Muhammad immediately corrected his statement:

No Saad, do not say this. Rather, you should say, "Today is the day of mercy, today Quraish is honored!"<sup>38</sup>

Moreover, to insure Saad did not commit any unnecessary bloodshed out of revenge for how the Meccans had treated him, the Prophet replaced Saad as a leader with Saad's son. This act was the least offensive gesture towards Saad, yet also the wisest move to safeguard against self-indulgent aggression and thereby restore peace and justice.<sup>39</sup>

In sum, while Muslims are not to acquiesce to injustice or oppression, they are not to resort to violence in their struggle against these vices. They are to take the proverbial "High Road," one paved with restraint, mercy, and forgiveness. Only if peaceful means fail, and an attack is launched against Muslims, is the defensive use of arms permitted. Even then, the rule of proportionality must be followed, and if and when the upper hand is gained, then once again, restraint, mercy, and forgiveness are to guide further action.

## § 49.03 EMPHASIS ON PEACE

### [A] Relations with Non-Muslims

It is easy to rush into the topic of war, focus exclusively on it, and forget the first and foremost emphasis in Islam is peace. Muslim individuals and countries should base their relations with other individuals and countries on terms of peace.<sup>40</sup> Only in extreme circumstances should peaceful ties ever be broken. That is, war is always a last resort.

First, as a general matter, Islam does not permit the killing of people because they practice a different faith, or because they differ on religious matters. In this respect, one widely-quoted Qur'anic passage, *surah* 60, *ayat* 8-9 state:

. . . <sup>8</sup>and He does *not forbid* you to deal kindly and justly with anyone who has not fought you for your faith or driven you out of your homes: God loves the just. <sup>9</sup>But God *forbids* you to take as allies those who have fought

<sup>37</sup> Ghazali, *supra* (emphasis added).

<sup>38</sup> Quoted in Ghazali, *supra*.

<sup>39</sup> Quoted in Ghazali, *supra*.

<sup>40</sup> See Submission.org, *The War System in Islam*, posted at [www.submission.org/war.html](http://www.submission.org/war.html). [Hereinafter, *War System in Islam*.]



against you for your faith, driven you out of your homes, and helped others to drive you out: any of you who take them as allies will truly be wrongdoers.<sup>41</sup>

The difficulty with this passage is it stops short of barring all killing on the grounds of religion. *Ayah* 8 is phrased not as an order to be kind and just, but rather as a permission to behave as such, and then only to persons who have not fought with Muslims. *Ayah* 9 explains how Muslims are to treat persons who have fought with them on religious grounds. It does not tell them to kill such persons, but it bars them from reconciliation.

Of course, *ayat* 8-9 are not the only Qur'anic passages relevant to the topic of peace. *Surah* 8, *ayah* 61 states:

But if they incline towards peace, you [Prophet] must also incline towards it, and put your trust in God: He is the All Hearing, the All Knowing.<sup>42</sup>

"They" are non-believers, meaning (as *surah* 9, *ayah* 55 puts it), "those who reject Him [God] and will not believe."<sup>43</sup> This passage complements *surah* 60, *ayah* 8: if non-believers do not fight against Muslims, and are open to peace, there is no need to fight. Muslims may treat them kindly and justly. Muhammad, in particular, is to accept an olive branch offered him by opposing forces. By extension, Muslims are to follow his *Sunnah*.

Yet, even *surah* 8, *ayah* 61, does not create an unequivocal, all-encompassing, affirmative obligation to make peace. Its purview could be circumscribed to situations in which non-believers take the initiative and seek peace. To draw a contrast with Catholic Christianity, it falls short of one of the Beatitudes from Christ's Sermon on the Mount, recounted in *The Gospel According to Matthew*:

Blessed are the peacemakers,

For they will be called children of God.<sup>44</sup>

There are further Qur'anic passages about peace and tolerance. Yet, none is adamant. Each varies in the directness and durability of the inference that can be drawn from it.

For example, *surah* 2, *ayah* 256, states as a fact, and calls for a rule — that there is no compulsion in religion. The inference that Muslims ought to behave peacefully toward persons of other faiths is direct. *Surah* 109, *ayah* 1-6, concerns disbelief. These verses simply state differences in religion exist. This entire *surah* is an instruction to the Prophet, commanding him not to compromise on the principles that have been revealed to him. How he should enforce this command, and how Muslims should view the command in their own lives, is left open.

<sup>41</sup> Qur'an, *supra*, 60:8 at 369 (emphasis added).

<sup>42</sup> Qur'an, *supra*, 8:61 at 114.

<sup>43</sup> See Qur'an, *supra*, 8:55 at 114.

<sup>44</sup> *The Gospel According to Matthew*, 5:9, in *THE CATHOLIC STUDY BIBLE 13* (New York, New York: Oxford University Press, 1990, New American Bible trans.). [Hereinafter, *BIBLE*.]

Beyond the Qur'anic passages, there are several *hadiths* in which Muhammad testifies to the importance of honoring and respecting non-Muslims, and inspiring his followers toward peaceful exchanges with them. For example, *Imām* Bukhari narrates the following *hadiths*:

- Anybody who believes in Allāh and the Last Day should not harm his neighbor, and anybody who believes in Allāh and the Last Day should entertain his guest generously, and anybody who believes in Allāh and the Last Day should talk what is good or keep quiet (*i.e.*, abstain from all kinds of evil and dirty talk).<sup>45</sup>
- Whoever killed a *Mu'āhid* (a person who is granted the pledge of protection by the Muslims) shall not smell the fragrance of Paradise though its fragrance can be smelt at a distance of forty years (of traveling).<sup>46</sup>

These statements are resolute and unequivocal. The first of them, while not creating an affirmative obligation to "love" thy neighbor, demands no harm be done to the neighbor, regardless of his or her faith. Further, it mandates generosity toward guests, regardless of their faith. The second *hadith* explains that killing a person, regardless of faith, who has been guaranteed safe conduct is an offense punishable by condemnation to hell. A third relevant *hadith* is as follows:

"Beware on the Day of Judgment" the Prophet said while pointing to his chest, "I shall myself be complainant against him who wrongs a non-Muslim citizen of a Muslim state or lays on him a responsibility greater than he can bear or deprives him of anything that belongs to him. Whoever kills a non-Muslim ally is forbidden by God to smell the scent of Paradise that can be smelled from a distance of 70 years away."<sup>47</sup>

Here, too, is a clear, robust statement against committing an injustice toward a non-Muslim. However, it is qualified by the context in which that person lives, namely, in a Muslim state. It does not cover the treatment of non-Muslims in other spheres.

In sum, a variety of Qur'anic passages and *hadiths* underscore, albeit with varying degrees of strength and scope, a crucial idea in Islam: peace and harmony between people of different faiths should be the foundation of a society, and Muslims should work toward this cause. In this respect, recall the proper Muslim greeting: *Asalamu Alaykum*, which means "Peace Be Unto You." In contrast, the statement "Peace Be with You" tends to be uttered in Catholic Christianity only as

<sup>45</sup> BUKHARI, *supra*, at vol. VIII, book LXXIII (The Book of Al-Ādāb (Good Manners)), p. 29, *hadith* no. 47.

<sup>46</sup> BUKHARI, *supra*, at vol. IX, book LXXXIII (The Book of Ad-Diyāt (Blood Money)), p. 37, *hadith* no. 49.

<sup>47</sup> Ibn Hujr Al-Asqalani, MUWAFQAQ AL-AKHABAR AL-KHABAR, 2184, posted at [www.dorar.net/enc/hadith/%D8%AD%D8%B1%D9%85+%D8%AD%D8%AC%D9%8A%D8%AC%D9%87/+d1%2C2+w](http://www.dorar.net/enc/hadith/%D8%AD%D8%B1%D9%85+%D8%AD%D8%AC%D9%8A%D8%AC%D9%87/+d1%2C2+w) (original in Arabic, translated by Jomana Qaddour). This *hadith* also is narrated by Al Mawardi:

Beware on the Day of Judgment; I shall myself be complainant against him who wrongs a non-Muslim citizen of a Muslim state or lays on him a responsibility greater than he can bear or deprives him of anything that belongs to him.

Compilation of *Sahih Al-Mawardi* (original in Arabic, translated by Jomana Qaddour).

part of the Mass, but not as an everyday greeting. "*Asalamu Alaykum*" also is said by Muslims at the end of each prayer, five times a day, and thus is an integral part of the Second of the Five Pillars of Islam. Symbolically, this greeting and prayer-ending phrase bespeaks the religious significance of peace in Islam. Sadly, however, this relationship is distorted by extremists, who dwell on a different one, namely, between *jihād* and war.

### [B] Love Your Enemies?

While by no means perfect travelers along the "High Road" throughout history, this path is familiar to Catholic Christians. Indeed, *The Gospel According to Matthew* records the words of Christ on love of enemies:

<sup>48</sup>"You have heard that it was said, 'You shall love your neighbor and hate your enemy.' <sup>49</sup>But I [Jesus] say to you, love your enemies, and pray for those who persecute you, <sup>45</sup>that you may be children of your heavenly Father, for He makes His sun rise on the bad and the good, and causes rain to fall on the just and the unjust. <sup>46</sup>For if you love those who love you, what recompense will you have? Do not the tax collectors do the same? <sup>47</sup>And if you greet your brothers only, what is unusual about that? Do not the pagans do the same? <sup>48</sup>So be perfect, just as your heavenly Father is perfect."<sup>48</sup>

Likewise, in his *Letter to the Romans*, Saint Paul writes:

<sup>14</sup>Bless those who persecute [you], bless and do not curse them. . . . <sup>15</sup>If possible, on your part, live at peace with all. <sup>16</sup>Beloved, do not look for revenge but leave room for the wrath; for it is written "Vengeance is mine, I will repay, says the Lord." <sup>20</sup>Rather, "if your enemy is hungry, feed him; if he is thirsty, give him something to drink; for by doing so you will heap burning coals upon his head."<sup>49</sup>

And, the Apostle Peter states in *The First Letter of Peter*:

<sup>8</sup>Finally, all of you, be of one mind, sympathetic, loving toward one another, compassionate, humble. <sup>9</sup>Do not return evil for evil, or insult for insult; but on the contrary, a blessing, because to this you were called, that you might inherit a blessing.<sup>50</sup>

These passages embody a contrast with Islamic doctrine on the treatment of enemies. Islamic doctrine is not antithetical to Catholicism. Rather, it does not go far enough.

To instruct the faithful to act with restraint, mercy, and forgiveness, and fight only in self-defense, is noble. But, to instruct the faithful not only to love and pray for their enemies, but also to strive to be perfect like God, is radical. Moreover, embedded in the metaphor of Matthew, chapter 5, verse 45 is a precept about judgment. The sun shines, and rain falls, on both good and bad people, and we

<sup>48</sup> *The Gospel According to Matthew*, 5:43-48, in BIBLE, *supra*, at 15.

<sup>49</sup> *The Letter to the Romans*, 12:14, 18-20, in BIBLE, *supra*, at 246.

<sup>50</sup> *The First Letter of Peter*, 3:8-9, in BIBLE, *supra*, at 379.

cannot know why. Only God knows, and it is for God to judge the good from the bad, at the appropriate time, and in the appropriate manner. In the meantime, while we do not have to (and cannot possibly) "like" everyone, we can "love" them in the sense of wanting for them what is objectively good. Or, put directly as Saint Paul does, judgment and wrath are the province of God.

### § 49.04 JIHĀD AS WAR?

#### [A] Distinction between "*Jihād*" (Struggle) and "*Ḳatl*" (Killing)

On certain occasions, the Qur'ān mentions war and fighting, but does not use the word "*jihād*" in the relevant passages. In fact, when the Qur'ān does use the word "fight," which it does in various *ayat*, albeit not in the same context in each *ayah*, the Arabic term it employs is a verbal command: "*katl*," or *katloo* (plural).<sup>51</sup> The word "*jihād*" could have been used equivalently with "fight," but was not. Herein lies the key point: there is no instance in the Qur'ān when the words "fight" and "*jihād*" are used interchangeably.

Muslims contend that readers who truly understand the spirit of the Qur'ān understand that this linguistic difference exists for a reason. The words "*jihād*" and "*katl*" were not meant to be synonymous. Moreover, Muslims assert, neither the Prophet nor his *Ṣahābah* liked fighting, and Allāh knew this. Hence, Muhammad said:

"Fighting is ordained for you, *though you dislike it*. You may dislike something although it is good for you, or like something although it is bad for you: God knows and you do not."<sup>52</sup>

Purportedly, there is a *ḥadīth* narrated by a Companion that claimed Muhammad, upon returning from battle, said:

"We return from the lesser *jihād* to the greater *jihād*."<sup>53</sup>

This *ḥadīth* often is quoted by Islamic extremists to justify the calling of "*katl*" as "*jihād*." However, the *ḥadīth* is weak and its origin uncertain, if not entirely unknown.<sup>54</sup> Most Muslim scholars put little credence in it, and regard it as unauthentic. Despite its weakness, this *ḥadīth* fosters debate on the link between *jihād* and war. Ironically, Muhammad appears to be saying that battle is a "lesser" *jihād*, and thereby indicating the greater struggle is within oneself. In sum, the

<sup>51</sup> See Ali, *supra*.

<sup>52</sup> Qur'AN, *supra*, 2:216 at 24 (emphasis added).

<sup>53</sup> Quoted in IBS TAYMIYYAH, AL-MUSTAḌIRAK AL-ĀLMĀJMOO', 221:1, posted at [www.dorar.net/enc/hadith/%D8%A7%D9%84%D8%AC%D9%87%D8%A7%D8%AF+%D8%A7%D9%84%D8%A3%D8%B5%D8%BA%D8%B1/+p](http://www.dorar.net/enc/hadith/%D8%A7%D9%84%D8%AC%D9%87%D8%A7%D8%AF+%D8%A7%D9%84%D8%A3%D8%B5%D8%BA%D8%B1/+p) (original in Arabic, translated by Jomana Qaddour). See also IBS TAYMIYYAH, MAJMOO' AL-FATAWA 11:197 (concerning this topic).

<sup>54</sup> Telephone Interview by Ms. Jomana Qaddour with Dr. Hamed Ghazali, Ph.D., Adjunct Professor at the American Muslim University, Chairman of the Muslim American Schools (MAS) Council of Islamic Schools, and Director of the Houston Qur'ān Academy (29 March 2009).



majority of references to *jihād* in the Qur'ān and *hadīth* do not speak of taking up arms or engaging in battle.

### [B] *Jus Ad Bellum, Jus In Bello, and Power to Declare War*

The Qur'ān and Prophet speak of defensive battles and the protection of one's life, property, and family. There is an immediate similarity with the familiar delineation in Public International Law between:<sup>55</sup>

- *Jus ad bellum* (right to wage war), i.e., the law on the appropriate grounds for going to war and thereby on the right to use force.
- *Jus in bello* (justice in war), i.e., the law on appropriate conduct during wartime.

It might even be speculated that Islamic scholars contributed to this distinction.

As for *jus in bello*, both *Sunnīs* and *Shītes* agree as to the regulations regarding invocation and the permissible acts during warfare. There should be no torture, killing of non-combatants, or burning of cultivation.<sup>56</sup> However, generally speaking, the emphasis in Islamic International Law scholarship has been on *jus ad bellum*.

In this respect, with one notable exception, differences among the Four *Sunnite* Schools, and between *Sunnites* and *Shītes*, on *jihād* and warfare are few. The exception concerns who has the power to declare war. According to *Sunni* scholars, only a Caliph, with the support of the *ulema*, can declare war.<sup>57</sup> The existence of a Caliph presumes the existence of a legitimate Islamic state, without which war cannot be declared. In contrast, *Shītes* hold that all legitimate forms of warfare are defensive. Therefore, a *Shīte Imām* (in this context, analogous in secular authority to a Caliph) is not necessary for warfare.<sup>58</sup>

### [C] Fighting in Self-Defense

In respect of *jus ad bellum*, *Sunni* and *Shīte* scholars identify two distinct cases in which fighting is permissible under the *Shar'ā*: fighting in self-defense and fighting in the cause of Allāh. Arguably, a critical review of the history of Islam suggests that the first instance of warfare came 15 years after the first verse of the Qur'ān was revealed, that is, 15 years after 610 A.D., or 625 A.D., which in the Islamic calendar is the second year of *Hijra*. Until permission was given through the Qur'ān to the Prophet, Muhammad refused to let his companions fight the pagan Meccans, even though some of them had beaten, robbed, and killed the early

<sup>55</sup> See STEPHEN C. McCaffrey, UNDERSTANDING INTERNATIONAL LAW § 8.02 at 236, § 9.01[C] at 256 (Newark, New Jersey: LexisNexis, 2006); MARK JANIS, INTERNATIONAL LAW 176-77 (New York, New York: Aspen Publishers, 5th ed. 2008).

<sup>56</sup> See JOHN L. ESPOSITO, UNHOLY WAR: TERROR IN THE NAME OF ISLAM 38-39 (New York, New York: Oxford University Press, 2002). (Hereinafter, *Unholy War*.)

<sup>57</sup> See UNHOLY WAR, *supra*, at 38.

<sup>58</sup> See UNHOLY WAR, *supra*, at 38-39.

Muslims and pressured them to renounce the Prophecy of Mohammad.<sup>59</sup> With the Battle of Badr, the first verses in the Qur'ān on defensive *jihād* were revealed:

<sup>190</sup>Fight in God's cause against those who fight you, but do not overstep the limits . . . <sup>192</sup>Fight them until there is no more persecution, and [your] worship is devoted to God. If they cease hostilities, there can be no [further] hostility, except towards aggressors.<sup>60</sup>

The Qur'ān describes regulations and prohibitions associated with warfare, such as who is to fight and who is exempted (as in *surah* 48, *ayah* 17, and *surah* 9, *ayah* 91), when hostilities must cease (in *surah* 2, *ayah* 192), and how prisoners should be treated (in *surah* 47, *ayah* 4).<sup>61</sup> It enjoins Muslims not to damage cultivated or residential areas, and prohibits them from killing women, children, and non-combatants.

Indeed, as regards *jus in bello*, the key rule is proportionality: the conduct of warfare is to be only commensurate with the threat, as the Qur'ān emphasizes:

. . . So if anyone commits aggression against you, attack him as he attacked you, but be mindful of God, and know that He is with those who are mindful of Him.<sup>62</sup>

The Qur'ān also grants permission to Muslims to protect and defend their religious rights, and those of their fellow Muslims who had been prohibited from leaving Mecca or who did not have the financial means to do so and remained victims of religious persecution in Mecca. *Surah* 22 states:

<sup>39</sup>Those who have been attacked are permitted to take up arms because they have been wronged — God has the power to help them — <sup>40</sup>those who have been driven unjustly from their homes only for saying, "Our Lord is God." If God did not repel some people by means of others, many monasteries, churches, synagogues, and mosques, where God's name is much invoked, would have been destroyed. God is sure to help those who help His cause — God is strong and mighty. . . .<sup>63</sup>

Note the emphasis on self-defense, though certainly forgiveness and peace, whenever possible, is held as the better choice. Note, too, there is no clear "Turn the Other Cheek" exhortation, in contrast with Catholic Christianity.

To put the above-quoted passages in contemporary context, Muslim scholars generally would argue that defensive warfare to protect the territory of Muslims and fighting those who oppress Muslims, is authorized, but peaceful means of resolution and forgiveness are the preferred responses. Further, this scheme generally accords with the rules followed by non-Muslim states: they are permitted to defend themselves against external aggression and occupation. Of course, this scheme does not address questions about pre-emptive self-defense, and anticipatory

<sup>59</sup> See Ghazali, *supra*.

<sup>60</sup> QUR'AN, *supra*, 2:190, 193 at 21-22.

<sup>61</sup> See UNHOLY WAR, *supra*, at 32.

<sup>62</sup> QUR'AN, *supra*, 2:194 at 22.

<sup>63</sup> QUR'AN, *supra*, 22:39-40 at 212.

self-defense, which given the present-day destructive potential of weaponry, are critically important.

### [D] Fighting for Cause of Allāh and Four Caveats

It is incumbent on Muslims to work for justice, and create an environment to allow them to follow the Will of Allāh. Individual *jihād* is partially a struggle to eradicate injustice and oppression. It entails withstanding societal pressure to do good works and stand firmly as a believer. Put bluntly, Islam does not treat oppression lightly.

Accordingly, Muslims who live in oppressive circumstances, under a tyrannical ruler who, for example, forcefully evicts law-abiding citizens from their property without cause, or jails non-violent opponents, should strive for justice. But, their intentions must be to serve Allāh, not themselves and their own individual self-interests.<sup>64</sup> In *surah* 4, *ayat* 74-75, the Qur'an speaks about the aims of war:

<sup>74</sup>Let those of you who are willing to trade the life of this world for the life to come, fight in God's way. To anyone who fights in God's way, whether killed or victorious, We shall give a great reward. <sup>75</sup>Why should you not fight in God's cause and for those oppressed men, women, and children who cry out, "Lord, rescue us from this town whose people are oppressors! By Your grace, give us a protector and helper!" <sup>76</sup>The believers fight for God's cause, while those who reject faith fight for an unjust cause. Fight the allies of Satan: Satan's ploys are truly weak.<sup>65</sup>

Indubitably, this passage, which pertains to *jus ad bellum*, needs to be read with care. Four caveats are in order.

First, the entire passage must be read in historical context, albeit at the risk of committing the Orientalist Fallacy. At the time *ayat* 74-76 were revealed, the Prophet sent his delegates to eight neighboring rulers, calling them to embrace Islam. The Persian and Roman emperors at the time were known for their oppressive ruling methods. Some of the rulers killed the delegations sent by the Prophet.<sup>66</sup> At that point, Muslims urge, Muhammad permitted the eradication of oppression in the lands of the neighboring empires, so as to permit individuals there to live under just circumstances, embrace Islam, or otherwise practice their religion freely.

Second, *ayah* 74 is easily susceptible to abuse. Who decides "God's cause"? History is littered with individuals claiming they were justified to take up violent means to remedy oppression in the name of God. *Ayah* 74 holds out martyrdom as a desirable fate. But, some would-be martyrs hold to a distorted conception of martyrdom, erroneously understanding what a martyr really is or does. A martyr is a witness to the truth, and by no means must their witnessing entail an act of aggression on their part. As the history of Christian martyrs who died at the hands of the Ancient Romans shows, and as the history of more recent martyrs, such as

<sup>64</sup> See *War System in Islam*, *supra*.

<sup>65</sup> *Qur'an*, *supra*, 4:74-76 at 57.

<sup>66</sup> See *War System in Islam*, *supra*.

Saint Maximilian Kolbe, who died at the hands of the Nazis, also shows, martyrdom involves an act of sacrifice at the hands of an aggressor. Not surprisingly, the *Oxford English Dictionary* defines "martyr" as:

[a] person who is put to death for refusing to renounce a faith or belief.<sup>67</sup>

Thus, to "make a martyr of oneself" is to "accept . . . unnecessary discomfort."<sup>68</sup> The issue is whether a true martyr goes out looking to make trouble and start a fight. Another way to put the point is in terms of spiritual discernment. The ability to see clearly matters that pertain to God, and discern an appropriate course of conduct is a rare gift. Typically, those who are blessed with it are not the first to call others to launch violent combat.

Third, a literal reading of *ayat* 75-76 can yield dangerous consequences. Obviously, the history of war knows no religious or geopolitical boundaries. Through the millennia, one faith has launched a holy war or crusade against another. Political leaders have plunged their nations into war against other nations, whipping up a frenzy of hatred that demonizes the opponent by manipulating religious language, concepts, and metaphors. Oppression exists as part of the human condition and oppressors permeate history. If oppression were the *casus belli* (the incident or cause of war, i.e., the cause of war) for going to war against oppressors, then war — both international and civil — would be a permanent state in the human experience.

Thus, reading *ayat* 75-76 literally as permission from Allāh to fight, in a violent sense, for His "cause" for "oppressed" persons against "oppressors" is a recipe for disaster. With the existence of weapons of mass destruction (WMD), perhaps a literal reading would spell the eradication of the human species. Out of necessity of collective self-preservation, "fight" has to be read to refer to non-violent methods. That is all the more true given the Arabic verb used in connection with "unjust cause" in *ayah* 76 (as well as "unjust tyrants" in *surah* 4, *ayah* 60): *taghut*. As Professor Abdel Haleem points out, this verb can have a "multitude of meanings," referring to an opponent of the Prophet, idol, oracle, or tyrannical ruler.<sup>69</sup> With this verbal latitude, the "just causes" for conflict would be limitless.

The fourth caveat follows logically from the first three. To fight Satan, whose ploys are "truly weak," as *ayah* 76 states, is it not more efficacious to take the proverbial "high road"? Consider the response of Jesus when entering a Samaritan village en route to Jerusalem, as recounted in Chapter 9 of *The Gospel According to Luke*:

<sup>51</sup>When the days for his [Jesus'] being taken up were fulfilled, he resolutely determined to journey to Jerusalem, <sup>52</sup>and he sent messengers ahead of him. On the way they entered a Samaritan village to prepare for his reception there, <sup>53</sup>but they [the Samaritans] would not welcome him because the destination of his journey was Jerusalem. <sup>54</sup>When the disciples James and John saw this they asked, "Lord, do you want us to call down

<sup>67</sup> OXFORD AMERICAN DICTIONARY AND THESAURUS (New York, New York: Oxford University Press, 2003) at 919 (entry for "martyr"). (Hereinafter, *DICTIONARY*.)

<sup>68</sup> *DICTIONARY* at 919 (entry for "martyr") (emphasis added).

<sup>69</sup> See *Qur'an*, *supra*, fn. b to 4:60 at 56, fn. b to 4:76 at 57.



fire from heaven to consume them?" <sup>55</sup>Jesus turned and rebuked them, <sup>56</sup>and they journeyed to another village.

<sup>57</sup>As they were proceeding on their journey someone said to him, "I will follow you wherever you go." <sup>58</sup>Jesus answered him, "Foxes have dens and birds of the sky have nests, but the Son of Man has nowhere to rest his head." <sup>59</sup>And to another he said, "Follow me." But he replied, "[Lord,] let me go first and bury my father." <sup>60</sup>But he answered him, "Let the dead bury their dead. But you, go and proclaim the kingdom of God."<sup>70</sup>

While the New Testament Parable of the Good Samaritan and the Samaritan woman cast a favorable light on Samaria, the above-quoted passage does not.<sup>71</sup> (Samaria was territory between Judea and Galilee, to the west of the Jordan River, and for "ethnic and religious reasons, the Samaritans and the Jews were bitterly opposed to one another."<sup>72</sup>) At the time of this journey, it was hazardous for Jews to travel through Samaria. Samaritans were not always hospitable toward Jews, much less one like Jesus, who had a controversial message to share. The followers accompanying Christ specifically ask whether they should resort to violence against the Samaritans in retaliation for the unkind treatment they accorded Jesus. His response is a sharp "no," admonishing his followers to let the spiritually dead (i.e., those who do not believe) bury their physically dead, to move on and "proclaim" (not "impose") the message, and thereby to take the high road.<sup>73</sup>

#### § 49.05 KHARIJITES AND ASSASSINS

Tragically, the monstrous transposition of meanings, and *bona fide* terrorism, are not phenomena of just the 20th and 21st centuries. Nearly since the advent of Islam, the *umma* "experienced the terror of religious extremist movements."<sup>74</sup> The *Kharijites* and the Assassins, both fundamentalist outliers in the religious and political sense, separated from mainstream Muslims and arguably were the first Islamic terrorists. Both groups separated from Muslim societies and established what they believed was a prophetic model and radical form of *jihād*.

The term "*Kharijites*" means "those who went out," and is associated with "*Khārij*," which means "stranger" or "third party." Historically, "*Khārijites*" also were called "*Shurat*," which means "buyers." This suggests they have traded their mortal life ("*al dunya*") for another life ("*al akhera*"), namely, one with God. The *Khārijites* supported the first three of the Four Rightly Guided Caliphs (*Rashidun*), and initially supported the fourth such Caliph, 'Ali, cousin and son-in-law of Muhammad, and the first *Shi'ite Imām*. Subsequently, they rejected 'Ali, and revolted against him, thereby becoming a group distinct from both *Sunnis*

and *Shi'ites*. A member of the *Khārijites* (specifically, one of the early groups within the movement, called the "*Harūriyya*"), Abd Al Rahman ibn Muljam, assassinated 'Ali.

The *Khārijites* insisted that any pious, able Muslim, whether or not related by blood to the family of the Prophet Muhammad (as 'Ali was), could serve as *Imām* in the sense of religious and political leader of the *umma*. They also insisted on the right to revolt against any leader who deviated from the example of the Prophet or the first two Caliphs, Abū Bakr and 'Umar. In addition to their political ideas, the *Khārijites* articulated religious and legal precepts that distinguished them from *Sunnites* and *Shi'ites*. For example, the *Khārijites* (specifically, the *Harūriyya*) accepted the proposition that a woman could be an *Imām*.

By the 7th century A.D., the *Khārijites* became concentrated in what now is Southern Iraq. Today, all that remains of the *Khārijites* are the "*Ibādī*" Muslims, who dominate in Oman, and also are found in certain parts of North Africa, and in Zanzibar. The *Ibādīs* reject the name "*Khārijites*" for themselves and take the label "People of Justice and Uprightness" (*Ahl Al-Adl wal Istiqama*).

The *Khārijites* demarcated strict lines between belief and disbelief. They were convinced it was their duty to kill those who sinned unless they repented.<sup>75</sup> Yet, this notion is contrary to the Qur'ān and *Sunnah*. Likewise, the Assassins departed on a crooked path from the true spirit of what Muhammad preached. They hid in clandestine communities and were guided by secret masters to kill both Muslims and Crusaders, and assassinate any *Abbasid* leaders, *ulema*, or generals they regarded as corrupt.<sup>76</sup>

In more recent centuries, many individuals have associated themselves with *jihād* to justify revolt against regimes they find antithetical to the establishment of true Islam. These individuals include Ibn Taymiyyah (1263-1328 A.D.), Mohammad ibn Abd al-Wahhab (1703-91), Hasan Al Banna (1906-1949), Mawlana Mawdudi (1903-1979), and Sayyid Qutb (1906-1966).<sup>77</sup> Their influence on the "*jihādī*" movement has been considerable. In contemporary times, the work of Sayyid Qutb, in particular, is famous (or infamous) for its influence on modern day Muslim political revolutionaries, most of whom are "terrorists" in the contemporary legal sense.<sup>78</sup>

Osama bin Laden, his followers, and many other contemporary extremists have committed themselves to using "*jihād*" as a way to transform their political and social environments into what they regard as Islamically acceptable, rejecting anything contradictory to their vision. A common theme among the extremists is rallying against America, Europe, and Israel to create an "us-versus-them" sentiment based on a rigid delineation between "right" and "wrong," and "pure" and "evil." To inflame emotions, they capitalize on the conflict between Israel and the Palestinians, resulting in some groups doing what most Muslims regard as

<sup>70</sup> *The Gospel According to Luke*, 2:1-11, in BIBLE, *supra*, at 150-151.

<sup>71</sup> For the Parable of the Good Samaritan, see *The Gospel According to Luke*, 10:29-37, in BIBLE, *supra*, at 120. For the story of the Samaritan Woman, or Woman at the Well, see *The Gospel According to John*, 4:4-42, in BIBLE, *supra*, at 150-151.

<sup>72</sup> *The Gospel According to Luke*, in BIBLE, *supra*, at fn. 9, 52 at 118.

<sup>73</sup> *The Gospel According to Luke*, in BIBLE, *supra*, at fn. 9, 60 at 118.

<sup>74</sup> *UNHOLY WAR*, *supra*, at 42.

<sup>75</sup> See *UNHOLY WAR*, *supra*, at 42.

<sup>76</sup> See *UNHOLY WAR*, *supra*, at 42.

<sup>77</sup> See *UNHOLY WAR*, *supra*, at 43-64.

<sup>78</sup> See *UNHOLY WAR*, *supra*, at 43-45.

religiously forbidden: suicide bombings and unrestrained offensive war to resolve the conflict.

## Chapter 50

### TERRORISM

A fanatic is one who can't change his mind and won't change the subject.

Sir Winston S. Churchill (1874-1965)  
British First Lord of the Admiralty (1911-1915, 1939-1940),  
British Prime Minister (1940-1945, 1951-1955),  
Awarded the Nobel Prize in Literature (1953)

#### SYNOPSIS

##### § 50.01 JIHĀD AS TERRORISM?

- [A] What is "Terrorism"?
- [B] Condemnation in Islamic Criminal Law

##### § 50.02 MUSLIM BROTHERHOOD

- [A] Origin, Evolution, and Growth
- [B] Philosophy, Principles, and Objectives
- [C] Terrorism

##### § 50.03 AL QAEDA

- [A] Origins
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- [C] Principles and Objectives
- [D] Legality of *Al Qaeda* Actions under Islamic Law of War
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##### § 50.01 JIHĀD AS TERRORISM?

###### [A] What is "Terrorism"?

Investigating the relationship between Islam and terrorism begs a key question. What is "terrorism"? The *Oxford English Dictionary* defines terrorism as:

a policy intended to strike with terror those against whom it is adopted; the employment of methods of intimidation; the fact of terrorizing or condition of being terrorized.<sup>1</sup>

However, from a legal perspective, this definition is insufficiently precise.

<sup>1</sup> OXFORD AMERICAN DICTIONARY AND THESAURUS (New York, New York: Oxford University Press, 2003) at 1989 (entry for "terrorism").



Turning to legal approaches, the term "terrorism" first was defined by the League of Nations in the 1930s, responding to ethnic separatist violence.<sup>2</sup> The League articulated a definition as part of an international legal regime to promote peace and stability. However, the League definition is not the only one. Indeed, there is no single, universally accepted legal definition of "terrorism." Rather, there are several definitions, even multiples ones within the United States government. Among the most prominent definitions are the following:

- League of Nations Definition —

All criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons or a group of persons or the general public.<sup>3</sup>

- United Nations Conventions —

Since 1963, under the auspices of the United Nations, 12 universal conventions and protocols against terrorism have been issued.<sup>4</sup> Their purpose is to create a global consensus as to what acts qualify as "terrorism," and thereby can be prosecuted as such. Hijacking an aircraft is an example. Not all United Nations members have signed all of them. The United Nations Office on Drugs and Crime collects these agreements.

- 1998 Arab Convention for the Suppression of Terrorism —

In 1998, meeting in Cairo, Egypt, the Council of Arab Ministers of the Interior and the Council of Arab Ministers of Justice agreed to the *Arab Convention for the Suppression of Terrorism*. That Convention defines "terrorism" as:

Any act or threat of violence, whatever its motives or purposes, that occurs in the advancement of an individual or collective criminal agenda and seeking to sow panic among people, causing fear by harming them, or placing their lives, liberty or security in danger, or seeking to cause damage to the environment or to public or private installations or property or to occupying or seizing them, or seeking to jeopardize a national resources.<sup>5</sup>

- United States Federal Criminal Code Definition —

["Terrorism" refers to] . . . activities that involve violent . . . or life-threatening acts . . . that are a violation of the criminal laws of the United States or of any State and . . . appear to be intended (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by

intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping . . . .<sup>6</sup>

- United States *USA PATRIOT Act* Definition —

["Terrorism" refers to] activities that

- (A) involve acts dangerous to human life that are a violation of the criminal laws of the U.S. or of any state, that
- (B) appear to be intended
  - (i) to intimidate or coerce a civilian population,
  - (ii) to influence the policy of a government by intimidation or coercion, or
  - (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping, and
- (C) occur primarily within the territorial jurisdiction of the U.S.<sup>7</sup>

- United States Law on Country Reports —

The Secretary of State must provide to Congress each year Country Reports on terrorism. For that purpose, American law defines "terrorism" as:

- (d) Definitions

As used in this section —

- (1) the term "international terrorism" means terrorism involving citizens or the territory of more than 1 country;
- (2) the term "terrorism" means premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents;
- (3) the term "terrorist group" means any group, or which has significant subgroups which practice, international terrorism;
- (4) the terms "territory" and "territory of the country" mean the land, waters, and airspace of the country; and
- (5) the terms "terrorist sanctuary" and "sanctuary" mean an area in the territory of the country —
  - (A) that is used by a terrorist or terrorist organization —

<sup>2</sup> See Amy Zalman, Ph.D., *Definitions of Terrorism*, posted at [http://terrorism.about.com/od/whatisterrorism/1ss/DefineTerrorism\\_2.htm](http://terrorism.about.com/od/whatisterrorism/1ss/DefineTerrorism_2.htm). [Hereinafter, Zalman.]

<sup>3</sup> See Zalman, *supra*.

<sup>4</sup> See Zalman, *supra*.

<sup>5</sup> See Zalman, *supra*.

<sup>6</sup> 18 U.S.C. § 2331.

<sup>7</sup> The full title from which the acronym is drawn is *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001*, Pub. L. 107-56 115 Stat. 272 (26 October 2001), codified at multiple sections in titles 8, 12, 15, 18, 20, 31, 42, 47, 49, 50, and 51. The above definition is found in title 18, which is the Federal Criminal Code.

- (i) to carry out terrorist activities, including training, fundraising, financing, and recruitment; or
- (ii) as a transit point; and
- (B) the government of which expressly consents to, or with knowledge, allows, tolerates, or disregards such use of its territory and is not subject to a determination under —
  - (i) section 2405(j)(1)(A) of the Appendix to title 50;
  - (ii) section 2371 (a) of this title; or
  - (iii) section 2780 (d) of this title.\*

• United States Department of Defense (DOD) —

The DOD *Dictionary of Military Terms* defines "terrorism" as:

The calculated use of unlawful violence or threat of unlawful violence to inculcate fear; intended to coerce or to intimidate governments or societies in the pursuit of goals that are generally political, religious, or ideological.<sup>8</sup>

• United States Federal Bureau of Investigation (FBI) Definition —

The unlawful use of force or violence against persons or property to intimidate or coerce a Government, the civilian population, or any segment thereof, in furtherance of political or social objectives.<sup>10</sup>

These definitions are not entirely reconcilable. For example, the 1998 *Arab Convention* states that motivation does not matter, whereas the American definitions all make motivation an element of the definition.

Nevertheless, as a general synthesis, the definitions contain six common elements. "Terrorism" involves:

- (1) Targeting non-combatants.
- (2) Pre-meditation.
- (3) Unlawful act or threat of violence.
- (4) Inculcation of fear of a danger to life, liberty, or property.
- (5) Intention to coerce or intimidate a government or non-combatants.
- (6) Goal (assuming motivation matters) is to pursue a political, religious, or ideological end.

Obviously, when the Qur'ān was revealed, none of the above-quoted definitions, nor the six-point synthesis of them, was in existence. Thus, investigating the relation-

\* 22 U.S.C. § 2656(d).

<sup>8</sup> See Zalman, *supra*.

<sup>10</sup> See Zalman, *supra*.

ship between Islam and terrorism imposes a contemporary legal framework retrospectively.

This imposition can be perilous. Muslims at the time of the Prophet, and for several centuries thereafter, as well as non-Muslims, did not conceive of "terrorism" in terms of these elements, if they even thought in terms of the concept of "terrorism." However, insofar as the inquiry pertains to contemporary behavior, then using the modern legal framework not only is reasonable, but is the purpose for that framework.

## [B] Condemnation in Islamic Criminal Law

As discussed earlier, "jihād" has no single meaning to a practicing Muslim. The *jihād* of one adherent may not be the same as that for another follower. Though there are commonalities, each person has a unique struggle to draw nearer to Allāh. Unfortunately, the elasticity of the meaning of *jihād* has created somewhat of a vacuum, filled by extremists. They have re-defined "jihād" closer to "terrorism" in the contemporary legal sense outlined above. To the horror of the vast majority of Muslims and non-Muslims alike, extremists have defiled what is very much a spiritual term.

Islam takes a strong position against terrorism, and like the modern American legal regime, is grounded in Criminal Law. What would be called "terrorism" today is a crime against the public order (*hirabah*), i.e., an act that threatens the security of society. Such acts include highway robbery (*kaʿ al-ṭarīq*), but are not limited to that example. The relevant Qur'ānic passage is *surah 5, ayah 33*:

Those who wage war against God and His Messenger and strive to spread corruption in the land should be punished by death, crucifixion, the amputation of an alternate hand and foot, or banishment from the land; a disgrace for them in this world, and then a terrible punishment in the Hereafter, unless they repent before you over power them: in that case bear in mind that God is forgiving and merciful.<sup>11</sup>

The punishment for a *hirabah* offense adduces the strength of Islamic Criminal Law against terrorism.<sup>12</sup> The offense is a *ḥaqq Allāh* crime, triggering a *ḥadd* punishment, which by nature are the severest. Muslim scholars do not limit this punishment to one type of crime. They agree "this is the punishment for those who commit acts of terrorism against other people, such as armed robbery or hijacking a plane."<sup>13</sup>

<sup>11</sup> THE QUR'AN — A New Translation by M.A.S. Abdel Haleem 5:33 at 71 (emphasis added) (Oxford, England: Oxford University Press, 2004). [Hereinafter, QUR'AN.]

<sup>12</sup> See Hamed Ghazali, Ph.D., *Islam for Peace and Justice*, 3 THE AMERICAN MUSLIM MAGAZINE 10, 18 (March 2002). [Hereinafter, Ghazali.] Dr. Ghazali is an American Muslim scholar, Adjunct Professor at the American Muslim University, Chairman of the Muslim American Schools (MAS) Council of Islamic Schools, and Director of the Houston Qur'ān Academy.

<sup>13</sup> See GHAZALI, *supra*, at 18.



Some *Shari'a* scholars interpret the term "banishment from the land" to mean jail, or isolation from society.<sup>14</sup> Others interpret it to mean execution, since it the verse states "banishment from the land," meaning all of the earth.<sup>15</sup> In brief, the punishment for the spreading of mischief and terrorism is severe. In practice, it is intended not only to provide specific deterrence (precluding the perpetrators from committing the offence again), but also general deterrence (discouraging others from engaging in that offense).

Because "terrorism," understood in the Qur'anic sense of spreading mischief through the land, never is condoned, it is clearly erroneous to interchange the terms "jihad" and "terrorism." "Jihad" is encouraged; "terrorism" is a serious criminal offense. The exercise of discerning and submitting to the Will of God has nothing to do with striking fear through violence or the threat thereof in the hearts of innocent persons.

## § 50.02 MUSLIM BROTHERHOOD

### [A] Origin, Evolution, and Growth

The Muslim Brotherhood (*Ikhwan al-Muslimin*) is a transnational *Sunni* movement and the largest political opposition group in many Arab nations, particularly Egypt. The movement is tremendously influential in many Muslim countries, operating networks of Islamic charities and grassroots social organizations. Most countries in which the Brotherhood is active are not pluralistic, multi-party democracies. Several ruling regimes in Arab countries have banned the Brotherhood. Consequently, restrictions on political activity effectively prevent it from obtaining power through elections.

Unsurprisingly, the Brotherhood tends to be depicted in the extreme: either as an unjustly oppressed group focused on social justice, or a dangerously violent network flirting with terrorism. In truth, for better or worse, contemporary Islamic activism owes much of its ideological and organizational foundations to the principles and *modus operandi* of the Muslim Brotherhood. The organization has had an incalculable impact on the development of subsequent Islamic movements throughout the Muslim world.

The founder of the Brotherhood was Hassan Al Banna. Born in 1906 in Mahudiya, Egypt, (northwest of Cairo), Al Banna was educated at Al-Azhar University and became a schoolteacher. His father was a local *imam* who adhered to the *Hanbali* School. Following the death of Al Banna in 1949, Sayyid Qutb (1906-1966) became the public voice of the Brotherhood. Qutb was brought up in the Asyut Province of Upper Egypt, in the village of Musha, and his father was a landowner, administrator of the family estate, and a politically activist. Between 1948 and 1950, Qutb studied on a scholarship in Greeley, Colorado, at the Colorado State College of Education, now known as the University of Northern Colorado. In 1949, while in America, he published his first major book, *Social Justice in Islam* (in

Arabic, *Al-Adala Al-Ijtima'iyya fi Al-Islam*). Both Al Banna and Qutb are justifiably regarded as the "trailblazers [and] architects of contemporary Islamic revivalism."<sup>16</sup>

Al Banna established the Muslim Brotherhood in 1928. He intended it to be a religious, political, and social movement, and its credo was and remains:

Allāh is our objective, the Qur'ān is our constitution, the Prophet is our leader, *Jihad* is our way, and death for the sake of Allāh is the highest of our aspirations.<sup>17</sup>

The timing was no accident. In 1928, the Arab Islamic community generally, and Egypt in particular, was in crisis, brought upon by economic and technological stagnation, corrupt leadership, international political turmoil, and Western colonialism. Muslim intellectuals perceived a lack of connection between actions of government, on the one hand, and commands of the *Shari'a*, on the other hand, leading them to label the Arab political elite illegitimate.<sup>18</sup> Thus, unstable conditions and intellectual frustration provided the base for a new mass movement.<sup>19</sup> The Brotherhood attained broad support relatively quickly, with its membership reaching over one million members by 1950.<sup>20</sup>

The primary catalysts for the call of the Brotherhood for comprehensive reform of Islamic society were what Al Banna and his cohort perceived to be imperialistic foreign behavior and "Westernized Muslim leadership."<sup>21</sup> Al Banna believed Western imperialism not only posed political and economic dangers, but also was a cultural threat. Al Banna regarded the "religiocultural penetration" of the West, especially in the spheres of education, law, and social values, as even more harmful in the long-run to Arab Islamic countries than immediate the imperialism of political economy, backed by military power, posed by the non-Muslim West. The intrusive influences in these spheres threatened the very identity, independence, and way of life of the Muslim *ummah*.<sup>22</sup> Declaring Islam an ideological alternative to Western capitalism and Soviet Marxism, Al-Banna saw the Brotherhood as joining intellectual thought with pragmatic action, creating organizations that engaged in political and social activism.

The Muslim Brotherhood primarily recruited followers from mosques, schools, and universities.<sup>23</sup> Its long-term goal was to cultivate a new generation of modern-educated, but Islamically oriented, leaders to assume power in a genuine

<sup>16</sup> JOHN ESPOSITO, *THE ISLAMIC THREAT: MYTH OR REALITY?*, 120 (New York, New York: Oxford University Press, 2nd ed. 1995). (Hereinafter, *ISLAMIC THREAT*.)

<sup>17</sup> The Muslim Brotherhood (*Ikhwan*), Official English Website, "The Principles of the Muslim Brotherhood" (13 June 2007), posted at [www.ikhwanweb.com](http://www.ikhwanweb.com). (Hereinafter, *Muslim Brotherhood Website*.)

<sup>18</sup> Muslim Brotherhood Website, *supra*.

<sup>19</sup> See AINI LINJAKUMPU, *POLITICAL ISLAM IN THE GLOBAL WORLD* 61 (Dryden, New York: Ithaca Press (IB), 2008). (Hereinafter, *LINJAKUMPU*.)

<sup>20</sup> See *LINJAKUMPU*, *supra*.

<sup>21</sup> *ISLAMIC THREAT*, *supra*, at 120.

<sup>22</sup> *ISLAMIC THREAT*, *supra*, at 122.

<sup>23</sup> See *ISLAMIC THREAT*, *supra*, at 123.

<sup>14</sup> See Ghazali, *supra*, at 18.

<sup>15</sup> See Ghazali, *supra*, at 18.

Islamic state. Al Banna believed, however, establishment of an Islamic state first required the "Islamization" of society through a gradual, grassroots social change. For this reason, the Brotherhood operated as a fundamentally (but not fundamentalist) populist movement.

### [B] Philosophy, Principles, and Objectives

The stated goal of the Muslim Brotherhood is to "raise the banner of Islam" through political means that revitalize the religion and allow followers to "feel the pulse" of Islam in all aspects of life.<sup>24</sup> What, then, does the organization say must be done in order to achieve such lofty goals? The Brotherhood puts forth two basic objectives.

First, Islamic countries should be free from all foreign, non-Islamic control. Second, free Islamic governments, operating under the *Shari'a*, should be established in all Muslim lands.<sup>25</sup> Note, then, Al Banna did not merely call for seats of power held by Islamists within Arab governments. He went further, demanding actual creation of authentic Islamic states. Going yet one more step, Al Banna advocated the establishment of a commonwealth of Islamic nations having its own central government, with the hope it one day would lead to a new Caliphate.<sup>26</sup>

Like secular and Islamic modernists, Al Banna acknowledged the weaknesses and shortcomings of Muslim society. However, he criticized both groups for their "excessive dependence on the West," which he deemed to be the root cause of the impotence of Muslim societies.<sup>27</sup> Secularists, he argued, cut off religion from society and saw the West as the only model for development. Islamic modernists, he claimed, in their keenness to demonstrate the compatibility of Islam with modernity, relied heavily upon Western values, thus producing a Westernized Islam.<sup>28</sup>

By contrast, for Al Banna, the Brotherhood asserted the complete self-sufficiency of Islam. Faith in the West was misplaced. Al Banna and his followers argued, first, Western democracy had not merely failed to limit, but even contributed directly to, the authoritarianism, corruption, and social injustice

<sup>24</sup> SAIED HAWWA, *THE MUSLIM BROTHERHOOD* 19 (New Delhi, India: Hindustan Publications, 1983). [Hereinafter, HAWWA.]

<sup>25</sup> HAWWA, *supra*, at 43-45. See also Muslim Brotherhood Website, *supra*.

<sup>26</sup> HAWWA, *supra*, at 67.

<sup>27</sup> HAWWA, *supra*, at 124.

<sup>28</sup> Abul Ala Mawdudi, founder of the *Jamaat-i-Islami*, a group created in India and Pakistan with strong ideological ties to the Muslim Brotherhood, wrote extensively on this issue, saying in part:

All these people in their misinformed and misguided zeal to serve what they hold to be the cause of Islam, are always at great pains to prove that Islam contains within itself the elements of all types of contemporary social and political thought and action. . . . [T]his attitude emerges from an inferiority complex, from the belief that we as Muslims can earn no honour or respect unless we are able to show our religion resembles modern creeds and is in agreement with most of the contemporary ideologies.

Abul Ala Mawdudi, *Political Theory of Islam*, in JOHN J. DONOHUE & JOHN L. ESPOSITO EDS., *ISLAM IN TRANSITION: MUSLIM PERSPECTIVES* 252 (New York, New York: Oxford University Press, 1982). The *Jamaat-i-Islami* group is banned as a terrorist organization in many countries.

plaguing Egypt and other Muslim societies. Second, Western secularism and materialism undermined religion, morality, and the family. Third, the Brotherhood condemned the betrayal of Arabs by the West, manifest in its unabashed support for the Israeli occupation of Palestine.<sup>29</sup>

Notably, over the last several decades, the second point has been made in various pronouncements by Popes and other Vatican officials. Betrayal of promises to Arab leaders was a point made following the First World War by none other than T.E. Lawrence (Lawrence of Arabia). Indeed, all of these arguments of the Brotherhood still resonate strongly not only among Arab intellectuals, but among average, every-day Muslims and non-Muslims alike around the world.

For the Muslim Brotherhood, repudiation of the West did not equate with a rejection of modernization. Al Banna differentiated Western values from modern political ideas and institutions. He maintained democratic ideals could be borrowed selectively from the West, if they were informed by Islamic values.<sup>30</sup> This philosophy is reflected in *15 Principles for Agreement*, formulated and published by the Brotherhood in the 1990s as a blueprint for government. The *Principles* are 15 confirmations, as follows:<sup>31</sup>

1. The people are the source of all power, thus it is not permissible for any one individual, party, group, or institution to claim the right to authority, or to continue in power, except with the consent of the people.
2. Total commitment to, and respect of, the principle of power exchange through free and fair general elections.
3. Freedom of personal conviction, including specifically religious conviction.
4. Freedom of establishing religious rites for all the known heavenly religions.
5. Freedom of opinion and the right to publicize it, and to call peacefully to it, within the limitations of the moral values of society that are detailed in the constitution.<sup>32</sup>
6. The right to form political parties. No administrative body should have the power to restrict or stop the application of this right. Rather, an independent judicial authority should be the only source to decide what manifestations of this right would fall outside the ideals and standards of society.
7. The right to public gatherings, the invitation to them, and participation in them, as long as violence or arms are not involved.
8. The right of peaceful demonstrations.

<sup>29</sup> See ISLAMIC THREAT, *supra*, at 125.

<sup>30</sup> See ISLAMIC THREAT, *supra*, at 125.

<sup>31</sup> Muslim Brotherhood Website, *supra*. See also LINJAKUMPU, *supra*, at 64-65.

<sup>32</sup> The "constitution" referred to is the Qur'an.



9. The importance of representing the people through a parliamentary council elected through free and fair elections.
10. The right of every citizen, whether man or woman, to take part in parliamentary elections.
11. The right of every citizen to become a member of parliament through elections.
12. The independence of the judicial system at all levels, plus the need to ensure the judiciary is safe from any source of fear or manipulation, and no person is tried except by a qualified judge.
13. The separation between the prosecution and investigation authorities, plus the need to ensure the public defense authority is independent from the minister of justice.
14. The need for the army to stay clear of politics, and concentrate only on protecting the security of the country from external threats.
15. The need for the police and all other security services to protect the security of the nation and society as a whole, to prohibit them from being used as an instrument of the state to crush opposition opinion.

On paper, it is difficult to argue with these Principles. After all, they are consistent with many features of the United States Constitution and guarantees in the Bill of Rights.

According to the Muslim Brotherhood, democracy is in accordance with the fundamental spirit of Islam, and the *Shar'ā* is inherently affixed to the Islamic form of government.<sup>33</sup> The Brotherhood believes the *Shar'ā* offers ideological and religious objectives that ought to be the sole basis for political decision-making and action. Thus, the ultimate goal of the Brotherhood is establishment of a democratic Islamic state functioning unequivocally according to *Shar'ā*.

### [C] Terrorism

Across its nearly 100-year history, the Muslim Brotherhood has oscillated between two pathways: evolution, a process emphasizing gradual, peaceful change from below; and revolution, the violent overthrow of un-Islamic systems of government and foreign control. In its early years, the Brotherhood advocated the implementation of *Shar'ā* not by violence, but through societal awakening.<sup>34</sup> Significantly, Al Banna did not adopt principles of revolution. He emphasized caution with regard to *jihād*:

[T]here is a big difference between action and *jihād*, between the right *jihād* and the wrong *jihād*. If people are to bear the hardships of *jihād*,

<sup>33</sup> See LINAKUMPU, *supra*, at 70.

<sup>34</sup> See LINAKUMPU, *supra*, at 69.

then it is not unlikely that if they are not supported by the grace of God, they may deviate from the path and lose their goal.<sup>35</sup>

Moreover, Al Banna urged force "only when there [is] no other course open," and said when such force is applied it should be done with "great respect and dignity . . . [and be the] epitome of extreme decency."<sup>36</sup> Despite these foundational caveats, opposition to violence did not remain a primary feature of the agenda of the Brotherhood.

The Muslim Brotherhood became increasingly militant in the 1950s and 1960s, a result of its confrontation with the Egyptian state.<sup>37</sup> Al Banna was assassinated in 1949, and Sayyid Qutb, the new and principal figure in the Brotherhood, led the organization down a revolutionary, violent path. The writings of Qutb, compiled during his years in prison, called for social and political revolution against the repressive Egyptian state. It was after Qutb's stay in the United States, where he observed strong pro-Jewish, anti-Arab sentiments, that he began to resent the non-Muslim West, leading him to categorize all non-*Shar'ā* abiding lands as *dār al-harb* and therefore enemy grounds.<sup>38</sup>

From 1954 to 1971, the Egyptian government systematically cracked down on the Brotherhood. Qutb and thousands of his colleagues and supporters were imprisoned and tortured, which served to radicalize further the Brotherhood and its methods. Qutb fueled re-entment, hatred, and rejection of western and non-Muslim social and political ideologies, and called for the overthrow of the Egyptian government. To protect their power, Egyptian President Nasser and other political leaders demonized Qutb's ideology.

During his time in captivity, Qutb wrote his most important work, *Milestones* (in Arabic, *Ma'alim fi Al-Tariq*), which called for using physical power and *jihād* to restore Islam and re-implement *Shar'ā*. First published in 1964, it is difficult to overstate the ideological impact of *Milestones*. Some commentators label it "political Islam's Communist Manifesto."<sup>39</sup> The analogy is apt, if for no other reason than both books illustrate the power of brevity: The Communist Manifesto, published in 1848, is about 100 pages, and *Milestones* is just 12 chapters, running about 160 pages. The Muslim world, argues Qutb, has lapsed back into *jahiliya*, i.e., the period of ignorance before Islam. A new *jihād* is needed to revive Islam.

For Qutb, this *jihād* must contain two elements. First, there must be holy war against the West, which he labeled the pervasive enemy of Islam and Muslim societies. Second, struggle is required against the "apostate" Arab governments — Egypt being first and foremost — beholden to Western interests. These regimes

<sup>35</sup> See HAWWA, *supra*, at 116–117 (quoting Hassan Al Banna).

<sup>36</sup> See HAWWA, *supra*, at 119.

<sup>37</sup> ISLAMIC THEAT, *supra*, at 126.

<sup>38</sup> See UNHOLY WAR, *supra*, at 60.

<sup>39</sup> JASON BURKE, *AL QAEDA: CASTING A SHADOW OF TERROR*, at 52 (London, England: I.B. Tauris & Co., Ltd., 2003). (Hereinafter, BURKE.)

had sold out their people, and neglected, even scoffed at, the *Shari'a*.<sup>40</sup> Each element conflicted with the ideals of Egyptian President Gamal Abdel Nasser, who promulgated nationalist, socialist, and secular notions of government. Not surprisingly, Nasser had Qutb hanged in 1966.

The two elements of *jihad* Qutb called for evince why some observers call him the "architect of radical Islam."<sup>41</sup> Moreover, his ideology led the Muslim Brotherhood to be dubbed "the seminal organization for Islamic terrorism."<sup>42</sup> However, the Brotherhood of today claims to stand for non-violent principles. Is it a misunderstood organization, an opposition group simply struggling under the oppression of autocratic Arab regimes? These questions are difficult to answer adequately, especially because groups affiliated with the Brotherhood include radical organizations such as *Takfir wal-Hijra*, which inspired some of the tactics used by *Al Qaeda* and *Hamas*.

Some experts go so far as to claim the "beginnings of all of the religious terrorism [witnessed] today were in the Muslim Brotherhood's ideology."<sup>43</sup> Other analysts counter the origins of modern Islamic terrorism are in the *Wahhabi* ideology. Still others urge that whatever the source of contemporary Islamic terrorism, the Brotherhood of today has little in common with extremist groups like *Al Qaeda*. The attitude of the Brotherhood toward violence did change at the end of the 1970s, as evidenced by its reaction to the 1978 *Camp David Accords* which brought about peace between Egypt and Israel. Despite its severe criticism of the Egyptian government for signing the *Accords*, the Brotherhood decided against violence as a protest mechanism.<sup>44</sup> Since then, the Brotherhood has consistently rejected all use of violence.<sup>45</sup> However, the nature and extent of its impact on the ideological underpinnings of Islamic terrorism is difficult to overlook.<sup>46</sup>

<sup>40</sup> For a concise explanation of the Islamist notion of apostasy, see generally IMPERIAL HUBRIS, *supra*, at 2.

<sup>41</sup> ISLAMIC THREAT, *supra*, at 126.

<sup>42</sup> Bruce Livesey, "The Salafist Movement," Frontline (PBS), 25 January 2005, posted at [www.pbs.org/wgbh/pages/frontline/shows/front/special/sala.html](http://www.pbs.org/wgbh/pages/frontline/shows/front/special/sala.html).

<sup>43</sup> Rachel Ehrenfeld & Alyssa Lappen, *The Truth About the Muslim Brotherhood*, FRONT-PAGE MAGAZINE, 16 June 2006, posted at [www.frontpagemag.com/Articles/Read.aspx?GUID=55B2AEB4-09BD-44C5-8827-66B50ABA2993](http://www.frontpagemag.com/Articles/Read.aspx?GUID=55B2AEB4-09BD-44C5-8827-66B50ABA2993).

<sup>44</sup> See LINAKUMPU, *supra*, at 87.

<sup>45</sup> See LINAKUMPU, *supra*, at 89.

<sup>46</sup> For recent work on the Brotherhood, including arguments that the non-Muslim west should engage with it if for no other reason that it is a fixture on the geo-political landscape, see Alison Pargeter, *The Muslim Brotherhood: The Burden of Tradition* (London, England: Saqi Books, 2010) and Lorenzo Vidino, *The New Muslim Brotherhood in the West* (New York, New York: Columbia University Press, 2010). See also the review of these books, *Wolves or Sheep*, THE ECONOMIST, 30 October 2010 at 91-92.

## § 50.03 AL QAEDA

### [A] Origins

*Al Qaeda* is an international Islamist organization founded in August 1988. Most experts believe this extremist group, or network, was created officially at a secret meeting among senior leaders of the Egyptian Islamic *Jihad*, or *Al Jihad*, including:

- Osama Bin Laden
- Ayman Al Zawahiri
- Sayyed Imām Al Sharif, also known as "Dr. Fadl"
- Abdullah Azzam, an Islamic scholar and Muslim Brotherhood member.<sup>47</sup>

The founders borrowed heavily from the ideology of Sayyid Qutb and the Muslim Brotherhood, particularly the emphasis on using *jihad* to create a new society based on Qur'anic principles. The *Al Qaeda* of today has two primary missions: to provide insurgent training to Islamists from around the world, and to build an ample contingent of fighters who can be sent wherever militant Islam needs them.<sup>48</sup>

*Al Qaeda* evolved from the *Maktab al Khidmat lil Mujahidin al-Arab (MAK)*, a Muslim organization founded by Abdullah Azzam in the early 1980s. The purpose of the *MAK* was to raise funds and recruit members to fight the Soviets in Afghanistan, who had invaded in December 1979 and ultimately were driven out a decade later, withdrawing completely in February 1989.<sup>49</sup> As is depicted in the 2007 movie *Charlie Wilson's War*, as part of its Cold War strategy, the United States supported the Muslim forces:

The CIA [Central Intelligence Agency] invested U.S. \$2.1 billion over a 10-year period to create an anti-Soviet resistance that included 200,000 fighters from over 20 Muslim nations. Osama bin Laden was one of those who joined.<sup>50</sup>

With the wealthy Osama Bin Laden as his second in command, Azzam and the *MAK* played a highly visible, though perhaps not tactically major, role in defeating the

<sup>47</sup> Lawrence Wright, *The Rebellion Within*, THE NEW YORKER, 2 June 2008, posted at [www.newyorker.com/reporting/2008/06/02/080602fa\\_fact\\_wright](http://www.newyorker.com/reporting/2008/06/02/080602fa_fact_wright). Whether these men shared the same dream is dubious:

The leaders of *Al Jihad*, especially Zawahiri, wanted to use their well-trained warriors to overthrow the Egyptian government. Azzam longed to turn the attention of the Arab *mujahideen* to Palestine. Neither had the money or the resources to pursue such goals. Bin Laden, on the other hand, was rich, and had his own vision: to create an all-Arab foreign legion.

*Id.*, at 4.

<sup>48</sup> See IMPERIAL HUBRIS, *supra*, at 63.

<sup>49</sup> ROHAN GUNARATNA, *INSIDE AL QAEDA: GLOBAL NETWORK OF TERROR*, at 3-4 (New York, New York: Columbia University Press, 2002). [Hereinafter, GUNARATNA.]

<sup>50</sup> [www.fact-index.com/usa/soviet\\_invasion\\_of\\_afghanistan.html](http://www.fact-index.com/usa/soviet_invasion_of_afghanistan.html).



Soviets.

Upon the conclusion of this successful campaign, Azzam sought to redirect the rank-and-file *mujahideen* (Islamic warriors) to a long-term, ideologically-driven effort.<sup>51</sup> The key objective of Azzam was to expand the operations of the MAK to include Islamist struggles around the globe.<sup>52</sup> Toward this end, Azzam put forth 8 guidelines for the creation and training of *Al Qaeda*:

1. It [*Al Qaeda*] must jump into the fire of the toughest tests and into the waves of fierce trials.
2. The training leadership shares with [the troops] the testing march, the sweat and the blood.
3. This vanguard has to abstain from cheap worldly pleasures and must bear its distinct stamp of abstinence and frugality.
4. In like manner it must be endowed with firm belief and trust in the ideology, instilled with much hope for its victory.
5. There must be strong determination and insistence to continue the march no matter how long it takes.
6. The [important practices] must consist of meditation, patience, and prayer.
7. Loyalty and Devotion [*sic*].
8. It must be aware of the existence of anti-Islam machinations all across the world.<sup>53</sup>

These basic principles are evident in the terrorist group. For example, despite his vast wealth, Bin Laden has long exemplified the third guideline, leading an austere life. The overarching emphasis on true belief and unwavering determination is tragically demonstrated by the way *Al Qaeda* fighters seemingly conquer the fear of death.

Would Azzam be proud of the group whose ideological foundations he helped set? Azzam was assassinated in 1989. He was more of a spiritual extremist than a violent revolutionary. Azzam never expressly supported terrorism as an acceptable tactic, though he certainly did advocate a militaristic approach.<sup>54</sup>

<sup>51</sup> See GUNARATNA, *supra*, at 4.

<sup>52</sup> According to the international terrorism expert, Rohan Gunaratna, the MAK began to evolve into *Al Qaeda* even before Soviet troops departed Afghanistan in 1989. He writes that the MAK diverted its resources away from Afghanistan into regional conflicts involving Islamist guerrillas in places such as Kashmir, Chechnya, Tajikistan, Somalia, Malaysia, Georgia, Yemen, Algeria, and Egypt. In most of these countries, Islamist movements were brutally oppressed by the governing regimes. The nascent *Al Qaeda*, taking advantage of the alleged status of MAK as a humanitarian group, was able to infiltrate the conflicts. See GUNARATNA, *supra*, at 5.

<sup>53</sup> Abdullah Azzam, *Al-Qa'idah al-Sulbah*, 41 *AL-JIHAD* at 46 (April 1988). Translated by Reuven Paz, International Policy Institute for Counter-Terrorism, Israel.

<sup>54</sup> See GUNARATNA, *supra*, at 86.

## [B] Development and Organizational Structure

To intervene successfully in conflicts affecting Muslims, *Al Qaeda* established financial, political, and military control over several Islamist terrorist groups. Afghanistan was the principal training base for *Al Qaeda*. It also trained recruits in Somalia, Tajikistan, Yemen, and the Philippines.<sup>55</sup> Because one primary goal of Bin Laden was for *Al Qaeda* to function globally, he invited representatives of numerous Islamist terrorist groups and political movements to join the *shura majlis*, or consultative council, of *Al Qaeda*.<sup>56</sup> Throughout the 1990s, *Al Qaeda* inspired and assisted some 30 Muslim extremist groups conduct attacks at home and abroad, particularly in Asia and the Middle East.<sup>57</sup> Yet, *Al Qaeda* remained under the radar during its formative years. The policy of *Al Qaeda* was not to claim such operations as its own.

Despite the vast geographic presence and capability of *Al Qaeda* to carry out deadly attacks on a grand scale, it is not a highly structured organization.<sup>58</sup> Rather, it is an impressively secret, almost virtual organization that has at times "denie[d] its own existence in order to remain in the shadows."<sup>59</sup> This reality helps explain why *Al Qaeda* usually does not seek publicity in pursuit of its goals. In fact, *Al Qaeda* occasionally uses other names and identities (such as the "World Islamic Front for the *Jihad* Against the Jews") when referring to its actions and statements, probably in an effort to keep its adversaries guessing about its true motives and intentions.<sup>60</sup> The utility of its secrecy and decentralized structure was evident in 2001-2002, as the group continued to operate even after losing its central command in Afghanistan following the American led invasion in October 2001. Moreover, the flexible edifice of *Al Qaeda* is precisely what allows Bin Laden to exercise control over a far-flung force. Simply by issuing periodic pronouncements and writings, Bin Laden trains and controls an inner circle while simultaneously inspiring and indoctrinating a periphery of constituent groups.<sup>61</sup>

*Al Qaeda* imposes strict selection criteria, screening out all but the most trustworthy, loyal, and capable operatives. Islamist extremists around the world hold the group in high regard, and for them, acceptance as a full *Al Qaeda* member

<sup>55</sup> See GUNARATNA, *supra*, at 5.

<sup>56</sup> See GUNARATNA, *supra*, at 6.

<sup>57</sup> See GUNARATNA, *supra*, at 6.

<sup>58</sup> See BURKE, *supra*, at 7-22.

<sup>59</sup> GUNARATNA, *supra*, at 3.

<sup>60</sup> See GUNARATNA, *supra*, at 3.

<sup>61</sup> The extent to which Bin Laden exercises logistical control over a tangible terrorist organization is open to debate. According to the controversial BBC documentary *The Power of Nightmares*, *Al Qaeda* is so weakly linked together it may not actually exist apart from Bin Laden and a small group of close associates. In the documentary, journalist Adam Curtis argues the idea of *Al Qaeda* as a formal organization is largely an American invention. Curtis and others contend American prosecutors hyped up the existence of *Al Qaeda*, because they needed to prove Bin Laden was the leader of a criminal organization to charge him *in absentia* under the United States Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1968. See *The Power of Nightmares* (BBC 2004). But see Peter Bergen, *Beware the Holy War: The Power of Nightmares (A Critique)*, 2 June 2005, posted at [www.thenation.com/doc/20050620/bergen](http://www.thenation.com/doc/20050620/bergen).

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is among the highest of honors.<sup>62</sup> The group trains its recruits in a two-tiered system in which all men are prepared to be insurgent fighters, while a select fraction also train for terrorist assignments abroad.<sup>63</sup> According to Western intelligence sources, there were several other terrorist groups operating training camps in Afghanistan during the 1990s, and from them, *Al Qaeda* selected only 3,000 men, or 3 percent, to train. This fact suggests *Al Qaeda*, not to mention other terrorist groups, enjoy a surfeit of manpower.

### [C] Principles and Objectives

*Al Qaeda* distinguishes itself from most other Islamic extremist groups by its broad-based appeal. The ideology, if not necessarily the tactics, of *Al Qaeda* attracts the affluent and poor, and transcends historical and sectarian barriers.<sup>64</sup> Indeed, *Al Qaeda* was formed with the purpose of overcoming national and ethnic divisions in the Muslim world, so as to create an international militia to fight "the real enemy," the non-Muslim West.<sup>65</sup> The establishment of a multinational, multiethnic Islamist organization is a major accomplishment, attributable primarily to the leadership of Bin Laden.<sup>66</sup>

Pre-*Al Qaeda* Islamic resistance movements focused mostly on taking down governing regimes in their home countries. They purported to follow the Prophet Muhammad, who commanded *jihad* against the "near" adversary before turning to the "far" enemy.<sup>67</sup> With Bin Laden appearing on the international stage at the end of the Soviet-Afghan War, *Al Qaeda* worked assiduously to shift the Islamist focus from apostate Muslim governments to the United States. Bin Laden has argued, and convinced many, that corrupt governments of Muslim countries remain in power only because of American shelter and succor. Rather than continue to seek political reform and revolution at home, *à propos* the Muslim Brotherhood, Islamic resistance must attack directly "the head of the snake."<sup>68</sup> The ability of Bin Laden to keep *Al Qaeda* members fixated on the United States has been a critical component of the growth and success of the group.

Another feature distinguishing *Al Qaeda*, since its inception, from other Islamist groups is its exclusive insistence on violent methods. Terrorist groups of the 1960s to the 1990s, including the Palestine Liberation Organization (PLO), generally avoided high casualty attacks for fear of negative publicity. In contrast, in their initial 1998 *Declaration of Jihad*, the founding members of *Al Qaeda* state:

<sup>62</sup> See GUNARATNA, *supra*, at 8.

<sup>63</sup> See IMPERIAL HURRIS, *supra*, at 63.

<sup>64</sup> See GUNARATNA, *supra*, at 12.

<sup>65</sup> See BURKE, *supra*, at 8.

<sup>66</sup> See IMPERIAL HURRIS, *supra*, at 139.

<sup>67</sup> See IMPERIAL HURRIS, *supra*, at 139.

<sup>68</sup> Quotation from interview by unknown source with Osama bin Laden, undisclosed location (2001), aired by CNN on 26 December 2001, transcript posted at <http://transcripts.cnn.com/TRANSCRIPTS/011226se.01.html>.

Islamic governments have never been and will never be established through peaceful solutions. They are established as they [always] have been — by pen and gun, word and bullet, tongue and teeth.<sup>69</sup>

Their statement is redolent of a famous quotation from the infamous Chinese Communist Party (CCP) Chairman Mao Zedong, reprinted in the 1964 edition of his *Little Red Book*: "political power grows out of the barrel of a gun."

Neither the Chairman nor Bin Laden would accept the point Shakespeare makes in *Hamlet* (1602), Act II, Scene 2: "Though this be madness, yet there is method in it." They see no "madness" in their means. To the contrary, *Al Qaeda* promotes the use of violence on a mass scale. Moreover, *Al Qaeda* places an unprecedented degree of glory upon its perverted conception of martyrdom. The 23 February 1998 *fatwā* issued by Bin Laden adduces this emphasis:

... a martyr's privileges are guaranteed by Allāh . . . with the first gush of his blood he will be shown his seat in paradise.<sup>70</sup>

While other Islamist organizations, such as *Hamas*, glorify dying in *jihad*, no other extremist band comes close to *Al Qaeda* in "programming its fighters for death."<sup>71</sup>

Bin Laden and *Al Qaeda* plan and effectuate terrorist attacks not to destroy America or its freedoms, but rather to force the United States to change drastically policies toward the Islamic world.<sup>72</sup> Bin Laden believes his duty is to "awaken Muslims" and "provide [the] *Ummah* with the inspiration it requires" to resist the West.<sup>73</sup> *Al Qaeda* is not meant to produce a decisive Muslim victory, but as a mechanism by which to incite Muslims to join a defensive *jihad*. His writings and pronouncements demonstrate he is a "practical warrior, not an apocalyptic terrorist in search of Armageddon."<sup>74</sup>

Consider how Bin Laden's view of his geographic region contrasts with that of the average American. Americans watch Saudi Arabia struggle with internal threats to its reform aspirations from Muslim fundamentalists. Terrorist groups lurk in countries around that Kingdom, from *Al Qaeda* and its affiliates to *Hamas* and *Hezbollah*. All are unstable, and Israel is the only country in the world that faces a perpetual existential threat. Hostile Iran is across the Persian Gulf, and nearby, sizeable populations antipathetic to the United States and Israel reside in Afghanistan and Pakistan to the East, and North Africa to the West. They sympathize with extremists. The average American sees the Islamic Heartland and broader Near East region as replete with terrorists.

<sup>69</sup> *Declaration of Jihad Against the Country's Tyrants*, Military Series, *Al Qaeda Training Manual*.

<sup>70</sup> *A Declaration of War by Osama bin Laden, together with leaders of the World Islamic Front for the Jihad Against the Jews and the Crusaders*, Afghanistan, 23 February 1998.

<sup>71</sup> GUNARATNA, *supra*, at 91.

<sup>72</sup> See IMPERIAL HURRIS, *supra*, at xviii.

<sup>73</sup> "Exclusive Transcript of Previously Unaired Interview with Usama Bin Laden," *Qoqaz* (Internet) 23 May 2002 (quoted in ANONYMOUS, IMPERIAL HURRIS: WHY THE WEST IS LOSING THE WAR ON TERROR, at 131 (2004)).

<sup>74</sup> IMPERIAL HURRIS, *supra*, at xviii.



Bin Laden and his followers see a different picture. The Kingdom is ruled by a corrupt House of Saud that allowed American forces on Saudi soil during Operation Desert Storm, the First Gulf War in 1991, and that sells its oil to America and its allies to fuel their decadent lifestyles. Bahrain is the headquarters of the United States Fifth Fleet. Pursuant to a 1991 Defense Cooperation Agreement, Qatar plays host to the Al Udeid air base, which is the center for all American air operations in the Gulf, plus serves as a logistics and military equipment hub.<sup>75</sup> The Congressional Research Service reports that "Camp As Sayliyah is the largest pre-positioning facility of U.S. military equipment in the world."<sup>76</sup> This equipment may be rushed in from Qatar to protect oil fields in the Eastern Province of Saudi Arabia. The United Arab Emirates (UAE) and Kuwait are open American allies, and Yemen is at best a battleground. Egypt and Jordan are un-Islamic regimes propped up by the United States. Peripherally, Morocco, Tunisia, and Turkey are American allies. The United States has "boots on the ground" in Iraq, Afghanistan, and Pakistan fighting devout Muslim forces and killing innocent civilians in the process. In sum, the Bin Laden view is "we are encircled by the Americans and their proxies." He believes he is engaged in a defensive *jihād* which is as compelling as the rationale that America is fighting defensive and pre-emptive battles is to the average American.

While the methods of *Al Qaeda* are barbaric and indeed un-Islamic, Bin Laden is not a deranged lunatic. Rather, he is a cold, calculating, charismatic killer with concrete objectives. His most important goals follow logically from his picture of his region:<sup>77</sup>

1. The end of all American assistance to Israel.
2. The elimination of the Jewish state and the creation of an Islamic Palestinian state.
3. The withdrawal of all American and Western military forces from the Arabian Peninsula and all other Muslim territories.
4. The ouster of American-protected Muslim regimes that do not govern according to *Shari'a* and their replacement by truly Islamic governments.
5. The end of American support for the oppression of Muslims by the Chinese, Russian, Indian, and other governments.
6. The restoration of Muslim control over the energy resources of the Islamic world.
7. The end of all American involvement in Afghanistan and Iraq.

The seventh goal is more recent than the others, in response to the actions of the United States following the 11 September 2001 attacks. Bin Laden has methodically focused his rhetoric on these objectives since the mid-1980s. His meticulous and

<sup>75</sup> See Robin Wigglesworth, *U.S. Air Base on Qatari Soil Tests Emirate's Capacity to Duck Gulf Tensions*, FINANCIAL TIMES, 24 September 2010, at 5.

<sup>76</sup> Christopher M. Blanchard, *Qatar: Background and U.S. Relations*, CRS REPORT FOR CONGRESS (RL 31718, 24 January 2008), posted at [www.usembassy.it/pdf/other/RL31718.pdf](http://www.usembassy.it/pdf/other/RL31718.pdf).

<sup>77</sup> See IMPERIAL HUBRIS, *supra*, at 210.

unwavering attention to a few core themes preserves the clarity of the message of *Al Qaeda*.

## [D] Legality of *Al Qaeda* Actions under Islamic Law of War

### • Does *Al Qaeda* have the authority to wage *jihād*?

The founders of *Al Qaeda*, heavily inspired by Muslim Brotherhood ideology, established the group for the ultimate purpose of creating societies founded on the most rigorous Islamist principles. But, are the methods employed by *Al Qaeda* in conformity with classical Islamic International Law? The answer, of course, depends on who is asked. A threshold question is whether Bin Laden and *Al Qaeda* possess the legitimate authority to issue *fatwās* inciting their followers to violence. The answer is a clear "no."

The force of a *fatwā* depends upon the education, integrity, and piety of the person who pronounces it. No competent, recognized Islamic authority regards Bin Laden as having any credentials.<sup>78</sup> Bin Laden is largely uneducated, never trained as an Islamic scholar, and is as much a pragmatic activist as he is a religious ideologue. His chief deputy, Zawahiri, is not an Islamic scholar. Their other partner, Dr. Fadl, who has since defected from *Al Qaeda*, states:

"*Al Qaeda* has no one qualified from a *Shari'a* perspective . . . on whose opinion you can count. They are ordinary persons."<sup>79</sup>

Despite his unremarkable intellectual and religious pedigree, Bin Laden constantly refers to "Allāh" and the "Prophet Muhammad" in his writings and speeches, deliberately intimating he is carrying out the Divine Will of God.<sup>80</sup> For example, in the "legal ruling" dated 23 February 1998, Bin Laden prefaced the *fatwā* as follows:

Praise be to God, who revealed the Book, and says in His Book: "When the forbidden months are past, fight and slay the pagans wherever ye find them, seize them, beleaguer them, and lie in wait for them. And peace be upon our Prophet Muhammad, who said, 'I have been sent with the sword between my hands to ensure that no one but God is worshiped, God who put my livelihood under the shadow of my spear and who inflicts humiliation and scorn on those who disobey my orders.'<sup>81</sup>

<sup>78</sup> See GUNARATNA, *supra*, at 7. See also DANIEL BENJAMIN & STEVEN SIMON, *THE SACRED AGE OF TERROR*, at 117 (Edinburgh, Scotland: Floris Books, 2002) (writing "[b]y issuing *fatwās*, Bin Laden and his followers are acting out of a kind of self-appointment . . . they are asserting their rights as interpreters of Islamic law").

<sup>79</sup> Lawrence Wright, *The Rebellion Within*, THE NEW YORKER, 2 June 2008, posted at [www.newyorker.com/reporting/2008/06/02/080602fa\\_fact\\_wright](http://www.newyorker.com/reporting/2008/06/02/080602fa_fact_wright).

<sup>80</sup> See MESSAGES TO THE WORLD: THE STATEMENTS OF OSAMA BIN LADEN (London, England: Verso, 2005, Bruce Lawrence, ed.).

<sup>81</sup> "Declaration of War Against the Americans Occupying the Land of the Two Holy Places: A Message from Osama bin Laden unto his Muslim brethren all over the world generally, and toward the Muslims of the Arabian Peninsula in particular," August 1996.

Bin Laden carefully interposes references to Allāh and Muhammad with explicit calls for violence, thus connoting there exists a religious justification for his means and ends.

However, from an authentic Islamic legal perspective, such attempts at justification are misleading and futile. No *fatwā* issued by Bin Laden is valid, because he has absolutely no authority to issue one. This legal reality does not deter him. He denigrates *fukahā'* who oppose him as being controlled by corrupt apostate regimes and their Western allies. Bin Laden claims earlier in Islamic history *ulema* and jurists courageously guided the pronouncing and waging of *jihād*, but today the neutered figures of the Establishment abdicate their duties and lead Muslims astray.<sup>82</sup> He writes:

Great evil is spreading throughout the Islamic world. The *imāms* calling people to hell are those who appear more than others at the side of the rulers of the region. [The clerics] all, except those upon whom Allāh had mercy, are busy handing out praise and words of glory to the despotic [rulers] who disbelieved Allāh and his Prophet. The clerics are prisoners and hostages of the tyrants.<sup>83</sup>

Bin Laden says because legal and religious authorities are unable or unwilling to do what needs to be done, individuals like him must spearhead efforts. Despite his lack of credentials, he believes edicts are legitimate, because the clerics have failed to act.

Bin Laden understands the importance of the guise of legal and religious legitimacy. He realizes *Al Qaeda* cannot expect the support of the Muslim world without the backing of a credible Islamic scholar. Arguably, Shaykh Nasir bin Hamid Al Fahd, a young Saudi cleric provided his endorsement in May 2003, by publishing *A Treatise on the Legal Status of Using Weapons of Mass Destruction Against Infidels*.<sup>84</sup> The *Treatise* amounted to a *fatwā* justifying a large-scale attack on the United States. However, it is unlikely the *Treatise* actually gave *Al Qaeda* religious approval to use a nuclear device against civilians. Fahd renounced several of his *fatwās* on Saudi television, while in prison for participating in *Al Qaeda* bombings of Riyadh on 12 May 2003. Ominously, the *Treatise* was not mentioned.

• *Are Al Qaeda's tactics legal under the Shari'a?*

Putting aside the invalidity of the 23 February 1998 *fatwā* issued by Bin Laden, and thus the *jihād* of *Al Qaeda*, are the terrorist acts perpetrated by the group themselves justifiable under *Shari'a*. Here, too, the answer is "no."

The deliberate killing of non-combatants is forbidden under the Classical Islamic International Law, unless those killed accurately can be labeled conspirators. The famous Qur'anic Rule of Proportionality, in *surah 2, ayah 190*, states:

<sup>82</sup> See IMPERIAL HUBBIS, *supra*, at 151.

<sup>83</sup> "A New Bin Laden Speech," MIDDLE EAST MEDIA RESEARCH INSTITUTE, *Special Dispatch Series*, No. 559, (18 July 2003), posted at [www.memri.org/bin/articles.cgi?Appa=sd&ID=SP53903](http://www.memri.org/bin/articles.cgi?Appa=sd&ID=SP53903).

<sup>84</sup> See IMPERIAL HUBBIS, *supra*, at 155-56.

Fight in God's cause against those who fight you, but do not overstep the limits: God does not love those who overstep the limits.<sup>85</sup>

Moreover, the Prophet Muhammad put the rule in specific terms:

"Do not kill women or children or an aged person. Do not cut down fruit bearing trees. Do not destroy an inhabited place."<sup>86</sup>

Ironically, the scholar Bin Laden quotes most frequently, Ibn Taymiyyah, renowned for his Traditionalist views, devotion to *jihād*, and literal interpretations of the Qur'an, states:

As for those who cannot offer resistance or cannot fight, such as women, children, old people, the blind, handicapped and their like, they shall not be killed, unless they actually fight with words and acts. Some [jurists] are of the opinion that all of them may be killed on the mere ground that they are unbelievers, but they make an exception for women and children since for Muslims they constitute property. However, the first opinion is the correct one, because we may only fight those who fight us when we want to make Allāh's religion victorious.<sup>87</sup>

Tragically, *Al Qaeda* deliberately kills thousands of non-combatants who cannot offer resistance. Is *Al Qaeda*, then, as one author writes:

engaged in an unprecedented exercise of corrupting, misinterpreting, and misrepresenting the word of God to generate support for [its] political mission?<sup>88</sup>

In a word, "yes." *Al Qaeda* is not at all authentically Islamic. Predictably, Bin Laden would argue to the contrary. He would cite three reasons to support his claim *Al Qaeda* acts wholly in accordance with the legal requirements of *jihād*.

First, a war that includes killing non-combatants is justified because *Al Qaeda* has overtly warned the United States and its people of the dangers coming their way. Such warnings take many forms, most notably the following:

The case is easy: America will not be able to leave this ordeal unless it leaves the Arabian Peninsula and stops its involvement in Palestine and all of the Islamic world. We renew our pledge to Allāh, our promise to the nation, and our threat to the Americans and Jews that they shall remain restless and shall not dream of security until they take their hands off our nation and stop their aggression against us and their support for our enemies.<sup>89</sup>

<sup>85</sup> QUR'AN, *supra*, 2:190 at 21.

<sup>86</sup> BUKHARI, *supra*, at vol. IV, book LII (The Book of *Jihād* (Fighting for Allāh's Cause)), pp. 159-160, *hadith* no. 257 (Arabic version). Note the above-quoted version does not exist *verbatim* in the English translation, which states simply: "Allāh's Apostle . . . disapproved the killing of women and children." *Id.*

<sup>87</sup> Ibn Taymiyyah, *The Religious and Moral Doctrine of Jihād*, in GOVERNANCE ACCORDING TO ALLAH'S LAW IN REPORTING THE RULER AND HIS FLOCK (2001), quoted in GUNARATNA, *supra*, at 85.

<sup>88</sup> GUNARATNA, *supra*, at 85.

<sup>89</sup> Quoted in IMPERIAL HUBBIS, *supra*, at 153.



According to some Islamic scholars, there is an established principle that Muslim forces "may go to war against non-Muslims after declaration of an intent to fight."<sup>90</sup> To Bin Laden, the repeated warnings by *Al Qaeda* constitute the requisite declaration.

Second, the warnings come with an invitation to Americans to convert to Islam. In an October 2002 statement, Bin Laden declared:

A message to the American people: Peace be upon those who follow the right path. I urge you to seek the joy of life and to rid yourself of your dry, miserable, and spiritless materialistic existence. I urge you to become Muslims, for Islam calls for the principle of "there is no God but Allāh."<sup>91</sup>

Entreating Americans to seek conversion to Islam is the second component of Bin Laden's attempt to justify the *jihād* of *Al Qaeda*. Though it is redolent of the traditional *Shari'a* rules on the Law of War (giving non-Muslims the option to convert to Islam), the genuineness of his plea is dubious. This strategy allows Bin Laden to uphold the Islamic Laws of War,<sup>92</sup> and take the moral high road. He gives Americans their chance to seek peace with Allāh. Having rejected the "right path," the infidels seal their fate.

On the subject of conversion, it is worth noting that in addition to *Al Qaeda*, various Islamist groups purport to wage war on the "infidels" for the sake of Allāh or Islam. Indeed, groups in Chechnya, Afghanistan, Iran, Iraq, Lebanon, Kashmir, Palestine, and Pakistan<sup>93</sup> claim they uphold justice on the earth and rid the world of oppression by waging war on the west and non-Muslims. To support their cause, many preach that their Muslim duty is to "convert everyone to Islam, either by persuasion or by force."<sup>94</sup> Yet, even Sayyid Qutb rejected this idea of forced conversions when he wrote:

It is not the intention of Islam to force its beliefs on people, but Islam is not merely 'belief.' Islam is a declaration of the freedom of man from the servitude of other men.<sup>95</sup>

Since the writings of Sayyid Qutb were published, however, the direction of extremists and terrorists has taken a dangerous twist, into an abyss that no longer comports with original Islamic ideals of peace, harmony, and justice.

The third rationale Bin Laden would employ is perhaps his most devilishly clever. He attempts to turn American democracy back on its own citizenry. Because Americans have the power to elect their own leaders, he argues, they are directly

<sup>90</sup> John Kelsay, *Religion, Morality, and the Governance of War: The Case of Classical Islam*, 18 JOURNAL OF RELIGIOUS ETHICS 2 at 125 (1990).

<sup>91</sup> Quoted in IMPERIAL HUBRIS, *supra*, at 154.

<sup>92</sup> See generally John Kelsay, *Al-Shaybani and the Islamic Law of War*, 2 JOURNAL OF MILITARY ETHICS issue 1 at 63–75 (March 2003).

<sup>93</sup> See UNHOLY WAR, *supra*, at 69.

<sup>94</sup> See UNHOLY WAR, *supra*, at 67.

<sup>95</sup> See UNHOLY WAR, *supra*, at 68.

responsible when their government prosecutes an "anti-Islam foreign policy."<sup>96</sup> He writes:

It is a fundamental principle of any democracy that the people choose their leaders, and as such, approve and are party to the actions of their leaders. So "in the land of freedom" . . . [each American has given] consent to the policies his elected government adopts. This is why the American people are not innocent. The American people are active members in these crimes.<sup>97</sup>

Thus, as for the rule in *Shari'a* that non-combatants should not be killed unless they are conspirators, Bin Laden intones American citizens are conspirators. They actively participate in the aggression of their government against Muslims. Consequently, they have put themselves in the line of fire, and it is not illegal to target them.

### [E] Future Prospects

Attempts to assess the future of *Al Qaeda* produce widely diverging prognostications. The United States National Intelligence Council predicts a diminishing influence of terrorism, particularly as practiced by *Al Qaeda*.<sup>98</sup> This prediction is due in part to rising frustration, horror, among Muslims over the killing by *Al Qaeda* of fellow Muslims. That tactic is divisive even among Islamist extremists. Whether Muslims can legally kill other Muslims in pursuing *jihād* was the topic of extensive discussion in the *Treatise* by Shaykh al-Fahd,<sup>99</sup> and was partly why Sayeed Imām al-Sharif ("Dr. Fadl") defected from *Al Qaeda*.<sup>100</sup> Should *Al Qaeda* continue to employ terrorist tactics that result in the wanton killing of Muslims, it may alienate a large portion of its base.

This prediction also is based on the effects of an enemy against which Bin Laden is largely impotent: modernity and secularism. The National Intelligence Council and others predict the failure of *Al Qaeda* to articulate a positive political program will push away Muslim youth who do not share the opposition to modernism. The modern charm of movies, music, and the iPhone, make the comfortable secular life at least as attractive as the grueling lifestyle of a *jihādi* zealot. Moreover, as in Catholic Christianity and other faiths, not every Muslim is equally dedicated to religious practice. Complacency, apathy, and even disdain concerning religion are hallmarks of secularism, which are not confined to the non-Muslim west. If enough Muslim youth are disinterested in scrupulous adherence to every precept of Islam, then expecting enthusiasm for *Al Qaeda* is quixotic.

Conversely, there is a pessimistic prediction. Some scholars expect *Al Qaeda* to remain a dangerous threat for a long time to come. Rohan Gunaratna writes that

<sup>96</sup> IMPERIAL HUBRIS, *supra*, at 156–57.

<sup>97</sup> Quoted in IMPERIAL HUBRIS, *supra*, at 157.

<sup>98</sup> NATIONAL INTELLIGENCE COUNCIL, GLOBAL TRENDS 2025: A TRANSFORMED WORLD 61 (2008), posted at [www.dni.gov/nic/NIC\\_2025\\_project.html](http://www.dni.gov/nic/NIC_2025_project.html).

<sup>99</sup> See IMPERIAL HUBRIS, *supra*, at 155–56.

<sup>100</sup> See Lawrence Wright, *The Rebellion Within*, THE NEW YORKER, 2 June 2008.

its:

unprecedented mobility, motivation, and capacity to generate wealth [will] pose multiple challenges to international security.<sup>101</sup>

Moreover, *Al Qaeda* is multi-dimensional, and has a knack for inciting Muslim migrant communities, particularly in the European Union. Bin Laden desires a protracted battle with the West. He is the world's most wanted man, yet managed to find shelter and evade capture for years. Why would he quit or slow down anytime soon?

Perhaps, then, *Al Qaeda* has increased the likelihood of a continuing conflict for the long term. Arguably, the scenario for Bin Laden may be akin to that of Hannibal, who led his Carthaginian forces against the Roman Republic in the Second Punic War (218-201 B.C.), wreaking havoc throughout the Roman Empire. Rather than being caught by the ultimately victorious Roman forces, Hannibal drank a vial of poison in 183/182 B.C. at the ancient port city of Libyssa (now called "Gebze") on the eastern shore of the Sea of Marmara, about 30 miles from modern-day Istanbul, Turkey. However, the scenario proved different for Bin Laden. At the start of May 2011, he was killed by United States forces in a mansion in which he had been hiding in Abbottabad, Pakistan.

<sup>101</sup> GUNARATNA, *supra*, at 13.

## PART FOURTEEN<sup>1</sup>

### GLOSSARY OF ARABIC TERMS

<sup>1</sup> The information in this Part is derived from a variety of sources, including:

- Articles in *The Economist*, *Financial Times*, and posted on the BBC website <http://www.bbc.co.uk/news>.
- JAMES A. BILL & JOHN ALDEN WILLIAMS, *ROMAN CATHOLICISM AND SHI'ITE MUSLIMIC PRAYER, PASSION, AND POLITICS* Glossary of Shi'a Terms 167-169 (Chapel Hill, North Carolina: University of North Carolina Press, 2002).
- H.A.R. GIBB & J.H. KRAMERS EDs., *CONCISE ENCYCLOPAEDIA OF ISLAM* (1953, Boston, Massachusetts: Brill Academic Publishers, Inc. 4th Impression, 2001).
- JAMILA HUSSAIN, *ISLAMIC LAW AND SOCIETY — AN INTRODUCTION*, Glossary of Arabic Terms at 211-215 (Annandale, New South Wales, Australia: The Federation Press, 1999).
- RAYMOND IBRAHIM ED. & TRANS., *THE AL QAEDA READER*, Critical Glossary of Arabic Terms at xix-xxii (New York, New York: Doubleday, 2007).
- MICHAEL J.T. McMillen, *International Legal Developments in Review: 2007 — Islamic Law Forum*, 42 *THE INTERNATIONAL LAWYER* 1017-1032 (Summer 2008).
- KHOSROW BAGHERI NOFARAST, *ISLAMIC EDUCATION* 67-71 (Tehran, Iran: Centre for Cultural and International Studies, Al Hoda Publishers, 2001).
- MAX RODENBECK, *CAIRO — THE CITY VICTORIOUS*, Glossary at 269-273 (1998).
- JOSEPH SCHACHT, *AN INTRODUCTION TO ISLAMIC LAW*, Index and Glossary of Arabic Technical Terms at 297-304 (Oxford, England: Oxford University Press (Clarendon Paperbacks) 1982).
- THE QU'AN — *A New Translation by M.A.S. Abdel Haleem* (Oxford, England: Oxford University Press, 2004) (specifically, certain footnote explanations therein).
- Wikipedia, <http://en.wikipedia.org>.



# GLOSSARY OF ARABIC TERMS

TABLE:  
BASIC GUIDE TO PRONUNCIATION

Diacritical Sign or Special Letter	Name	Example	Approximate Pronunciation in English	Example
ʾ	Arabic letter <i>hamza</i>	Qurʾān	A glottal stop. Pause between syllables created by opening and shutting of the glottis (the upper gap of the larynx between the vocal cords).	Qur-aan
ʾ	Arabic letter <i>ʾayn</i> (pronounced "ain")	Sharʾa	Deep, guttural sound: "agh." The sound comes from the back of the throat by closing the windpipe and emitting a breath.	Sha-ree-agh
ā (or Ā)	Long a	Qurʾān	Long a, as in "father."	Qur-aan
ī (or Ī)	Long i	Sharʾa	Long i, as in "eat-able."	Sha-ree-agh
ū (or Ū)	Long u	maʾdūd	Long u, as in "oops."	ma-duud
ḍ (or Ḍ)	Aspirated d	ḍamān	Heavy version of "d." Exhale with an h sound, "dh," or a slight "t" sound, "th."	dha-maan, tha-maan
ḥ (or Ḥ)	Aspirated h	ḥadīth	Heavy version of "h." Exhale with a heavy h sound, "hh."	hha-deeth
ḵ (or Ḷ)	Aspirated k	ʾakār	Heavy version of "k." Exhale with an h sound, "kh."	a-khaar

Diacritical Sign or Special Letter	Name	Example	Approximate Pronunciation in English	Example
ş (or Ş)	Aspirated s	<i>aşl</i>	Heavy version of "s," almost like a double s.	a-ssl
ţ (or Ț)	Aspirated t	<i>iqţā'</i>	Heavy version of "t," almost like a double t.	iq-ttaa
ẓ (or Ț)	Aspirated z	<i>diya mughallaẓa</i>	Heavy version of "d." Exhale with an h sound, "dh."	moo-ghall-adha
q	Arabic letter <i>qāf</i> .	Qur'ān	Like k, but with the sound coming from far back in the throat.	Qur-aan
gh	Mixture of g and h.	<i>ghaṣb</i>	Gargle-like sound.	gha-shb
kh	Mixture of g and h.	<i>khamr</i>	A hard "ch" sound.	kha-mr

COMMON ARABIC TERMS IN ISLAMIC LAW (*SHARĤA*)<sup>2</sup>

## FORMAT:

**Arabic Term** (*Alternative Spellings/Forms*) [Approximate Pronunciation] singular (s) or plural (p), part of speech:

Definition and/or additional information.

'*adala* (agh-aa-da):

See *urf*.

**abaya** (*abayah*) [a-bye-a] s. noun:

A head-to-foot, black-colored covering garment worn by some Muslim women, typically in the Persian Gulf region.

**Abū** (Abu) [Ah-boo] s. noun or pronoun:

Father. Out of respect, males sometimes are called not by their given first name, but as "Father of \_\_\_\_\_." The name of the eldest son fills in the blank. For example, a man named "Dhaifallah," whose eldest son has the first name "Yousef," would be "Abū Yousef." If there are no sons, then the man would be called respectfully by his eldest daughter.

'*adala* (agh-da-la) s. noun:

<sup>2</sup> Almost all parts of speech in Arabic, including nouns, adjectives, verbs, and adverbs, have masculine and feminine forms. For simplicity, only the masculine forms are used herein.

Competence. For example, to be an executor (*waş ī*) of an estate, one must possess "*adala*."

**aḏha** (*adha*) [adh-hha] s. noun:

Literally, "sacrifice."

**adhān** (*adhan*) [ad-haan] s. noun:

Islamic call to prayer, as used in Arabic. See also *azaan*. The call is issued by a *muezzin* (as used in the Near East and Indian Subcontinent) or *mu'dhin* (as used in Arabic). The call is made five times a day, from a minaret of a mosque, often via a recording through a loudspeaker. The *adhān* has 8 lines, invariably delivered in Arabic:

- (1) God (Allāh) is the Greatest.
- (2) I bear witness that there is no god but God.
- (3) I bear witness that Muhammad is the Messenger (*Rasūl*) of God.
- (4) Make haste towards worship.
- (5) Come to the true success.
- (6) Prayer is better than sleep.
- (7) God is the Greatest.
- (8) There is no god but God.

The 6th line is used only for prayers at dawn (*fajr salat*). The first line is repeated 4 times (except for the *Māliki* School, which repeats it twice). The 2nd through 7th lines are repeated twice. The last line is stated once.

For *Shī'ites*, There are minor differences in the 1st line of the *adhān* and in the 4th through 7th lines. *Shī'ites* repeat the 1st line four times and the other lines twice. Consistent with the importance of 'Alī to *Shī'ism*, some *Shī'ite* scholars recommend, adding "I bear witness that 'Alī is the Vice-Regent of Allāh," though this addition is not formally part of the *adhān* (or *iqama*, explained below). Technically, in each of the five times, there are two calls. The first one, which is *adhān*, announces that it is time to pray. The second call, known as "*iqama*," which means "to set up," states it is time to line up for the beginning of the prayer. It is issued in Arabic immediately before the prayer starts. The *iqama* is nearly the same as the *adhān*, but is delivered more quickly, in a monotone fashion, and differs in the 6th line of the call. Accordingly, the *iqama* is:

- (1) God (Allāh) is Greatest, God is Greatest.
- (2) I assert that there is no god but God.
- (3) I assert that Muhammad is the Messenger (*Rasūl*) of God.
- (4) Come to the prayer.
- (5) Come to salvation.
- (6) Stand for prayer (twice).



(7) God is Greatest, God is Greatest.

(8) There is no god but God.

Each of the first 6 lines is repeated twice (with minor variations in the *Hanafi* and *Māliki* Schools, and the *Shī'ites*). Thus, essentially both the *adhān* and *iqāma* summarize Islamic belief, proclaiming that God is Great, there is no God but Allāh, Muhammad is the Messenger of God, salvation is found through obedience to the Will of God, and prayer is an important expression of this obedience.

*Sunnis* and *Shī'ites* disagree as to the origin of the *adhān*. *Shī'a* say it was developed by the Prophet Muhammad alone on the command of Allāh. *Sunnis* say it came to one of the Companions of the Prophet (*Sahābah*), and later one of the Four Rightly Guided Caliphs (*Rashidun*), Omar, in a dream. That is, Allāh revealed the *adhān* to Omar in a dream. Muhammad liked it, in preference to bells (used by Christians) or a horn (used by Jews). In turn, Muhammad had Bilal ibn Ribah, a freed slave, issue the call because of his beautiful voice. *Shī'ites* agree that Bilal was the first to issue this call.

**'adl** ('adl, aḍl, aḍil) [a-dīl] s. noun:

Literally, "justice." Of good moral character, trustworthy, upright.

**'afw** ('afw) [agh-fw] s. noun:

Pardon.

**ahādīth** (*ahādīth*) [a-hhah-deeth] pl. noun:

The plural in Arabic of *ḥadīth*. However, the word "*ḥadīths*" is acceptable to convey the plural sense, and is used by English and Arabic speakers alike.

**ahkam** (*ahkam*) [ah-kam] pl. noun:

Islamic commandments that are based on religious and legal sources (noun, plural). Essentially, a law, ruling, or value under the *Shari'a*. The singular is "*ḥukm*." The term arises in connection with the Scale of Five Religious and Legal Qualifications (*Al Ahkām Al Khamsa*). Any act (or omission) by a Muslim is evaluated as a commandment and put into one of five categories, along this Scale.

**ahl al bayt** [a-hel ul bayt] s. noun:

People of the House, i.e., Family.

**ahl al kitāb** (*ahl al kitāb*) [a-hel al kee-taab] adjective:

People (or Peoples) of the Book. The traditional understanding of this term is that it encompasses only persons following a religion that pre-dates Islam and that has a sacred text, namely, Jews and Christians. A synonym is "*kitābi*."

**ahruf** [ah-roof] pl. noun:

Forms, modes, dialects. "*Ahruf*" is used to connote the seven different ways in which the Qur'ān is said to have been revealed, that is, the seven Arabic dialects in which it was recited. They were standardized into a single dialect, *Qurayshi*, during the Caliphate of 'Uthman. The term is closely related to "*Qirā'āt*," which may be

distinguished narrowly as different methods of pronunciation used in recitations. The singular is "*ḥarf*."

**'Āisha** (A'ishah, 'A'isha, 'Aisha, 'Aysha, Ayesha) [Aeye-sha] Pr. noun:

The third wife of the Prophet Muhammad, whose full name was 'Āisha bint Abū Bakr, and who died in 678 A.D. "'Āisha" literally means "she who lived." 'Āisha is known not only as the favorite wife of the Prophet, after Khadyja, but also as a teacher of Islamic jurisprudence and a narrator of many *ḥadīths*, particularly about the personal life of Muhammad. She narrated 2,210 *ḥadīths*, of which *Imām* Bukhari and *Imām* Muslim recount 316. In *surah* 33, *ayah* 6, the Qur'ān describes the wives of Muhammad as "Mothers of Believers," and 'Āisha sometimes is called the "Mother of Believers."

**ajal** [a-jal] s. noun:

Term, as in a waiting period.

**'akār** (*akar*) [a-khaar] s. noun:

A type of *māl* (legitimate object of commerce) that is an immovable object. An example would be land.

**'aḳd** ('aḳd, 'akd, aqd, akd, aqd) [ah-khid] s. noun:

Contract, i.e., the general term for an agreement that gives rise to legal rights and obligations.

**'akḍ al-bay'** ('aḳḍ al-bay, 'akḍ al-bay, aḳḍ al-bay, akḍ al-bay) [ah-khid al-bay-agh, ah-khid al-bay] s. noun:

Contract of sale.

**'aḳḍ muwalaṭ** ('aḳḍ muwalaṭ) [ah-kid moo-wa-lat] s. noun:

Mutual contract. A type of *takaful* historically, but no longer, used in Arabia and the Middle East.

**'āqila** ('akila, akila) [agh-khee-la] s. noun:

The group of persons who are liable to make payment of blood money on behalf of a perpetrator who is guilty of a *jināyāt* offense. Traditionally, this group consists of paid members of a Muslim army to which the perpetrator belongs, the male members of the tribe to which the perpetrator belongs (or, if there are too few of them to make the payment, the then of the nearest related tribes), the co-workers of the perpetrator, or the confederates of the perpetrator. This system no longer is used. See **'aqila** below.

**akl al kharzīr** [a-kel ul khan-zeer] verb phrase:

Eating flesh of the swine, i.e., eating pork or pork products, which is forbidden (*ḥarām*) to Muslims.

**al** (al-, ul-, ul-) [ul] article:

The.

**Al Ahkām Al Khamṣa** (*Al Hukm Al Khamis*) [ul huu-km ul-kha-mees] noun phrase:

Literally, "The Five Provisions" or "The Five Qualifications." *Al Ahkām* means "provisions," and "*Al Khamṣa*" means "five." That is, the Scale of Five Religious and Legal Qualifications. Any act (or omission) by a Muslim is evaluated as a commandment and put into one of five categories, along this Scale. The scale entails an analysis of the act from both a religious and legal standpoint. The five categories are:

- (1) *ḥarām* (forbidden)
- (2) *makrāh* (reprehensible)
- (3) *mubāh* (neutral, permissible, indifferent)
- (4) *mandūb* or *mustahabb* (recommended), or
- (5) *wajīb* (obligatory).

**Al Ashhur Al Hurum**, noun phrase:

The Forbidden Months, which are *Rajab*, *Dhu Al-Q'ada*, *Dhu Al-Hijja*, and *Muharram*. During these months, fighting is prohibited for Muslims everywhere, every year, unless it is defensive warfare and measures must be taken for the protection of life. The term is relevant to the first of the two Slaying Verses, *surah 9, ayah 5*, which is one of the three Sword Verses, of the Qur'an.

**alcohol** [al-co-hall] s. noun:

Alcohol.

**Al Fātimīyyān** [Ul Faa-tee-meey-yuun] noun phrase:

The Fatimid Caliphate (909-1171 A.D.).

**al fawāḥish** [ul fa-waa-heesh] pl. noun:

Indecencies.

**al hamdulillah** [ul ham-doo lil-lah] noun phrase:

Literally, "praise be to God." Also translated as "thanks be to God." The term is one of respect and reflects a fundamental tenet of Islam, namely, that God (Allāh) is the all-powerful Master of the Universe, and all that happens is according to His Will.

**al harbu al muqaddasah** (*al harbu al muqaddasa-tu*):

See "*jihād*."

**al ithra' bila sabab** [ul ithragh bee-la sa-bab] noun phrase:

Enrichment without cause, i.e., unjust enrichment. Literally, "*al-ithra*" means "enrichment," "*bila*" means "without," and "*sabab*" means cause. The term "*al-ithra' bila sabab*" is related to the term "*ribā*," which loosely translated means "interest." Under the *Shari'a*, it is thought that because a conventional, non-Muslim loan entails interest (*ribā*), it results in unjust enrichment for the lender, and thus is prohibited (*ḥarām*). Note, however, the term "*al-ithra' bila sabab*" relates to more

than just "*ribā*." For example, if a person rents a house or apartment, but does not pay the rent, then the person reaps *al-ithra' bila sabab*, because the person is enjoying the use of the premises without paying for them.

**al khala'** (*al khalo'*, *al khalu'*, *al khulu'*) [al kha-la] s. noun:

Take away, pull. One of several grounds in Islamic Family Law for the dissolution of a marriage, whereby a wife returns her nuptial gift (*mahr*) to her husband. This method is infrequently used.

**Allāh** (Allah, Allaah) [Ul-laah] Proper noun:

God, specifically the name of God as used in the Islamic faith.

**alem** (*alam*, *alim*) [a-lem] s. noun:

Generally, a scholar or scientist. "*Alem*" comes from the word "*ilm*," which means knowledge. "*Alem*" also is used to connote a religious scholar (singular noun), i.e., the singular of "*ulema*."

**'Alī** (Ali) Proper noun:

Cousin and son-in-law of the Prophet Muhammad, 4th of the four Rightly Guided Caliphs (*Rashidun*), and key figure second only in importance to the Prophet for *Shi'ites*.

**Al Queda** [U] Ka-ee-da, [U] Ka-eh-da, [U] Kay-da] s. noun:

Literally, "the base." The term is used, for example, in the context of learning "the base" of the Arabic language. The term has been adopted by an infamous, extremist, and violent group.

**al-walad lil-firāsh** [ul wa-lad leel feer-aash] noun phrase:

The Islamic Family Law doctrine that the child belongs to the marriage bed. Essentially, the doctrine creates a presumption that a child is legitimately born to a properly married couple.

**Al Rahim** (*Ar Rahim*) [Ul Ra-heem] noun phrase:

The All Compassionate. One of the most common names for (or attributes of) God among the 99 Names of Allāh.

**Al Rahman** (*Ar Rahman*) [Ul Rah-man] noun phrase:

The All Merciful. One of the most common names for (or attributes of) God among the 99 Names of Allāh.

**'amal ahl al Madinah** [agh-mal ul Ma-dee-nah] noun phrase:

Practice of the people of Medina. This practice, dated during the life of Prophet Muhammad, is accorded considerable importance by the *Māliki* School in terms of a source of the *Shari'a*.

**amān** [a-man] s. noun or adjective:

An insurance or surety for safe passage. Safe, as in a safe place.

**amāna** (*amānah*, *amanah*) [a-maa-na] s. noun:



Deposit or trust, deposit for safe keeping. A deposit arrangement that creates a relationship of trust, i.e., a fiduciary relationship, between the depositor of property and the *amin*. The word is a noun, and can refer to an institution that is a depository or trustee. The plural is "*emanet*," meaning deposits for safekeeping.

'*amd* [agh-med, a-md] adverb:

Deliberate intent, acting intentionally.

*amil al-souq* (*amil al-suk*) [a-meel ul sookh]:

See *muhtasib*.

*amin* [a-meen] s. noun:

Depository, i.e., an adjective describing the person or institution with whom or which an asset is deposited.

*amir* (*amir*, *emir*) [a-meer] s. noun:

A prince or commander, or a military rank below that of sultan.

*amirah* (*amirah*, *emirah*) [a-meer-ah] s. noun:

Princess.

*Amir al-Mu'minin* [A-meer ul Moo-agh-men-een] s. noun:

A synonym for "*Khalifa*," along with, "*Imām al-Mu'minin*," "*Imām al-Ummah*," and the English transliteration "Caliph."

*aqeedah* [a-khee-dah] s. noun:

Faith.

'*āqil* [aa-kheel] noun or adjective:

Literally, brain, but used in the sense of knowledgeable. A person is "'*āqil*" if he or she is in full possession of his or her mental faculties. Such a person is fully responsible for his or her actions or omissions. For instance, a person who is "'*āqil*" is able to be a testator (*musīd*). Thus, "'*āqil*" essentially means "sane." There is no specific age when a person becomes "'*āqil*," though typically the range cited is between 13-15 years.

'*aqila* [agh-key-la] s. noun:

Tribal aid after wrong killing. A type of *takaful* historically, but no longer, used in Arabia and the Middle East. See "*ākila*."

*aql* [a-kl] s. noun:

Literally, "intellect." "*Aql*" connotes reason, that is, human reasoning, in the sense of natural human knowledge. Sometimes, "*aql*" is translated as "dialectical reasoning." In addition, "*aql*" can refer to a Divine source of knowledge, specifically, the *Shī'ite* doctrine of the succession of Divine sources of knowledge through the blood lineage of the Prophet Muhammad.

'*āriyya* (*ariyya*) [aa-ree-yya] s. noun:

A contract for the loan of a non-fungible object.

'*asabā* ('*asaba*) [agh-ssa-ba] s. noun:

Agnate, near male relative, i.e., a person (especially male) who is descended from the same forefather or male ancestor. The term is used in Inheritance Law to denote Agnatic heirs. Noun (singular). The plural is "'*asabāt*."

*asalamu alaykum* (*assalamu alaikum*) [a-sa-lam-oo a-lay-comb] noun phrase:

Literally, "Peace Be Upon You," which is a traditional, polite Muslim greeting.

*aṣḥāb al-farā'id* (*ashab al farā'id*) [ass-hhaab al fa-raa-eedh] noun phrase:

Qur'anic heirs, i.e., any one, some or all of the 12 relations to a testator — decedent identified by the Qur'an (*sura* 4, *ayat* 11-12) as being entitled to a share (*fard*) in the net estate of the decedent. The *aṣḥāb al-farā'id* are:

- (1) Husband
- (2) Wife
- (3) Father
- (4) True Grandfather
- (5) Mother
- (6) True Grandmother
- (7) Daughter
- (8) Son's Daughter
- (9) Full Sister
- (10) Consanguine Sister
- (11) Uterine Brother
- (12) Uterine Sister

Note that 8 of the 12 Qur'anic heirs are women, and 5 of them (wife, mother, and daughter) are primary heirs, meaning their portions are unaffected by other claimants.

'*Āshārā* (*Ashura*) [a-shoo-ra]:

Literally, "tenth." The *Shī'ite* Festival in which the martyrdom of the 3rd *Shī'ite* *Imām*, Hussein, and his followers at the Battle of Karbala in 680 A.D. is celebrated. The key date is the 10th of *Muharram*, on which Hussein was killed.

*asī* (*asl*) [a-ssl] s. noun:

Nature of a transaction, i.e., the acts that make up the transaction.

*asīl* (*asil*) [a-sseel] s. noun:

Principal, or principal debtor as in a surety contract (*kafāla*) whereby the surety (*kafil*) promises to fulfill the obligations of the *asīl* to a creditor or other party.

Dep rela and or t	' <i>awl</i> [agh-wl] s. noun:  Literally, "increase." A procedure used in Inheritance Law when the sum of the shares ( <i>fard</i> s) of Qur'anic heirs exceeds unity (1). The denominator of each share is increased to be equal to the sum of the numerators, while leaving the numerators the same. The result is to bring the sum to one.
' <i>am</i>	
Deli	' <i>aurah</i> ( <i>aurah</i> , <i>aurah</i> ) [auw-rah] s. noun:  Nakedness. "' <i>Aurah</i> " refers to the parts of the body of a man or woman that must be covered, particularly in public, that is, in front of one or more persons who are not <i>maharim</i> (a spouse or close family relatives).
<i>ami</i>	
See	
<i>ami</i>	<i>ayah</i> ( <i>āyāh</i> ) [eye-ah] s. noun:  Verse.
Dep whic	<i>ayat</i> ( <i>āyāt</i> ) [eye-at] pl. noun:  Verses, i.e., the plural of " <i>ayah</i> ."
<i>ami</i>	
A pl	<i>Āyatollāh</i> ( <i>Ayatollah</i> , <i>Ayatullah</i> ) [Eye-a-tol-laah] s. noun:  Literally, "sign of God." A high-ranking <i>Shī'ite</i> title conferred on a person of great piety, learning, expertise, and respect, who serves as a guide for the community ( <i>ummah</i> ) in the absence of the <i>Imām</i> (i.e., until the return of the Hidden <i>Imām</i> ). An <i>Āyatollāh</i> not only carries great religious authority, but also wields political power.
<i>ami</i>	
Prir	
<i>Ami</i>	
A s2 and	
<i>aqe</i>	' <i>ayn</i> ( <i>ayn</i> ) [eign] s. noun:  Literally, "eye." Used in the <i>Sharī'a</i> to mean a thing. A synonym for "thing" is " <i>rakaba</i> ."
Fait	
' <i>āqi</i>	<i>azaan</i> ( <i>azan</i> ) [a-zaan] s. noun:  Islamic call to pray, as used in Near East and Indian Subcontinent. Specifically, the call to prayer issued five times a day by the <i>muezzin</i> ( <i>mu'dhin</i> ) of a mosque.
Lite she resj is al spec betv	' <i>azl</i> [a-zel] s. noun:  Withdrawal, that is, a method of contraception also known as <i>coitus interruptus</i> .
' <i>aqi</i>	<i>babs</i> :  See <i>safirs</i> .
Trif Ara	<i>badal</i> [ba-dal] s. noun:  Consideration.
<i>aql</i>	
Lite of n ing. <i>Shī'</i> line:	<i>baghi</i> [bag-hee] s. noun:  Rebellion, specifically, rebellion against a government, or a transgression by one group of a population against another group. The <i>Māliki</i> School treats <i>baghi</i> as a distinct <i>haqq Allāh</i> offense that triggers a <i>hadd</i> punishment.
' <i>ārī</i>	<i>bā'in</i> ( <i>ba'in</i> , <i>baa'in</i> ) [baa-een] adjective:

Definite. The term is used in Family Law in respect of *ṭalāk* (repudiation of a wife by a husband). *Ṭalāk* may be revocable (*raj'i*), which results in a suspension of the marriage contract, or definite, which results in dissolution of the marriage.

*bātil* (*batil*) [baa-teel] adjective:

Null and void, invalid, i.e., automatically a transaction has no legal effect because of a flaw.

*batin* [ba-teen] s. noun:

Esoteric issues in Islam, which is the focus of Sevenser (*Ismā'ili*) *Shī'ism*.

*bay'* (*bay*, *bai'*) [bay-agh, bay] s. noun:

Sale. Contract of sale, i.e., general term for any contract in which an object of commerce (*māl*) is bought and sold. The term also covers exchange or barter contracts, as well as sales for money. The full expression for "contract of sale" is "*aḳd al-bay'*."

*bay' al mu'ajjal* (*bay al-mu'ajjal*) [bay-agh al moo-a-jill] s. noun:

A deferred delivery contract, but actually involving two deferrals. One of two types of *salam* contracts in which the buyer pays the purchase price at a later date, after conclusion of the contract, either as a lump sum on a contractually-specified date, or via installments over a contractually-prescribed period, and thereafter receives delivery of the good or goods that are the object of the contract.

*bay' al salam* (*bay al-salam*) [bay-agh al sa-lam] s. noun:

A spot sale contract, but actually involving deferred payment. One of two types of *salam* contracts in which the buyer pays the full purchase price immediately upon the conclusion of the contract, but receives delivery of the good or goods that are the object of the contract at a later date.

*bay' al urbān* (*bay' al-arabun*, *bay al-arabun*) [bay-agh al ur-boon] s. noun:

Down payment, i.e., payment in good faith of a portion of the full price.

*bay' al wafa* (*bay' al-wafa*) [bay-agh al wa-fa] s. noun:

A mortgage or pledge contract involving the sale of real property.

*bay' atān fī bayā* [bay-agh a-taan fee ba-yaa] s. noun:

Double sale. A specific and ancient example is *mukhātara*, which existed in Medina among other places from at least the days of *Imām* Mālik, founder of the *Māliki* School. In this deal, a debtor sells its creditor an asset, and immediately buys back the asset for a greater amount, with re-delivery of the asset from the creditor to the debtor to occur on a specified future date. Economically, the creditor has "lent" funds to the debtor, secured by the debtor's asset. The creditor will receive those funds back, plus some extra money, when the creditor sells back the asset to the debtor. The difference between the two sale prices effectively is interest. This transaction clearly resembles a *murābaha* contract.

*Bayt Al-Ḥikmah* (*Bayt Al-Hikmah*) noun phrase:



House of Wisdom. Harūn Al-Rashid was the fifth and most famous *Abbasid* Caliph, ruling from 786-809 A.D. He was known for his interest in scientific, cultural, and religious matters. Thanks to the collection and translation of manuscripts from foreign lands by the Caliph Harūn (and by his predecessor, the second *Abbasid* Caliph, Al Mansūr (reigned 754-775)), and owing to the considerable support of the son of Harūn, the Caliph Al-Ma'mun (reigned 813-833), the famous library of Bagdad — the "*Bayt Al-Ḥikmah*" or "House of Wisdom" — was established.

**Bayt al-Izzah** (*Bay al Izzah*) [bay-it-al-eez-zah] noun phrase:

House of Honor, or House of Power. The term refers to the lowest Heaven, to which — according to some *ulema* — Allāh sent down the Qur'ān from the highest heaven on the Night of Decree (*Laylatul Qadr*).

**bayt al māl** (*bayt al māl, bayt al-māl, bait ul-māl*) [bay-it-al-maal, bait-ul-maal] noun phrase:

Government treasury.

**biḍā'ah** (*bida'ah, bidaa'ah*) [bee-dhaa-ah] s. noun:

Giving goods to another person to trade, such as when a shop owner leaves the store to another store owner to sell merchandise, but without paying wages or employing that other store owner. The transaction is voluntary, with the second owner performing *gratis*.

**bi'l kalām** (*bi'l-kalām, bi'l-kalam*) [bee-l ka-lam] adverb:

In words (orally, verbally).

**bi'l kitābah** (*bi'l-kitābah, bi'l-kitabah*) [bee-l kee-ta-bah] adverb:

In writing.

**bismallah** [bees-mal-lah] noun phrase:

"In the Name of God," or in full form, "In the name of God, the Lord of Mercy, the Giver of Mercy" (*Bismallah al Rahman al Rahim*). The "*bismallah*" is the opening passage, before the first *ayah*, to virtually every one of the 114 *surahs* in the Qur'ān.

**bughāt** (*bughat*) [boo-ghaat] pl. noun:

Rebels. Also translated as "transgressors." A rebel is distinct from a *murtadd* (apostate).

**burkha** (*burka, burqa*) [bur-kha, boor-kha] s. noun:

A veil worn by some Muslim women, particularly in Saudi Arabia and other Gulf countries, Afghanistan, Pakistan, and even the United Kingdom. The *burkha* covers all of the face, and does not leave a slit for exposure of the eyes. Rather, sight is possible through a mesh screen, or through the fabric of which the *burkha* is made. In other words, the *burkha* is a full-face veil. An additional or attached garment covers the rest of the body, including arms to the wrists, and legs to the ankles, making the *burkha* an effective head-to-toe veil. The *burkha* is almost always black in color, though in Afghanistan, particularly under Taliban rule or influence, it has

a medium-toned blue hue. A general synonym for "*burkha*" is "*niqāb*." However, a technical distinction exists between the two: a "*burkha*" covers the entire face, with no exception, as well as the body. A "*niqāb*" leaves the eyes uncovered, via a narrow slit, and is worn with an accompanying headscarf. A separate veil, covering the eyes, may or may not be worn with the "*niqāb*."

**Caliph** [Ca-lif] s. noun:

The English transliteration of "*Khalīfa*."

**da wa ta'ajjal** [da wa ta-aj-jal] verb:

Prepay and reduce. That is, in the context of asset financing, a debtor-buyer-lessee obtains a reduction in the amount owed to a creditor-seller-lessor by prepaying the purchase price or lease amount. While forbidden (*ḥarām*) in earlier times, the prohibition on *da wa ta'ajjal* has been loosened, and prepay-and-reduce arrangements now are common with Islamic credit cards. A *da wa ta'ajjal* transaction is the mirror image of a transaction involving *ribā al-jahiliyya*.

**da'if** [da eef] noun or adjective:

Weak. The third highest of four levels of authenticity that a *ḥadīth* can have, i.e., the *ḥadīth* is not widely corroborated, and contains some uncertainty or flaw, such as an interruption in the chain of transmission (*isnād*) or a transmitter in it (*rawi*) is unknown.

**dalīl 'aqlī** [da-leel aghq-lee] noun phrase:

Rational argument, rational proof, based on reason. For example, a proposition could be based on reason, *dalīl 'aqlī*, on law, *dalīl shar'ī*.

**ḍamān** [dha-maan] s. noun:

Liability.

**ḍaman khatr al-tariq** (*ḍaman khatr al-tariq*) [da-man kha-ter al ta-reek] s. noun:

Insurance (typically in the form of a surety) against dangers when traveling. A type of *takaful* historically, but no longer, used in Arabia and the Middle East.

**ḍamin** [dhaa-meen] noun or adjective:

Liable, i.e., to be liable.

**dār al-ḥarb** (*dar al-harb*) [daar al-harb] s. noun:

Literally, the "abode of war." Land of war, enemy territory. Sometimes referred to as "*dār al-kufr*," or house of disbelief.

**dār al-Islām** (*dar al-Islam*) [daar al-Islam] s. noun:

Literally, the "abode of peace." Household of peace, abode of peace. Sometimes referred to as "*dār al-salam*" or "*dār es-salaam*."

**darak** [da-rak]: s. noun:

Default in ownership of property.

**da'wah** [da-wah] verb:

Literally, making an invitation (to invite) or issuing a summons (to summon). The term is used in respect of preaching, or evangelizing, through an educational process.

**dayn** [dayn] s. noun:

A debt or claim arising from a credit loan. The plural, "*duyun*," means debts or liabilities.

**darar** (*darar*) [dah-rar] s. noun:

Harm.

**darar fāhish** (*zarar fahish*) [dah-rar Faa-hheesh] s. noun:

Excessive harm, excessive damage.

**daraba:**

See "*idrib*."

**dararāh** (*darara*, *darārāt*) [dah-rue-rah] s. noun:

Necessity.

**dawlah** [daw-lah] s. noun:

Literally, state, for example *Dawlah* Qatar means "State of Qatar." A term used by the *Abbasid* Caliphs to connote a new era.

**dhawā'ī arḥām** [dha-wuu-l ar-hhaam] pl. noun:

Uterine heirs. Distant kindred persons.

**dhawā'ī furāḍ dhawā'ī fara'id** [dha-wuu-l fu-ruudh] pl. noun:

Qur'anic heirs. Persons identified in the Qur'an as entitled to a share (*fard*) in the estate of a decedent. With notable exceptions, most of them are women.

**dhikr** [dhee-ker] s. noun:

Remember, remembrance. The Qur'an asks believers to "remember your Lord" and "remember God often" (33:41).

**dhimma** (*dhemma*) [dhim-ma, dheem-ma] noun or adjective:

Literally, engagement, obligation, responsibility, or care as a duty of conscience. The term is used to connote a treaty of surrender with a conquered non-Muslim group, who having signed the treaty, are "*dhimmi*s."

**dhimmi** (*dhimmi*, *zimmi*) [dhim-mee, dheem-mee] noun or adjective:

Literally, "protected person." Generally, a non-Muslim protected by a Muslim authority under a treaty of surrender. The protection is afforded in exchange for payment of a tax (*jizya*) and acquiescence to certain restrictions that may amount to second-class citizenship. Historically, "*dhimmi*" referred to the People of the Book ("*ahl al kitāb*," or "*kitābi*"), other than Muslims, i.e., Jews and Christians. (See *surah* 60, *ayat* 8-9 of the Qur'an.) Eventually, the term took a geo-political dimension to refer to permanent and temporary residents in Muslim territories.

**dhul yad** (*dhul al yad*) [dhool yahd] s. noun:

Possessor, i.e., a party in possession of property.

**dhurri** (dhur-ree):

See *waqf ahli*.

**din** (*din*, *deen*) [deen] s. noun:

Loosely translated, religion. The totality of the faith and actions of a Muslim so that he or she submits to the Will of Allāh. That is, "**din**" connotes obedience to Allāh. In the Qur'an, "**din**" is used in 72 verses and Islam is referred to as "*dīn*." In those verses, two other meanings of "din" are used, which are different from the first. "*Din*" can mean empire, "government, honor, power, rulership, or supremacy. "*Dīn*" also can mean to render a judgment, along with reward or punishment.

**diwan** [dee-wan] s. noun:

Office.

**diyyah** (*diya*, *diyyah*) [dee-yyah] s. noun:

Blood money. Blood money is one of three forms of liability associated with *haqq ādamī* offenses, i.e., with *jināyāt* (civil wrongs, or torts), the others being retaliation (*kiṣās*) and damages. The plural is "*diyyat*."

**diya mughallaza** (*diya mughallaza*) [dee-ya moo-ghall-adha] s. noun:

Heavier blood money, which may be paid to settle a serious *jināyāt* case.

**diya muḥakkaka** (*diya muḥakkaka*) [dee-ya moo-hakh-kha-kha] s. noun:

Normal blood money, which may be paid to settle a less serious *jināyāt* case.

**Druze** [Drooze] s. or pl. noun:

The minority branch of Sevever (*Ismā'īlī*) *Shī'ism*.

**dukhāl** (*dukhul*) [do-khool] s. noun:

Consummation of a marriage through sexual intercourse. *Dukhāl* is not required for conclusion of a valid marriage (*nikāh*) contract.

**Eid** [Eed] s. noun:

Literally, "festivity" or "festival."

**Eid al-Aḍha** (*Eid al-Adha*, *Eid ul-Adha*) [Eed ul ad-ha] noun phrase:

Literally, "festival of sacrifice." Muslim holiday marking the willingness of Abraham (Ibrahim) to sacrifice his only son, Issac, as a sign of faith to God. (Of course, God intervened at the last moment and allowed Abraham to sacrifice a ram in lieu of Issac.) Muslims celebrate *Eid al-Fitr* at the end of the *Hajj*. The starting date for the festivities is roughly 70 days after the end of *Ramadan*, on the tenth day of the month of *Dhī Al-Hijja*. The celebration begins with a short prayer, and then a sermon (*khuṭba*). *Eid al-Aḍha* also is called the "Greater *Eid*," as it lasts for four days, in comparison with *Eid al-Fitr*, which lasts for three days. Note that *Eid al-Adha* is called "*Baqra Eid*," or "*Baqri Eid*," in Urdu-speaking areas such as



Pakistan. In Arabic, “*baqarah*” means “heifer” or “cow,” and in Urdu, “*baqri*” means “goat. Traditionally on this *Eid*, a cow or goat is sacrificed.

***Eid al-Fitr*** (*Eid al-Fitr*, *Eid ul-Fitr*) [Eed ul fit-tr] noun:

Literally, “festival to break fast.” The Muslim holiday marking the end of *Ramaḍān*. Muslims celebrate *Eid al-Fitr* at the end of the month of *Ramaḍān*, on the first day of the month of *Shawwāl*. The celebration lasts for three days. *Eid al-Fitr* also is called the “Smaller *Eid*,” in comparison with *Eid al-Adha*. Throughout *Eid al-Fitr*, Muslims recite the *takbīr*, as per *surah* 2, *ayah* 185 of the Qur’ān.

***Eid al Ghadir*** (*Eid al Ghadir*, *Eid al Ghadeer*) [Eed ul Gha-deer] noun phrase:

Festival of Ghadir, an important *Shī‘ite* event held annually on to mark the sermon at Ghadir Al Khumm in which *Shī‘ites* believe the Prophet Muhammad designated ‘Ali as his successor.

***Fadilah*** [fa-dee-lah] s. noun:

Recommended. A synonym for “*mustahabb*.”

***fadl Allāh*** (*fadl Allah*) [fa-del U-lahh] Proper noun or noun phrase:

Bounty or favor of Allāh, used (for example) in the context of property or other forms of wealth.

***fajr*** [fa-jr] s. noun:

Literally, “dawn.” The “*fajr*” prayer is the first of the five daily prayers, and those prayers are one of the Five Pillars of Islam.

***faqih*** (*faqeeh*) [fa-keey] s. noun:

A legal scholar, jurist, or respected specialist in the *Shari‘a*, i.e., the singular of *fukahā‘*.

***farā‘id*** (*farā'id*) [fa-raa-eedh] pl. noun:

Allotted portions, i.e., shares, particularly referring to shares in the net estate of a decedent.

***fard*** (1st meaning) (*fard*) [fardh] s. noun:

Duty or obligation. Synonym of “*‘awājib*.”

***fard*** (2nd) (*fard*) [fardh] s. noun:

Fixed inheritance share of an heir, as fixed in the Qur’ān, *sura* 4, *ayah* 11-12.

***fard ayn*** (*fard al-ayn*) [fardh aghyn] s. noun:

Individual duty. A duty that every Muslim is supposed to perform, such as those contained in the Five Pillars of Islam.

***fard kifaya*** (*fard al-kifaya*) [fardh kee-fay-a] s. noun:

Collective duty. A duty imposed on the community of Muslims (*ummah*).

***fāsid*** (*fasid*) [faa-seed]: adjective:

Defective, voidable, i.e., at the option of a relevant party, a transaction may be voided, and thus rendered legally ineffective, on the basis of some defect in that transaction.

***fāsik*** (*fasik*, *faasik*, *fasiq*) [faa-seek] noun or adjective:

Sinner, i.e., the opposite of ‘*adl*’.

***faskh*** [fask] s. noun:

Cancellation, specifically, cancellation of a contract.

***Fatah Al Mubeen*** [Fa-tah U1 Moo-been] noun phrase:

Glorious Victory, referring to the non-violent conquest of Mecca by the Prophet Muhammad and his supporters in 630 A.D.

***Fātimah*** (Fatimah, Fatima, Faṭimah) [Faa-tee-mah] proper noun:

Youngest daughter of the Prophet Muhammad and wife of ‘Ali, the cousin and son-in-law of the Prophet. Also the name of the wife of Abū Ṭalib, the father of ‘Ali.

***fatwā*** (*fatwa*) [fat-waa] s. noun:

A religious order. Specifically, a juristic opinion that is accepted as definitive. Such an opinion can be issued only by a recognized Islamic legal authority, such as a *mufti*. In the Kingdom of Saudi Arabia, following the February 2009 reforms proclaimed by King Abdullah, the Fatwa Council of the *Majlis* consists of leading legal scholars from all Four Schools. The plural is “*fatawā*,” or simply in English, “*fatwās*.”

***fi‘l*** [fee-aghl] verb:

Conduct or act, such as the delivery of goods to convey an offer to form a contract.

***fi‘l-fi‘l*** (*fi‘l-fi‘l*) [feel- fee-aghl] verb or adverb:

In the act, as to the act. The term is used (for example) in the context of killing by mistake (*khata‘*), where the mistake goes to the act.

***fi‘l-kaṣd*** (*fi‘l-kaṣd*) [feel- khaṣṣd] verb or adverb:

In the purpose, as to the purpose. The term is used (for example) in the context of killing by mistake (*khata‘*), where the mistake goes to the purpose.

***fiqh*** (*fiqh*, *fiqh*) [fick] s. noun:

Literally, “understanding,” from the verb “*faqaha*,” which means “to understand.” The science of the *Shari‘a*, or more generally, the science of Islamic jurisprudence. That is, the totality of human comprehension of the perfect, immutable, and divine law revealed in the Qur’ān and Sunnah, and explained, elaborated, and interpreted by Islamic Law scholars (*fukahā‘*). The full term is *uṣūl al-fiqh*, referring to the roots of the jurisprudence.

***fitna*** [fit-na] s. noun:

Secession, upheaval, chaos, civil war. The plural is “*fitan*.”

***fiṭr*** (*fiṭr*) [fit-tr] verb:

Literally, to "break fast," *i.e.*, to break a period of fasting.

**Fiver *Shi'ites*:**

See *Shi'i*, and *Zaydi Shi'ites*.

***fukahā'*** (*fukahā*, *fuqahā'*) [foo-kah-hah] pl. noun:

Literally, "jurists." Islamic legal scholars or respected specialists in the *Shari'a*. In other words, experts in Islamic Law. All *fukahā'* are trained in the religion of Islam, and thus are considered members of the *ulema*. But, not all *ulema* are *fukahā'*. Only those members of the *ulema* who are specialists in Islamic Law are regarded as *fukahā'*. There are different levels of expertise in Islamic Law, of course, as there are in any legal system. The highest level of *faqih* is known as an Unrestricted Jurist-Scholar, or "*Mujtahid Mutlaq*." Among *Sunnites*, it is believed that there are few, if any, such scholars at this level today. A *mujtahid mutlaq* has satisfied all the conditions for independent reasoning (*ijtihad*). Among *Shi'ites*, it is believed that the most prominent scholars meets these conditions. Below this level is a Restricted Jurist-Scholar, or "*Mujtahid Muqayyad*." This type of scholar has mastered the methodology of his School of Law (*madhhab*), and can apply it to reach the traditional rulings of that School, and to pass new rulings within that School or within his area of legal specialty. The singular term is "*faqih*."

***gaḥd al 'ariyyah*** [gaḥd al agh-reey-ya] verb phrase:

Malicious denial of borrowed property. None of the Four Schools treats this behavior as a *ḥaqq Allāh* crime that carries a *ḥadd* punishment, though it is listed as such by Ibn Hazm al Zahiri based on a version of a particular *ḥadith*.

***gannah*** (*jannah*) [gan-nah, jen-nah] noun:

Heaven.

***gharar*** [gah-rar] noun:

Broadly, "risk" or "uncertainty," but literally, "trick." Often used to refer to commercial uncertainty.

***ghaṣb*** (*ghasb*) [gha-ssb] noun or verb:

Usurpation.

***ghaṣīb*** (*ghasīb*) [gha-sseeb] noun or adjective:

Usurper of property. *ghayba* [ghay-ba] noun or adjective: Concealment, hiding. "*Ghayba*" is used by *Shi'ites* to refer to the Lesser Occultation. That is the Twelfth *Shi'ite* belief the 12th *Imām*, Al Mādhī, went into hiding at age 5, in 874 A.D., following the death of his father, the 11th *Imām*, Al 'Askari.

***gholalah*** [gho-la-lah] s. noun:

A garment of thick fabric to be worn under clothing, much like a ladies slip is worn under dresses and skirts in modern times. Use of a *gholalah* prevents the outer dress from describing the shape of the body of a woman.

***ghurra*** [ghur-ra] s. noun:

Blood money. More specifically, an indemnity (*i.e.*, compensation for loss incurred) payment made for causing the death of an unborn child through a miscarriage or abortion. A related concept is "*diyyah*."

***ghusl*** [ghoo-sel] s. noun:

Purification, specifically, the full ablution (ritual washing) with clean water before prayers. *Ghusl* is mandatory before commencing prayers after having sexual intercourse or sexual discharge (such as of semen), menstruation, or giving birth. Full ablution is required before major rituals, such as Friday and *Eid* prayers, and the *Hajj* or *Umrah*. "*Ghusl*" is distinct from partial ablution, or "*wudu*," which is necessary before reading the Qur'an or performing certain prayers.

***ḥabs*** - 1st meaning (*ḥabs*) [hh-abs] s. noun:

Lien, *i.e.*, the retention of property or other asset in order to secure a claim.

***ḥabs*** - 2nd meaning (*ḥabs*) [hh-abs] s. noun:

Imprisonment.

***ḥaḍāna*** (*ḥadana*, *hadaana*, *ḥadhanah*) [hha-dhaa-na] s. noun:

The right to care for a child, which entails both the right of custody of a child, and the right to rear a child. More generally, the presumption in Islamic Family Law that for the benefit of a small child, the child should remain with his or her mother. This right remains with the mother of a child until a male child is 7 (or in some instances, 9) years old, if male, or until a female child comes of age (*i.e.*, has her first menstrual cycle). Some accounts indicate the right ends as early as 2 years of age, and the *Māliki* School says for a girl it lasts until she is married. Should the mother die before these cut-offs, *ḥaḍāna* passes to the nearest female relative of the child. Divorce and re-marriage to another man causes the mother to forfeit the right.

***hard*** (*ḥadar*) [ha-dar] noun or adjective:

Not protected under Islamic Criminal Law (*i.e.*, a person who enjoys that protection). The opposite — a person protected by that Law — is "*ma'sūm*," *ḥadd* (*ḥadd*) [haddh] s. noun: Literally, limit, but used in the context of a fixed punishment for certain crimes, namely, *ḥaqq Allāh*.

***ḥadith*** (*ḥadith*, *ḥadīth*, *haddith*, *haddīth*) [hha-deeth] s. noun:

The prophetic tradition, in particular, a saying or account of an action of the Prophet Muhammad. Specifically, a non-prophetic statement made by the Prophet Muhammad, *i.e.*, a saying of his that is not part of the revelation contained in the Qur'an. The saying is recorded in writing, and has been researched, debated, and verified by *ulema* and *fukahā'*. In brief, a "*ḥadith*" is a *Sunnah* for which there is an textual record authenticated by scholars. The statement of the Prophet may be an explicit oral utterance, a decision, dicta, or an expression through silence. It may also be a recounting of a behavior — an act or practice — of Muhammad. Thus, in general, the term refers to any formal tradition of the Prophet. These traditions are recorded in a variety of compilations. The plural is "*ḥadīths*" or "*aḥādīth*."

***ḥadith qudsi*** (*ḥadīth*, *ḥadīth*, *haddith*, *haddīth*, *qudsi*) [hha-deeth kood-see] s. noun:



Literally, "sacred *ḥadīth*." A *ḥadīth qudsī* is a sub-category of *ḥadīths*. Muslims believe a *ḥadīth qudsī* is the Word of God (Allāh) that the Prophet Muhammad repeated. As repeated by the Prophet, the statement was recorded and ultimately transmitted and verified through the *isnād* process. That is, Allāh revealed to the Prophet a *ḥadīth qudsī*, on some occasions through a dream. But, the statement is in the words of Muhammad himself. In contrast, Muslims regard a passage in the Qur'ān as the direct words of God transmitted to His Messenger.

**ḥafīz** (*hafēez*) [ha-fee-z] noun and proper noun (*i.e.*, can be a surname):

A person who has memorized the revelations received by the Prophet Muhammad, that is, a person who has memorized the Qur'ān.

**Ḥajj** (*Hajj, Haj*) [Hhaj, hazh] noun:

The Fifth of the Five Pillars of Islam, the pilgrimage to Mecca and Medina, which occurs annually from the seventh to the thirteenth days of the month of *Dhī Al-Hijja*.

**Ḥajj Mabarr** [Hhaj ma-broor] noun phrase:

An accepted *Hajj* in the sense of righteous, sinless, or in effect, perfect *Hajj*.

**Ḥajjat Alwada'** [Hhajj Al-wa-da] noun phrase:

Farewell Pilgrimage, the last Pilgrimage of the Prophet, which he undertook in 632 A.D.

**ḥajr** (*hajr*) [hah-j-r] noun:

Judicial interdiction, judicial intervention.

**ḥakam** (*hakam*) [hah-calm] s. noun:

Arbitrator. Notably, the Prophet Muhammad was a renowned *ḥakam*.

**ḥalal** (*halal*) [hah-laal] noun or adjective:

Permitted, permissible. Any act that is not forbidden (*ḥarām*) is *ḥalal*. However, there are different and more subtle degrees of permissibility, as indicated through a religious and legal appraisal according to the Scale of Five Religious and Legal Qualifications (*Al Ahkām Al Khamsa*).

**ḥalas** (*khalas*) [kha-las] noun, adjective, or adverb:

Enough.

**Ḥanafī** (*Hanafi*) [Hhah-nah-fee] s. noun:

Oldest of the Four Schools, founded by *Imām* Abū Hanifa Al-No'man (699-787 A.D.).

**Ḥanbalī** (*Hanbali*) [Hhahn-ba-lee] s. noun:

One of the Four Schools, and the most recent one, founded by *Imām* Ahmed ibn Hanbal (780-855 A.D.).

**ḥaqq** (*hakḳ, hack*) [hahwk] s. noun:

Right, claim. The plural is "*ḥuquq*."

**ḥaqḳ ādamī** (*hakḳ ādamī, hakḳ adami*) [hhawk aa-da-mee] s. noun:

Private right, private claim.

**ḥaqḳ Allāh** (*hakḳ Allāh, hakḳ Allāh*) [hhawk ul-laah] s. noun:

A right or claim of Allāh.

**ḥaqḳ al majrā** [hhawk ul maj-raa] noun:

The right of flow, as where a private property owner must let water flow, or pour out water, in respect of water (such as a river) passing through her land or sourced on that land (such as a spring).

**ḥarām** (*haram*) [hah-raam] noun or adjective:

Forbidden. The term often is associated with the Scale of Five Religious and Legal Qualifications (*Al Ahkām Al Khamsa*).

**ḥarb** [hharb] noun:

Literally, "war." See *jihād*.

**ḥarbī** (*harbi*) [hhar-bee] noun or adjective:

Enemy alien.

**ḥasan** [hh-a-san] noun or adjective:

Good. The second highest of four levels of authenticity that a *ḥadīth* can have, *i.e.*, the *ḥadīth* has been corroborated, but not as extensively as is the case with a *ḥadīth* that is "*ṣaḥīḥ*," and there are some discrepancies in the wording of the versions of the *ḥadīth*.

**Hashim** (*Hashem*) [Ha-shem] proper noun:

The clan (*i.e.*, large family unit), which is part of the *Quraysh* tribe, to which the Prophet Muhammad belonged.

**ḥawāla** (*hawala, hawalah, hawala*) [hah-wah-lah] noun or verb:

Transfer, specifically, transfer of obligations.

**hibah** (*hiba*) [hee-bah] s. noun:

Gift or donation. Note that a *hibah* is considered a contract (*'aqd*). The plural is "*hibat*."

**ḥijāb** (*hijab*) [hhi-jab] s. noun:

Literally, "veil," "curtain," or "barrier." Typically, "*ḥijāb*" is used to connote a headscarf, of which there is a myriad of styles and colors. In the non-Muslim world, the most common type of *ḥijāb* is a square- or rectangular-shaped scarf worn over the head and neck, which leaves the full face clearly exposed. Some women wear this kind of *ḥijāb* loosely, exposing a bit of hair, while others wear it tightly, scrupulously endeavoring to reveal no hair.

**Hijra** (*Hijrah, Hegira*) [hi-j-ra] s. noun:

Migration, immigration. Also, the name given to the Islamic calendar, which dates from 622 A.D., which in turn corresponds to year 1 in that calendar. That year marks the migration of the Prophet Muhammad and many of his companions from Mecca to Medina. The letters "A.H." following a year refer to "After *Hijra*."

**hīla** (*hila*) [hhee-la] pl. noun:

The singular of *hiyal*.

**hīlf** [hhelf] s. noun:

Literally, cohort, but refers to a confederation for mutual assistance, for financial and military aid. A type of *takaful* historically used in Arabia and the Middle East, and which has modern incarnations.

**hīmā** [hhee-maa] s. noun:

Broadly, public pasture. Specifically, setting aside land, and barring public ownership thereof, to keep it for pasture and graving of livestock.

**hirabah** (*hiraba*) [hee-ra-bah] s. noun:

Narrowly defined, highway robbery, which is a *haqq Allāh* crime (though that is the subject of debate among Muslim scholars) that carries a *hadd* punishment. More generally, a crime against society, in the sense of undermining the security of society. Also called "*kaṭ' al-tariq*."

**hīrz** (*hīrz*) [hheerz] s. noun:

Custody of a thing or things. The absence of *hīrz* is a defense in a criminal case of theft (*sariqa*), which, if accepted, could eliminate the applicability of a *hadd* punishment, and trigger the possibility of a *ta'zīr* punishment.

**hisba** (*hisba*) [hhis-ba, hhees-ba] s. noun:

Literally, "calculation." The Office of the Inspector of the Market. Historically, the second of the Four Rightly Guided Caliphs (*Rashidun*), Omar ('Umar) ibn al-Khattab, assigned the task of inspecting the fairness of the business practices in the market to the *hisba* officer. Eventually, in legal discourse, "*hisba*" took on a broader meaning, to cover regulatory issues beyond business to include personal, family, and public policy issues.

**hiyal** (*hiyal*) [hhee-all] pl. noun:

Legal fictions, formalisms, or evasions.

**Houthis** [Who-thees]:

See *Shabab Al Moumineen*.

**hudna** [huud-na] s. noun:

Literally, "truce," "armistice," or "cease fire," but also can mean "quiet" or "calm" (as it comes from the Arabic root verb for "calm"). Note the truce is temporary in nature.

**hudud** (*hudud*) [hhoo-duud] pl. noun:

The plural of *hadd*, i.e., punishments.

**hukm** [hoo-km] s. noun:

Rule, as in a legal rule.

**hulafa'** [hhoo-la-fagh] pl. noun:

The parties who come together to form an alliance to provide a *hilf*, that is, an insurance of mutual assistance.

**huquq** (*huquq*) [hhoo-quuq] pl. noun:

The plural of *haqq*, i.e., rights or claims.

**'ibadah** (*ibadah*) [ee-baa-dah] s. noun:

Worship.

**Ibādī** or **Ibādīs** (*Ibadi* or *Ibadis*) [ee-baa-dhee]:

See "*Khārijite*."

**ibāha** [ee-baa-hha] s. noun or adjective:

Permissibility.

**ibāhāt** (*ibāhāt*) [ee-baa-hhaat] pl. noun:

Permissible rights, i.e., liberties.

**ibn** [ib-en] s. noun:

Son.

**'idda** (*idda*) [id-da, eed-da] s. noun:

The waiting period for a woman, after the termination of her marriage, before she may get re-married.

**idrib** (*idrib*) [ee-dhreeb] verb:

A verb, the root letters of which (*d r b*) have multiple meanings, namely, to propound, strike, smite, stamp (or stomp one's foot), beat, cite (an example or a dispute), encompass, cast (throw, or fling upon the ground), set a barrier, engender, turn about, make a sign or point with the hand, prohibit, prevent, hinder from doing a thing one has begun, seek glory, avoid, shun, leave, turn away oneself, be with shame, be in a state of commotion, be in a state between hope and fear, and go away. The term — in particular, the related word "*daraba*," — appears in *surah* 4, *ayah* 34, of the Qur'ān. Through the ages, the translations (all by men) of the Qur'ān interpret the term to mean "beat," or a synonym thereof. The result of such translations is authorization for a husband to "beat" his wife. However, the translation by Dr. Laleh Bakhtiar — *The Sublime Quran* (6th ed., 2009) — interprets the word to mean "to go away," and thereby interprets *surah* 4, *ayah* 34 not to authorize wife beating.

**ifā'** (*ifā*, *ifa*) [ee-faagh] s. noun:

Fulfillment, specifically, the fulfillment of a contractual obligation.



**'Ifrād**, s. noun:

One of three types of *Hajj* pilgrimages, in which a pilgrim performs only the *Hajj*, not the *'Umrah* as well, and does not sacrifice an animal. Consequently, this type of pilgrimage is regarded as the easiest of the three.

**ihām** [ihh-raam] s. noun:

Customary religious garb worn during the *Hajj*.

**ījāb** (ījāb) [ee-jaab] s. noun:

Offer, i.e., one of the essential elements for formation of a contract.

**ījāra** (ījarāh, ījarah, ijara) [ee-jaa-ra] s. noun or adj:

Leasing. Hire or lease contract.

**ījaza** [ee-jā-za] s. noun:

Permission. For example, among *Shī'ite* scholars, a *mujtahid* obtains the *ījaza* of other *mujtahidān* to interpret religious law for the community (*ummah*).

**ījma'** (ījma, ijma', ijma'a) [ij-ma] s. noun:

Consensus, i.e., consensus among the legal scholars (*fukahā'*) on a point of law at a particular time, and in a particular School of Law, or possibly across multiple Schools. Such consensus may be accorded permanent and infallible legal value. However, the consensus may reflect not unanimity, but rather a majority view, in which case its permanence and infallibility is dubious.

**ījma' ahl al-Madīnah** [ij-ma ul Ma-dee-nah] noun phrase:

Consensus of the Ancient School of Medina, which the *Mālikī* recognizes as the second most important source of the *Shari'a* after the *Qur'an*.

**ījma' al-tabi'in** [ij-ma ul ta-be-en] s. noun:

Consensus of the Successors (of the Prophet Muhammad).

**ijra** [ij-ra] s. noun:

A reward received by a wife in a temporary marriage, or *mut'a*. A *mad'a* marriage is legal under *Shī'ite* jurisprudence, but forbidden (*harām*) under *Sunni* Family Law. An *ijra* is distinct from a nuptial gift, or dowry (*mahr*), in a normal marriage (*nikāh*).

**ijtihād** (ijtihad, ijtihād, idjtihād) [ij-tee-haad] s. noun:

Literally, "effort," but referring to the use of individual (or independent) reasoning, or a strenuous endeavor at applying reason to an issue. Also, speculative legal reasoning. This legal reasoning may take one or more of a variety of forms. It should use the roots of the law (*uṣūl al-fiqh*), such as *qiyās* (analogical reasoning), as its basis. But, with those roots in mind, it might also take the form of deductive reasoning; inductive reasoning; consequentialist (utilitarian) reasoning; de-ontological reasoning; public policy reasoning; and even reference to interdisciplinary concepts and paradigms. However, insofar as the "Door" to *ijtihād* was "Closed" around the year 1,000 A.D., many *ulema* and *fukahā'* have asserted that

only *qiyās* is acceptable. That assertion, and indeed the very idea that the Door to *ijtihād* ever was Closed, has been subject to great scrutiny, especially after the terrorist attacks of 11 September 2001.

**ikhtilāt** [eeh-tee-lat] s. noun:

Literally, "mixing." The term is used to refer to mixing of the sexes. In Saudi Arabia, *ikhtilāt* is forbidden, that is, men and women are not supposed to mix in public places, subject to limited exceptions (principally to do with family members, such as a husband and wife, or parent and child). *Ikhtilāt* appears to derive from tribal custom, and among Saudi officials and scholars, the extent to which it is proscribed by the *Shari'a* is debated. At issue is whether *ikhtilāt* is basically innocent behavior, and does not involve the sin of *khulwa*. The wives of the Prophet Muhammad served male guests, and in modern times, wealthy Saudis rely on a daily basis on maids and drivers.

**ikrah** (ikrah, ikraah) [eek-raah] s. noun:

Duress. A situation of duress exists if one party fears the carrying out of a threat by another party, and that other party is in a position to carry out the threat. The absence of duress, i.e., the manifestation of free will of transacting parties, is an essential constitutive element for contract formation. The presence of duress is a defense in a criminal case.

**ikrār** (ikrar, iqrar) [eeke-raar] s. noun:

Acknowledgement or confession.

**ikhtilās** (ikhtilaas, ikhtilas) [ikh-tee-laas] s. noun or verb:

Snatching things unaware, i.e., taking the private property of a person while that person is unaware of what is happening, as in pick-pocketing. This act is not considered *ṣarīka* (the *ḥaqq Allāh* crime of theft, triggering a *ḥadd* punishment). It is a *ḥaqq ādamī* offense, thus it does not trigger a *ḥadd* punishment, but rather is actionable as a civil wrong, or tort (*jīnāyāt*).

**Ikhwan al-Muslimin** [Ikh-wan ul Muz-lee-meen] noun:

The Muslim Brotherhood.

**ilā'** (ila) [ee-la] s. noun:

An oath taken by a husband (*ṣawj*) to abstain from sexual intercourse with his wife (*ṣawja*) for four months. If he adheres to this oath, then the marriage (*nikāh*) between the two parties is terminated. Or, at a minimum, the wife has a right to obtain a formal divorce. Thus, *ilā'* is a method of divorcing a wife. The pre-Islamic era (*jahiliya*) witnessed the abuse of the practice of *ilā'*, as it would freeze relationships, resulting in neither divorce nor marriage, and it did not have a defined period of time. Islam regulated the practice, by limiting its duration to only four months, and ensured that after this period the wife has the right to obtain a divorce, or the husband could get around his oath by fulfilling a religious expiation (*kaffāra*).

**'illa** [eel-la] s. noun:

Legal reasoning, or more specifically the legal rationale that underlies a rule.

**'ilm** [ee-lm]:

A *Shī'ite* doctrine that each *Imām* has special religious knowledge and insights. This doctrine was developed fully by the 6th *Shī'ite Imām*, Ja'far Al Ṣādiq.

**Imām** (*Imam*) [ee-maahm] s. noun:

Literally, "leader." Among *Sunnites*, an "*imām*" is a person who leads prayers. By tradition, only a man can lead prayers. However, in recent years in the United States and United Kingdom, women have led prayers. Among *Shī'ites*, an "*Imām*" is more than just a leader of prayers. He — and, again, it is by tradition a male — is a religious and political leader of the *Shī'ite* community. The plural is "*immah*," though in English it is common to say "*imāms*."

**Imāmah** or **Imāmate** (*Imamah*) [ee-maahm-ah] s. noun or adjective:

Leadership. Specifically, the *Shī'ite* doctrine concerning not just political, but also religious and spiritual, leadership of the Muslim community (*umma*). Essentially, the doctrine holds that the legitimate leaders, and thus rightful successors to the Prophet Muhammad, are the *Imāms*. They have three key characteristics: (1) supernatural knowledge, (2) special authority (indeed, infallibility, or "*iṣmah*"), and (3) lineage by blood to the family of the Prophet (*i.e.*, they are part of the family of Muhammad). *Sunnis* do not accept the doctrine.

**Imām al-Mu'minīn** [ee-mahm ul moo-agh-men-een] noun phrase:

A synonym for "*Khalifa*," along with "*Amīr al-Mu'minīn*," "*Imām al-Ummah*," and the English transliteration "Caliph."

**Imām al-Ummah** [ee-mahm ul oom-mah] noun phrase:

A synonym for "*Khalifa*," along with "*Amīr al-Mu'minīn*," "*Imām al-Mu'minīn*," and the English transliteration "Caliph."

**Imāmi** (*Imami*) [ee-maahm-ee] s. noun or adjective:

A synonym for "Twelve *Shī'ites*," that is, *Shī'ites* but not including Sevener *Shī'ites* (*Ismā'īlis*) or Fiver *Shī'ites* (*Zaydis*). Other synonyms are "*Ithna 'Ashari*" and "*Ja'fari*." The term is based on the Twelve *Shī'ite* belief in the special authority, indeed infallibility, of *Imāms*. Although Sevener (*Ismā'īlis*) *Shī'ites* share this belief, the term "*Imāmi*" is reserved for Twelve *Shī'ites*.

**imḍā'** (*imda'*, *imda*) [eem-dhaa] s. noun or verb:

Ratification, as in ratification of a contract.

**Injeel** [In-jeel] s. noun:

An Arabic word transliterated from the Greek for The Bible, that is, the Christian Holy Book, or specifically the New Testament.

**intifada** [in-te-faa-dah] s. noun:

Uprising. The term typically is used in the context of the movement of Palestinians living in the Occupied Territories (specifically, Gaza and the West Bank) against Israel, which captured the Territories in the June 1967 War. The First *Intifada* started in 1987.

**insha'Allāh** (*inshallah*) [in-shah-al-la] noun phrase:

This term may be translated as "Allāh willing," "if Allāh wills," "if it is Allāh's will," "if Allāh wishes," "depending on Allāh's will," "when Allāh wills, up to Allāh." This expression is commonly used throughout the Islamic World, by Muslims and non-Muslims alike. The expression reflects a fundamental tenet of Islam, namely, that Allāh is the all-powerful Master of the Universe, and all that happens is according to His Will. The expression also reflects hope, namely, hope that a good event at issue will transpire in the future, or a bad event at issue will not occur. In that respect, "*insh'Allah*" is akin to the English expression "hopefully." (That analogy is all the closer when it is recalled that Hope, along with Faith and Charity, are the Three Theological Virtues according to Catholic Christian teaching, essentially meaning that these Virtues come from God.) Both indicate the speaker would like to see something take place, or not, and suggest an invocation of God's blessing.

**iqama** [ick-a-ma] s. noun:

Second Call to Islamic Prayer. See *adhān*.

**igra'** (*ikra'*, *igra'*) [ick-ra] verb:

To read.

**iqṭā'** [eek-ttah] s. noun:

Assignment.

**iqṭā' istighlāl** [eek-ttah is-tigh-laal] s. noun:

A specific type of assignment, namely, a developmental land grant by which a government assigns to a private party rights to public property for the purpose of advancing the value of the property, or extracting wealth from it.

**i'rāb** [ee-agraab] s. noun:

Traditional Arabic grammar, and in particular, the way words are pronounced, such as the spoken endings of Arabic words, as sometimes indicated by diacritical marks.

**irfāq** (*irfaq*) [ir-faak] gerund:

Attaching. Derived from "*arfaq*," which means "attached" (verb, past tense).

**irtidād** (*irtidad*) [eer-tee-daad] s. noun:

Apostasy, specifically, conversion from Islam to another religion. *Irtidād* is to be distinguished from "*riddah*," which is conversion away from Islam to a state of unbelief (*kufr*), possibly atheism or agnosticism.

**Islam** [Is-lam] s. noun:

Literally, "submission," but used to refer to submission to the Will of God.



**'iṣmah** (*ismah*) [iss-mah] noun:

Literally, "protection." The *Shī'ite* belief in the special authority, indeed infallibility, of an *Imām*. According to this belief, the Prophet Muhammad, and certain other figures in Islam (namely, his daughter, Fatima Zahra), were endowed by God (Allāh) with freedom from error and sin. The belief also holds that Allāh bestowed freedom from error and sin on the *Imāms*. This belief is shared by Twelver *Shī'ites* (*Ja'fari*, or *Imāmis*) and Sevener *Shī'ites* (*Ismā'ilis*). But, Fiver *Shī'ites* (*Zaydis*) do not ascribe "'iṣmah" to the *Imāms*. According to at least one source, the doctrine is based on a speech given by Abū Bakr after the death of the Prophet, in which Abū Bakr said that "God has elected Muhammad over all other human beings, and has protected him from moral weaknesses."<sup>3</sup> However, the doctrine is accepted neither by *Sunnis* nor by *Khārijites*. They cite *surah* 48, *ayah* 2 of the Qur'ān, which speaks of God forgiving the past and subsequent faults of Muhammad.

**Ismā'ili** (*Ismaili*) [Is-my-lee] noun or adjective:

A synonym for Sevener *Shī'ites*.

**isnād** (*isnād*) [is-naad] noun:

Chain of transmission, or more precisely, the chain of transmitters, referring to the line of persons who transmitted a *ḥadīth*.

**istidānah** (*istidanah*, *istidaanah*) [is-tee-daa-nah] noun or past tense verb:

Purchase on credit terms. "*Istidānah*" also means to borrow.

**iṣṭilā'** (*istifa*) [iss-tee-faa] noun:

Receiving, such as of a thing in acquiring derivative ownership thereof.

**istighlāl** (*istighlal*) [is-tigh-laal] noun or verb:

To use, to advance.

**istighlāla** (*istighlala*) [is-tag-halla] past tense verb:

Used, advanced.

**istihkāk** (*istihkak*) [is-teeh-khaakh] s. noun:

Third party, due obligation.

**istiḥsān** (*istihsan*, *istihsaan*) [is-teeh-saan] s. noun:

Literally, "approval." The term connotes juristic preference. It is discretionary reasoning that is not based strictly on *qiyās*. Specifically, a form of *ijtihād* in which scholars weigh an opinion about a legal rule against other opinions.

**istirdād** (*istirdad*) [is-teer-daad] s. noun:

Third party, recovering possession of property.

**istiṣlāḥ** (*istislah*) [is-teess-laahh] s. noun:

<sup>3</sup> See M.M. Bravmann, *Studies in Semitic Philology*, particularly Chapter 29, *The Origin of the Principle of Ismah* (1977), cited in <http://en.wikipedia.org/wiki/Ismah>.

Taking into account the public interest, i.e., public interest reasoning.

**istiṣnā'** (*istisna'*) [is-teess-naa] s. noun:

Literally, "manufacturing." A manufacturing contract, i.e., contract for the manufacture of an object.

**it'ikāf** [ee-tee-kaaf] s. noun:

Voluntarily confining oneself to a mosque to pray for a limited number of days, and thus leaving jobs and other worldly matters aside for that period. This practice may occur during *Ramādān*.

**ithm wa baghy** [it-hm wa bag-hee] pl. noun:

Sins.

**Ithna 'Ashari** (*Ithna 'Ashariyya*) [ith-na agh-sha-ree] s. noun or adjective:

A synonym for Twelver *Shī'ites*, that is, *Shī'ites* but not including Sevener *Shī'ites* (*Ismā'ilis*) or Fiver *Shī'ites* (*Zaydis*). Other synonyms are "*Imāmī*" and "*Ja'fari*." The term is based on the Twelver *Shī'ite* belief in the special authority, indeed infallibility, of *Imāms*. Although Sevener (*Ismā'ilis*) *Shī'ites* share this belief, the term "*Imāmī*" is reserved for Twelver *Shī'ites*.

**'iwāḍ** (*'iwad*, *iwad*) [ee-wadh] s. noun:

Counter-value.

**ja'ālah** (*jo'ala*) [joh-agh-lah] s. noun:

Services fee agreement or contract. More precisely, an agreement with a person or firm with expertise in a given field to engage in a task for a set fee or commission, such as hiring a private investigator to find a missing object, or a consultant to perform a project. Also, "*ja'ālah*" can refer to a unilateral contract for services in which the offeror, addressing the public, designates a specific amount of money to be paid upon performance of a certain condition. See *ju'l*.

**Ja'fari** (*Ja'fari*, *Ja'fari*) [Ja-agh-fa-ree] noun or adjective:

A synonym for Twelver *Shī'ites*, that is, *Shī'ites* but not including Sevener *Shī'ites* (*Ismā'ilis*) or Fiver *Shī'ites* (*Zaydis*). Other synonyms are "*Imāmī*" and "*Ithna 'Ashari*." The term "*Ja'fari*" comes from the person of Ja'far Al-Sadiq, who Twelver *Shī'ites* accept as their Sixth *Imām*. Interestingly, scholars who founded the *Ḥanafī* and *Mālikī* Schools narrated certain *ḥadīths* from Ja'far Al-Sadiq.

**Jahannam** [ja-han-nam] s. noun:

The worst place in Hell (*naar*). There are various regions of Hell, all encompassed by the generic term "*naar*," but "*jahannam*" is the worst of them. The term "*jahannam*" corresponds directly to the geographical site "Gehenna," which is referenced in Jewish and Christian writings, and which was located outside the Old City of Jerusalem (the Valley of Hinnom).

**jahiliya** (*jahiliyyah*) [ja-hee-lee-ya] s. noun:

Literally, "ignorance." The term is used by Muslims to refer to pre-Islamic ignorance, that is, civilization before Islam, particularly the era of paganism on the Arabian Peninsula before the Prophet Muhammad began reciting the revelations given to him. Properly used, the term refers only to the Arabian Peninsula and its inhabitants, not to other geographic locations or peoples. Certainly, the existence of Judaism and Christianity throughout the Middle East and beyond, not to mention the existence of Buddhism and Hinduism, all before Islam, adduce that the pre-Islamic period was anything but "ignorant." However, a softer connotation may be that the revelations to Muhammad had not yet been given, and thus were not yet known. Contemporary Muslims use the term to describe critically situations of violent group behavior, such as violence due to sports rivalry.

**jalada** [ja-la-da] verb:

To hit the skin with the hand or any object. This word is used in reference to the punishment of 100 lashes prescribed in the Qur'an in *surah* 24, *ayah* 2, for unlawful sexual intercourse.

**jā'iz** [jaa-ez] verb or adjective:

Allowed, unobjectionable. The term is used to connote and act or omission that is *nubāh* (neutral, indifferent, and thus permissible) is allowed, as there is no religious objection. The term often is associated with the Scale of Five Religious and Legal Qualifications (*Al Ahkām Al Khamsa*).

**jam'** [yaam] s. noun:

Combination. The term arises in Islamic Family Law, and connotes an impediment to marriage in that a man cannot marry simultaneously two or more women who are related to each other within a forbidden degree (*mahārim*) or through fosterage (*radā'*).

**janin** [ja-neen] s. noun:

Bud, very smallest beginnings, but also used to mean a fetus.

**Jibreel** (Jabreel) [Ja-breel, Ji-breel] pronoun:

The Archangel Gabriel, responsible for the Annunciation and the transmission of the Qur'an to the Prophet Muhammad.

**jihād** (*jihad*) [jee-haad] s. noun:

Struggle, strive. Sometimes translated as "holy war." However, the correct Arabic rendition of "the holy war" is *al harbu al-muqaddasah* (in Arabic) or *al harbu al-muqaddasatu* (in the Near East and Indian Subcontinent). The verb forms of *jihād* are *yujaḥidu* (male) or *tujāḥidu* (female). Occasionally, but not during the time of the Prophet Muhammad, the terms "*harb*" and "*qital*" are used interchangeably with "*jihād*," or as an aspect of "*jihād*."

**jihād al-akbar** (*jihad al-akbar*) [jee-haad al ak-bar] s. noun:

The greater struggle. The greater struggle is a personal struggle to understand the will of Allāh and submit to it. The goal of the greater struggle is moral healing, that is, a journey from learning what is "bad" and avoiding it, to learning what is "good"

and pursuing it. The goal also is a second journey, namely, from being "good" to pleasing God (Allāh), and thereby meriting entry into Heaven.

**jināya** (*jinaya*) [jee-naa-ya] s. noun:

Literally, "offense." In the language of Anglo-American Law, a civil wrong, tort, or in the language of Roman and Civil Law, a *delict*.

**jināyāt** (*jinayat*) [jee-naa-yaat] pl. noun:

Literally, "offenses," the plural of *jināya*.

**jizyah** (*jizya*) [jeez-ya] s. noun:

Tax, tribute, compensation, payment in return. Specifically, a special tax paid by non-Muslims minorities residing in a Muslim country to the governing Muslim authority that gives them the status of "*dhimmis*." In effect, a poll tax. The tax is a payment in return, in that the Muslim authority gives protection to the *dhimmis*, grants them benefits, and exempts them from military service and the *zakāt*. Traditionally, the *jizya* is levied on an able-bodied free man, excluding monks, who can afford to pay it, and is a low amount such as one *dīnar* per year. The tax is based on *surah* 9, *ayah* 29 of the Qur'an, and the *ḥadīth*.

**ju'l** [jool]:

Corresponds to the Roman Law contract of *locatio conductio operis*. See **ja'ālah**.

**Jum'a** (*Jum'ah*) [juu-ma, jew-ma] s. noun:

Friday. In the Islamic faith, Friday is the equivalent of Sunday in the Christian faith.

**juyūb** [joo-yoob] pl. noun:

The neck slit of a dress. "*Juyūb*" also has a secondary meaning, which is connected logically to the first meaning, namely, the bosom or bust of a woman. The singular is "*jayyb*."

**Ka'ba** (*Kaba, Kaaba, Ka'baa, Ka'bah*) [Ka-ba, Kagh-baa] s. noun:

Central place of worship in the Grand Mosque, Mecca, Kingdom of Saudi Arabia, a focal point for the *Hajj*, and the most revered and sacred place and object in the world among Muslims. In pre-Islamic times, the *Ka'ba* was a pagan shrine. According to the Qur'an, in *surah* 2, *ayah* 127, the *Ka'ba* was rebuilt by Abraham (Ibrahim) and his son Ishmael (Ismā'il).

**kabḍ** (*kabḍ, qabḍ*) [kha-bdh] s. noun:

Taking possession, such as of a thing in acquiring derivative ownership thereof.

**kabāl** (*kabul, qabul*) [kha-bool] s. noun:

Acceptance, i.e., one of the essential elements for formation of a contract.

**kada** [ka-dhaa] s. noun:

An Ottoman Turkish term referring to the building block unit for civil government was the *kada*. A *kada* was a district in which a particular *qāḍī* had jurisdiction.



**ḡadhḡ** (*kaḡḡf, qaḡḡf*) [kha-def] s. noun:

Slander, specifically, false accusation of unlawful sexual intercourse. *ḡadhḡ* is a *ḡaqq Allāḡ* crime that carries a *ḡadd* punishment.

**kadiyya** [ka-dee-yya] s. noun:

Case, e.g., a legal case.

**kafāla** (*kafala*) [ka-faa-la] s. noun:

Suretyship (surety contract).

**kafāla bil-māl** (*kafala bil-māl*) [ka-faa-la beel maal] s. noun:

Surety for a claim, i.e., a contract creating additional liability (incumbent on the surety) to secure fulfillment of an obligation.

**kafāla bil-nafs** (*kafala bil-nafs*) [ka-faa-la beel naphs] s. noun:

Surety for a person, i.e., a contract creating additional liability (incumbent on the surety) to secure performance of an act by a person.

**kaffāra** (*kaffara*) [kaf-faa-ra] s. noun:

Religious expiation, i.e., atonement or penance for the commission of a wrongdoing or other failure to fulfill a religious obligation.

**kafil** [ka-feel] s. noun:

A guarantor or surety.

**kāfir** (*kafir*) [ka-fear] s. noun:

Literally, "rejector" or "unbeliever." In particular, an unbeliever or infidel, i.e., one who does not believe in Islam. Historically, "referred to a person who does not belong to the People of the Book (*"aḡl al kitāb,"* or *"kitābi"*), i.e., who is not a Jew, Christian, or Muslim. Eventually, the term took on a geo-political dimension to refer to non-residents of Muslim territories. Further, the term is a pejorative one used by some Muslims for all non-Muslims.

**kaḡba** (*kaḡba, qaḡba*) [khaḡ-ba] s. noun:

Whore, prostitute.

**kalimah** (*kalima, kalema*) [ka-lee-mak] s. noun:

Literally, "the word." Often used in connection with the First Pillar of Islam to connote the entirety of the *Shahāda*. *Kanun* [Khaa-noon] s. noun: A Turkish term referring to the administrative law of the Ottoman Empire, consisting of legislative pronouncements, regulations, directives, and orders of the Sultans.

**karaha** [ka-ra-ha] s. noun:

Offensiveness.

**kaḡ' al-tarik** (*kat al-tarik, qaḡi'taraiq, qati'taraiq*) [khatt' al-ta-reek] s. noun:

Highway robbery, with *"kaḡ"* (*"qaḡi"*) meaning "robbery" and *"tarik"* (*"taraiq"*) meaning "highway." It is a *ḡaqq Allāḡ* crime that carries a *ḡadd* punishment. Also

called *"ḡirabah."*

**Katib** (*katib*) [ka-teeb] s. noun:

Clerk of the Court, or Secretary to a *qāḡi*. This office was borrowed in the late *Umayyad* Caliphate from the *Sassanid* Persians, when the institution of the *qāḡi* entered into the *Sharī'a*.

**kaḡl** (*kaḡl, qatīl, qateel*) [kha-teel] s. noun:

Homicide, or more generally, killing. *Kaḡl* is a *ḡaqq ādami* offense, thus it does not trigger a *ḡadd* punishment, but rather is actionable as a civil wrong, or tort (*jināyāt*). The plural is *"kaḡloo"* (*"qatīloo"*), meaning "killings."

**Khadyja** (Khadija, Khadijah, Khadijah, Cadijah) [kha-dee-ja] Proper noun:

Employer, wife (indeed, the favorite wife), and companion of the Prophet Muhammad. A widow and successful businesswoman, her relationship with Muhammad began in 595 A.D., and lasted until her death in 619 A.D.

**Khalifa** (*Khalifa, Caliph*) [Kha-lee-fa] s. noun:

Literally, successor or representative. The head of an Islamic state and/or leader of an Islamic community (*ummah*). Historically, Caliphs also have been called *"Amir al-Mu'minin,"* which means "Commander of the Faithful," *"Imām al-Mu'minin,"* or *"Imām al-Ummah."*

**khalwa** [khal-wa] s. noun:

Privacy, particularly between a husband (*zawj*) and wife (*zawja*). *Khalwa* is not required for conclusion of a valid marriage (*nikāḡ*) contract.

**khamr** [kha-mer] s. noun:

Intoxicating drink, wine.

**kharāj** [ka-raj] s. noun:

Land tax.

**Khārijite** (*Khārijite*) [Kha-ree-jite] noun or adj:

Literally, "those who went out," associated with *"Khārij,"* which means "stranger" or "third party." The *Khārijites* supported the first three of the Four Rightly Guided Caliphs (*Rashidun*), and initially supported the fourth such Caliph, 'Alī, cousin and son-in-law of the Prophet Muhammad, and the first *Shī'ite Imām*. Subsequently, they rejected 'Alī, and revolted against him, thereby becoming a group distinct from both *Sunnis* and *Shī'ites*. In effect, they were Secessionists. It was a member of the *Khārijites* (specifically, one of the early groups within the movement, called the *"ḡarāriyya"*), Abū al-Raḡman ibn Muḡjam, who assassinated 'Alī. The *Khārijites* insisted that any pious, able Muslim, whether or not related by blood to the family of the Prophet Muhammad (as 'Alī was), could serve as *Imām* in the sense of religious and political leader of the Muslim community (*umma*). They also insisted on the right to revolt against any leader who deviated from the example of the Prophet or the first two Caliphs, Abū Bakr and Umar. In addition to their political ideas, the *Khārijites* articulated religious and legal precepts that

distinguished themselves further from Sunnites and *Shī'ites*. For example, the *Khārījites* (specifically, the *Harūriyya*) accepted the proposition that a woman could be an *Imām*. Historically, "*Khārījites*" also were called "*Shurat*," which means "buyers." This appellation suggests they have traded their mortal life (or "*al dunya*") for another life ("*al akhera*"), namely, one with God. By the 7th century A.D., the *Khārījites* became concentrated in what is today Southern Iraq. Today, all that remains of the *Khārījites* are the "*Ibādī*" Muslims, who dominate in Oman, and also are found in certain parts of North Africa, and in Zanzibar. These Muslims, the "*Ibādīs*" reject the rubric "*Khārījites*" for themselves and take the label "People of Justice and Uprightness" (*Ahl Al-'Adl wal Istiqama*).

**khata'** (*khata'*) [kha-tta] s. noun:

Mistake, as in killing (*katl*) by mistake.

**khayar** [kha-yar] s. noun:

Benefit, blessing, used (for example) in the context of property or other forms of wealth.

**khimār** (*khimar*) [khee-maar] s. noun:

Head covering, veil covering the head. The plural is "*khumur*."

**khiyāna** (*khiyāna al-amāna*) [*khiyaana, khiyana*] [khee-yaa-na] s. noun:

Literally, "abuse of confidence." The term is used to mean embezzlement. *Khiyāna* is not considered *sariḥa* (the *ḥaqq Allāh* crime of theft, triggering a *ḥadd* punishment), but rather a *ḥaqq ādamī* offense actionable as a civil wrong, or tort (*jināya*).

**khiyār** (*khiyar*) [khee-yar] s. noun:

Literally, option, but used in the context of rescission. A right to rescind a completed contract, whereby one or the other party may withdraw from the contract. *Khiyār* is an important remedy that ensures there is no *caveat emptor* (buyer beware) in the *Sharī'a*. *Khiyār* also is relevant in Penal Law, in the instance of duress (*ikrah*), which gives rise to the option of the afflicted party to rescind his or her otherwise wrongful behavior. The option to rescind indicates the action or transaction at issue is voidable.

**khiyār al 'aib** (*khiyar al-aib*) [khee-yar al-aighb] s. noun:

The doctrine of rescission of (*i.e.*, withdrawal from) a completed contract in the circumstance where there is a fault existing, at the time of the contract, in the goods or services that are the subject of the contract.

**khiyār al majlis** (*khiyar al-majlis*) [khee-yar al-mahj-lees] s. noun:

The doctrine of rescission of (*i.e.*, withdrawal from) a completed contract, at the option of either party, as long as they have not physically separated. The term "*majlis*" means "meeting," hence rescission is possible from a face-to-face contract as long as the parties are still in the physical presence of one another.

**khiyār al ru'ya** (*khiyār al-ru'ya, khiyar al ru'ya*) [khee-yar al ruu-ya] s. noun:

The doctrine of rescission of (*i.e.*, withdrawal from) a completed contract, where goods are sold sight unseen, with the buyer having the option to reject the goods upon sight.

**khiyār al shart** (*khiyār al-shart, khiyar al-shart*) [khee-yar al ssart] s. noun:

A stipulation in a contract about a right of rescission (*khiyār*), specifically the period of time in which either party may exercise the option to rescind a completed contract. Sometimes expressed as "*shart al-khiyār*."

**khiyār al wasf** (*khiyār al-wasf, khiyar al-wasf*) [[khee-yar al was-ef] s. noun:

The doctrine of rescission of (withdrawal from) a completed contract in the circumstance in which there is a difference between the parties about the description of the goods or services that are the subject of the contract.

**Khojas:**

See *Nizāris*.

**khulwa** [khool-wa] s. noun:

Seclusion. The term is used in reference to seclusion by an unrelated, unmarried couple in a setting that could tempt devish, that is, sinful, behavior. Traditionally in Saudi Arabia, preventing *khulwa* is the justification for *ikhtilat* (gender separation in public places).

**khums** [khooms] s. noun or adjective:

Literally, one-fifth (1/5). An annual *Shī'ite* tax of one-fifth (1/5) levied on wealth accumulated during the year. The tax is imposed on net income (*i.e.*, gross revenues less expenses), net increase in real estate holdings, stored gold, silver and jewellery, mined goods, goods taken from the sea, and spoils of war. The tax is for the Prophet Muhammad, his family, orphans, the needy and travelers. Half of the *khums* (*i.e.*, one-tenth, or a tithe) is deemed the share of the *Imām* (*sahl al Imām*), as it is the inheritance of the *Imām* from the Prophet.

**khutba** (*khutba*) [khuuth-ba] s. noun:

Sermon.

**Khutbat Alwada'** [Khuuth-bat Al-wa-da] noun phrase:

Farewell Sermon, the last sermon delivered by the Prophet Muhammad. He gave it in 632 A.D. at Mount Ararat, near Mecca.

**khutbatul Jum'a** (*khutbatul Jumu'ah*) [khuut-ba-tuul juu-ma, huut-ba-tuul juu-ma] s. noun:

Friday sermon, *i.e.*, the sermon delivered by an *imām*, typically from a raised pulpit (*mimbar*) in a mosque, at the Friday congregational prayers.

**kifaya** [kee-fay-a] verb:

Literally, "enough."

**kitābī** [kee-taa-bee]:



See *ahl al-kitāb*.

**ḳīma** (*ḳīma, qimah*) [khee-ma]: s. noun:

Value. *Ḳīma* is distinct from *thaman* (price).

**ḳīmī** (*ḳīmī*) [khee-mee]: s. noun:

Non-fungible (heterogeneous), non-fungible object, such as artwork.

**ḳirā'** (*ḳirā*) [kee-ra]: s. noun:

Corresponds to the Roman Law contract of *locatio conductio rei*. The term is rarely used, and refers to a sale.

**ḳisma** (*ḳisma*) [khees-ma]: s. noun:

Division, as in the dividing of jointly-owned property among the owners.

**ḳiṣāṣ** (*ḳisaas, kisas, qisaṣ*) [khee-ssaass]: s. noun:

Retaliation, i.e., private vengeance. *Ḳiṣāṣ* is one of three forms of liability associated with *ḥaqq ādamī* offenses, i.e., with *jināyāt* (civil wrongs, or torts), the others being blood money (*diya*) and damages.

**kitāb** (*ḳitaab, kitab*) [kee-tab]: s. noun:

Literally, "book." Often used in the sense of a sacred scripture, such as the Qur'ān. "*Kitāb*" also can be translated as "established decree" or "law." The plural is "*kutb*" ("books").

**kufr** [koo-far]: s. noun:

Unbelief, as in a lack of belief in Islam.

**lakīṭ** (*lakit, laqit*) [la-kheett]: s. noun:

Foundling, i.e., a child who has been abandoned and whose parentage is unknown.

**latmiya** [lat-mee-a]: s. noun:

A mourning chant during the *Shī'ite* Festival of *Ashura* in which the suffering of the 3rd *Shī'ite* Imām, Hussein, and his followers at the Battle of Karbala in 680 A.D. is recounted.

**Laylatul Qadr** [lay-la-tool qa-der]: s. noun:

Night of Decree, one of the odd-numbered nights during the last 10 days of *Ramādān* during which some *ulema* speculate that Allāh sent down the Qur'ān, from the *Umm al-Kitāb*, from the highest heaven to the lowest heaven (*Bayt al-Izzah*).

**lāzim** (*lazīm*) [laa-zeem]: adjective:

Binding, as in a binding contract.

**li'ān** (*li'an*) [lee-aan]: s. noun:

One of several grounds in Islamic Family Law for the dissolution of a marriage, whereby a husband accuses under oath his wife of committing an unchaste act.

*Li'ān*, on the one hand, and *ḳadhf* and *zinā*, on the other hand, are mutually exclusive.

**lisan** [lee-san]: s. noun:

Law.

**luqṭa** [luke-tta]: s. noun:

Treasure.

**luṭf** [loo-thf]: s. noun:

Divine grace, the grace of God.

**madhhab** [madh-hab]: s. noun:

School of legal thought, of Islamic jurisprudence, as used in Arabic. That is, A religious and legal school in Islamic Law, of which in *Sunnite* Islam there are four major ones, which in chronological order of their establishment are: *Ḥanafī*, *Mālikī*, *Shāfi'i*, and *Ḥanbalī*. See *mazhab*. The plural, "schools of Islamic Jurisprudence," is "*madhahib*."

**madrasa** (*madrasah, madrassa, madrassah*) [ma-dra-sa]: s. noun:

An Islamic religious school or seminary. Note the term also is used to refer to all pre-college level schools, elementary, middle, and high. The plural is "*mederis*," though in English the term "*madrasas*" is used.

**ma'dād or ma'dad mutaḳārib** (*ma'dud*) [ma'-duud]: pl. noun:

Fungible things that can be counted. A synonym is "*'dadi*."

**maḥārim** (*mahaarim, maharim*) [mah-aa-reem]: pl. noun:

The plural of "*maḥram*."

**Māhdi or Al Māhdi** (*Mahdi*) [Maah-dee]: Proper noun:

A lineal descendant of the Prophet Muhammad. Specifically, the 12th *Shī'ite* Imām, or Hidden Imām.

**mahr** [ma-her]: s. noun:

Nuptial gift, i.e., the gift given by a bridegroom to his bride as part of the marriage (*nikāh*) contract between the bridegroom and the guardian (*walī*) of the bride. Simply put, the dowry. The amount of the *mahr* is supposed to be "fair" (*mahr al-mithl*). The marriage gift may be paid in full immediately, deferred entirely, or a combination of immediate and deferred payment. The portion that is paid "up front" is called "*muajjil*." The portion that is deferred is called "*muakhkhar*."

**mahr al-mithl** [ma-her al mith-l]: noun phrase:

Fair *mahr*, i.e., a value for the nuptial gift that is fair.

**maḥram** (*mahram*) [mah-ram]: s. noun:

A nearby relative, that is, a person closely connected by a familial relationship. Such a person falls within a forbidden degree of relationship, in two respects. It is not

possible to marry such a person, and it is not possible to steal from such a person (as ownership of the object in question essentially extends to both persons in the relationship). The plural is "*maḥarim*."

**maja'yya** [ma-ja-agh-ee-yya] s. noun:

A rule-making authority delegated from *Mahdi*, used in *Usuli Shī'ism* (a dominant branch of Twelver *Shī'ism*). The *maja'yya* is authorized to determine the content of the *Shari'a*, that is, to identify and re-define issues, and to promulgate solutions.

**majlis** [mahj-lees] s. noun:

Meeting, assembly, session, committee. Sometimes the full expression, "*shura majlis*" is used, to indicate a "consultative council."

**makīl** (*makīl*) [ma-keel] s. noun:

Fungible things that can be measured, such as barley, dates, salt, and wheat. A synonym is "*kayli*."

**makrah** (*makrah*, *mukruh*) [mah-krue, ma-crew, ma-cruuh] noun or adjective:

Reprehensible, disapproved, disliked, undesirable, and strongly discouraged, from a religious standpoint, or from a legal standpoint, but not expressly forbidden (*i.e.*, not *ḥarām*). That is, a proposed action is reprehensible under Islamic Law. *Makrah* is the opposite of *mustahabb* (recommended).

**māl** (*mal*) [maal] s. noun:

A legitimate object of commerce, *i.e.*, a thing capable of being bought and sold. "*Māl*" is a general term whereby the thing could be a good (such as a movable object) or real property.

**māl ḥukmī** [maal hhook-mee] s. noun:

A supposed right, *i.e.*, a right that is reputed or believed to exist.

**māl mankūl** [maal man-khool] s. noun:

A type of *māl* (legitimate object of commerce) that is a movable object. An example would be a car. A synonym is "*māl nakli*."

**mālik** [maa-leek] pronoun:

Owner, *i.e.*, an owner of property.

**Mālikī** (*Maliki*) [Maa-li-key, Maa-le-kee] noun or adjective:

One of the Four Schools, and the second of the Four in chronological terms, founded by *Imām* Mālik ibn Anas Al Asbahi (710-795 A.D.).

**ma'lām** (*ma'lum*) [magh-loom] adjective:

Certain or known, as in a definite term or waiting period (*ajal*).

**mamlak** (*mamluk*) [mam-luke] adjective:

Literally, "owned." Used as an adjective or the past tense of the verb "*tamlik*," which means "to own" (feminine).

**mandub** [man-duub] adjective:

Recommended. A synonym for *mustahabb*.

**mansūkh** [man-sookh]:

See *naskh*.

**manfa'a** [man-fa-gha] s. noun:

Usufruct. Also, a proceed from a *waqf*. The plural, "proceeds," is "*manāfi'*"

**marāḍ al-mawāt** (*marad al-mawāt*, *marad al-mawt*) [ma-rad al ma-wat] noun phrase:

Terminal illness, which is one factor that disqualifies a party from having legal capacity to enter into a contract.

**marja 'at-taqlid** [mar-ja agt tack-leed] s. noun:

Literally, reference point for emulation. Source of emulation, namely, a *mujtahid* the rulings (*fatawā*) of which others follow.

**māshā'Allāh** (*māshā'Allah*, *masha'Allah*, *mashallah*) [maa-shaa-al-lah] noun phrase:

Literally, "whatever Allāh wills." Also translated as "Allāh willed it" or "Allāh has willed it." The term is used when a good deed or special achievement occurs, often coupled with an element of surprise. For example, it is used in connection with an excellent performance in an academic or athletic endeavor, such as an examination or a marathon, and in connection with a wedding or the birth of a child. The term is one of respect and reflects a fundamental tenet of Islam, namely, that Allāh is the all-powerful Master of the Universe, and all that happens is according to His Will. A similar English expression would be "Congratulations," but it is more secular in nature, thus "God bless you" would be a closer analogy.

**mashrā'** [mash-roo] adjective:

Legally valid, recognized by law. "*Mashrā'*" is the general term for legal validity, and indeed the most generic concept for validity in the *Shari'a*.

**masjid** [mas-jid] s. noun:

Literally, "mosque." The plural, "mosques," is "*masajid*."

**maṣlahah** (*maslahah*) [mass-la-hah] s. noun:

Public interest, or more generally the common good.

**ma'sām** (*ma'sum*) [magh-ssoom] s. noun or adjective:

Literally, "inviolable," referring to protection under Islamic Criminal Law (*i.e.*, a person who enjoys that protection). "*Ma'sām*" also is translated as "immune." *Shī'a* use the term to connote "impeccable" and "infallible," which are attributes of *Shī'ite Imāms*. (The opposite — a person unprotected by that Law — is "*ḥadr*.")

**mawali** [ma-wa-lee] pl. noun:

Term for non-Arab Muslims, used during *Abbasid* Caliphate.



**mawdu'a** [maw-duu-a] noun or adjective:

Fabricated, made up. The lowest of four levels of authenticity that a *hadith* can have, indeed, it is not even a *hadith* because it is not accepted as and authentic, reliable statement of the Prophet Muhammad. Rather, it is fabricated, perhaps for reasons of politics, religion, or self-interest.

**mawla** [maw-la] s. noun:

Protector. Also, "*mawla*" can mean a person of slave origin who lacks the protection of a tribe, or have the dual meaning of master or servant. Further, during the Umayyad Caliphate, the plural "*mawali*" referred to non-Arab converts to Islam who were adopted into Arab tribes.

**mawlanas** [maw-la-na] pl. noun:

Islamic jurists. A term used during the Moghul and British Empires on the Indian Subcontinent. The singular is "*mawlana*."

**mawzūn** (*mawzun*) [maw-zoon] s. noun:

A fungible thing that can be weighed, such as gold and silver. A synonym is "*wazni*."

**maysir** [may-seer] s. noun:

A game of hazard or chance that is forbidden as a kind of gambling (i.e., as involving *ghavar*) by the Qur'an, but for which the Qur'an does not specify a punishment.

**mazhab** [ma-zhab] s. noun:

Same as *madhhab*, but typically used in the Near East and on the Indian Subcontinent. See *madhhab*.

**mazlum** [maz-loom] noun or adjective:

Wronged, unjustly oppressed. In Persian, "*mazlum*" is a person unwilling to take action against another or others, even when he or she is oppressed, not because of fear or insecurity, but rather because of forbearance and munificence.

**Medina** (*Madina*) [Me-dee-nah] Proper noun:

Literally, "city," and normally referred to as the City of Prophet Muhammad. Located 3 ½ hours north of Mecca in the Hejaz, in the far west of the Kingdom of Saudi Arabia. Formerly known as Yathrib.

**Mejelle** (*Majalla*, *Majallah*, *Majalat Al-Akham Al-Adliyah*, *Majalat-i Ahkami Adliye*, *Mecelle* (Turkish)) [Mah-gel-eh] s. noun:

Ottoman Civil Code of 1877, which codifies part of the jurisprudence (*fiqh*) of the *Hanafi* School. The Code was prepared by a committee of *Hanafi* School scholars between 1869 and 1888, and published between 1870 and 1877. Though the committee never finished its work, the *Mejelle* was the law of the Ottoman Empire on all topics other than those covered by the Commercial Code. The *Mejelle* served as the Civil Code of the Ottoman Caliphate between 1877 and 1926.

**Meqaat** [Mee-kaat] s. noun:

Any one of six locations in the Kingdom of Saudi Arabia from which the '*Umrah* or '*Hajj* is started.

**millet** [mill-et] s. noun:

Loosely translated, "denomination." This Turkish word is derived from the Arabic word "*millah*," which literally meant "nation." "*Millet*" covers both religion and community, and sometimes is translated as a "confessional community." The *Millet* System, derived from the Ottoman Empire, is the basis for the Law of Personal Status in parts of the Middle East, notably, Israel and Palestine.

**milk** - 1st meaning [milk] s. noun:

Ownership.

**milk** - 2nd meaning [milk] s. noun:

The marital right, i.e., the right of a husband to have sexual intercourse with his wife.

**milk al-'āmmah** (*milk al-'amma*) [milk al-aaghm-ma] s. noun:

Public property, also referred to as *al-milkiyyah al-'āmmah*.

**milk khabith** (*milk khabith*) [milk kha-beeth] s. noun:

Bad ownership.

**minbar** [meen-bar] s. noun:

Pulpit, i.e., the raised platform and podium in a mosque from which an *imām* delivers a sermon (*khutba*).

**minha** [meen-ha] s. noun:

Inquisition, used (for example) in the *Abbasid* Caliphate between 833 and 848 A.D.

**mithli** (*mithli*) [mith-lee] s. noun:

Fungible (homogeneous), fungible object, such as bulk cargo.

**muadhin** [moo-a-dheen]:

See *muezzin*.

**muajjil** [moo-aj-jeel] s. noun:

The portion of a nuptial gift (*mahr*) that is paid immediately, i.e., at the time the marriage (*nikāh*) contract is entered into.

**muakkkhar** [moo-akh-khar] s. noun:

The portion of a nuptial gift (*mahr*) that is paid on a deferred basis, i.e., at some point after the marriage. In some cases, this portion is paid only if the husband divorces or pre-deceases his wife. In the latter instance, it is paid out of his estate.

**mu'āmalah** (*mu'amalah*) [moo-a-ma-lah] s. noun:

A sale and purchase transaction, but infrequently used as a synonym for a *sharikah al-mudārabah*.

**mubāh** (*mubah*) [muu-baah] noun or adjective:

Neutral, and therefore permissible. That is, the proposed action is permitted, but the position of Islamic Law on it is neutral. It is neither recommended (*mustahabb*) nor obligatory (*wajib*). The stance is indifferent. The term often is associated with the Scale of Five Religious and Legal Qualifications (*Al Ahkām Al Khamsa*).

**muqārib** [moo-dhaah-reeb, muu-dhaa-reeb] s. noun:

The working partner in a *sharikah al-muqārabah*. The plural, "working partners," is "muqāribeen."

**mu'dhin** [mo-od-heen] s. noun:

The Arabic term for *muezzin*.

**muezzin** (*muazzin, mu'azzin*) [moo-ez-zeen] s. noun:

Caller to prayer. The person at a mosque who issues the call to prayer, or *azaan*, five times a day. This person invariably is a man. A synonym is "muadhin."

**muftis** [moof-tees] noun or adjective:

Bankrupt.

**mufti** (*mufti*) [moof-tee] s. noun:

A specialist in Islamic Law who is accredited, by virtue of outstanding scholarly reputation and personal piety, governmental authority, or both, to give an authoritative legal opinion. The Chief *Mufti*, or Grand *Mufti*, in a country is known as the "Shaykh Al Islam." The plural is "mufteen" or "muftain," but in English typically is "muftis."

**Mughārasa** (*mugharasa, mugharasa*) [moo-ghar-a-sa] s. noun:

A contract for the purpose of planting seeds for agricultural crops, including trees.

**Muhammad (PBUH) - Prophet Muhammad (PBUH)** (Muhammad, Mohammed Mohamed) [Mu-hham-mad] proper noun:

The name of the Messenger, or Prophet, of the Islamic faith, respectfully followed by "Peace Be Upon Him" ("PBUH").

**muhajir** (*mohajir*) [moo-ha-jeer] s. noun:

One who emigrates, i.e., an emigrant. For instance, Muslims who left India in anticipation of, and following, the British Partition of India on 15 August 1947 and migrated to Pakistan were referred to as "muhajirs," and regrettably that term still is in use today as a pejorative one.

**muhaqqiq** (*muhaqqiq*) [moo-hak-keek] s. noun:

The proponent of or advocate for *taḥqiq*, that is, of verification or revival. The term is used to describe someone who sees an issue or thing as it is, without obfuscation, in effect, one who sees the matter clearly.

**muhṣan** - 1st meaning (*muḥsan*) [mooh-ssaan] s. noun:

A person who has concluded and consummated a valid marriage.

**muhṣan** - 2nd meaning (*muḥsan*) [mooh-ssaan] s. noun:

A person who has never committed unlawful sexual intercourse (*zinā*).

**muhtahid** [mooh-ta-heed] s. noun:

Well-qualified scholar or renewer of the Islamic faith. This title was earned (*inter alia*) by Muhammad Al Shāfi'i.

**muhtasib** (*muhtasib*) [moo-tah-seeb] s. noun:

The Inspector of the Market, whose basic responsibility is to promote good and virtuous behavior, and police against vice. The Office itself is the "*hisba*." More generally, the term "*muhtasib*" connotes a person who seeks to earn religious merit by showing zeal for the *Shar'ā*. During the *Umayyad* Caliphate, the equivalent terms "*amil al-souq*" "*sahib al-souq*" were used.

**mujaddid** [mooj-ad-deed]:

See *tajdid*.

**mujtahid** [moo-ja-heed] s. noun:

A warrior for the Islamic faith, a participant in a *jihād*. The plural, "warriors," is *mujahidin* (*mujahideen*).

**mujtahid** [mooj-ta-heed] s. noun:

Literally, "one who strives." An educated Muslim who is competent to interpret Islamic Law in practical contexts, possibly through the use of *ijtihād* (independent reasoning), and arrive at rulings that are binding, but only on himself. A *mujtahid* may or may not specialize in a particular field. Note that "*mujtahidān*" and "*fukahā*" (in the singular, "*mujtahid*" and "*faqih*") are not synonymous, because the latter class of persons have obtained formal training in the *Shar'ā*. The term "*mujtahidān*" is used in the context of the community of legal scholars that must approve of an outcome to have a consensus opinion, i.e., to forge *ijma'*. The plural is "*mujtahidān*," though in English the singular and plural commonly are used interchangeably.

**mujtahid muqayyad** [mooj-ta-heed moo-qa-yyad]:

See *fukahā*'.

**mujtahid mutlaq** [mooj-ta-heed moot-lak]:

See *fukahā*'.

**mukallaf** [moo-kal-laf] noun or adjective:

Fully responsible, that is, in possession of full legal capacity, for example, to provide a conduct of safe passage (*amān*).

**mukallid** (*mukallid, muqallid*) [moo-khal-leed] s. noun:

Follower, one who is not competent to interpret religion and, therefore, relies on authority. A legal scholar or lawyer who practices *taqlid*. The plural, "followers," is "*mukallideen*" or "*muqallideen*."



**mukhāṭara** [moo-khaa-tha-ra]:

See *bay' atān fi bayā*.

**mullah** [mool-lah, mul-lah] s. noun:

A term of respect for a religiously educated man, one who is educated in Islam and the *Shar'ā*. Particularly in Afghanistan, Iran, Turkey, and the Indian Subcontinent, "mullah" is used to denote any Islamic cleric or mosque leader. "*Mullah*" comes from the Arabic word "mawla," which means "vicar," "master," or "guardian." The plural is "*mullal*," though in English it is common to say "*mullahs*."

**muqāradah** (*muqaradah*) [moo-caar-a-dah] s. noun:

A loan transaction, but used as a synonym for a *sharikah al-muqārabah*.

**murābaha** (*murabaha, murabahah, morabaha*) [moor-ah-ba-ha] s. noun:

Sale and repurchase, which has the economic effect of being a non-interest bearing loan. Also characterized as cost-plus pricing. That is, a contract for resale plus a stated profit. In particular, a contract for the purchase and resale of an asset (such as a home) or commodity (such as a car), with a surcharge to represent an amount for profit, in lieu of interest. For example, a bank (the creditor) purchases a home or car for a customer (the debtor), and resells the item to the customer. The customer must repay the bank not only the purchase price (the amount for which the bank bought the home or car), but also an extra sum, the difference between the bank's cost and the resale price. That difference is the surcharge. Economically, a *murābaha* contract involves cost-plus pricing.<sup>4</sup> This characterization is accurate, because when a retail customer seeks to buy an asset (such as a home), or an expensive consumer durable item (such as a car), a bank buys the asset for the customer — that is the "cost." The bank then sells the asset to the customer. The customer repays the bank in installments, including a mark-up, or fee — that is the "plus pricing." For many, but not all, Islamic legal scholars, the surcharge is not considered unjust enrichment, or *ribā*. However, some sources consider it essentially equivalent to a fixed interest loan.<sup>5</sup> A non-interest bearing loan, i.e., *murābaha*, should not be confused with an interest-free loan, i.e., *qard al hassan*. An interest-free loan involves neither interest nor payment of a fee, via a higher resale price, by the borrower. For example, a lender loans U.S. \$100, and the borrower repays \$100. That is a pure loan, with no interest. That transaction is *qard al hassan*. A non-interest bearing loan, however, does obligate the borrower to pay a fee, in the form of a higher price. For instance, a bank buys a house for a customer at U.S. \$100,000, and the customer repays the bank in installments a total of \$125,000. The \$25,000 is not interest, but rather the cost-plus pricing, or a fee.

**murtadd** [mur-tadd, moore-tadd] s. noun:

An apostate, one who converts away from Islam.

<sup>4</sup> See MABUDUL ALAM CHOUDHURY & MOHAMMAD ZIAUL HOQUE, AN ADVANCED EXPOSITION OF ISLAMIC ECONOMICS AND FINANCE 26, 74 (Lewiston, New York: The Edwin Mellen Press, 2004).

<sup>5</sup> See, e.g., ANGELO M. VENARDOS, ISLAMIC BANKING & FINANCE IN SOUTH-EAST ASIA — ITS DEVELOPMENT & FUTURE 234 (Singapore: World Scientific Publishing Co. Pte. Ltd., 2005).

**murtadd ḥīri** (*murtadd ḥīri*) [mur-tadd fee-three, moore-tadd fee-tree] s. noun:

An apostate, specifically, a person born to Muslim parents who subsequently leaves the Islamic faith. The adjective "*ḥīri*" means "natural," "inborn," "innate," or "native."

**murtadd milli** [mur-tadd meel-lee, moore-tadd meel-lee] s. noun:

An apostate, specifically, a person who is not born to Muslim parents, who converts to Islam, but subsequently leaves the Islamic faith. The noun "*milla*" denotes a "religious community."

**musa bihi** [moo-sa bee-hee] adjective:

Bequeathed property, i.e., property gifted by a will.

**musa lahu** [moo-sa lah-hoo] s. noun:

A legatee, i.e., a person who is named in a will to receive property, one who receives a legacy or bequest. Essentially, a beneficiary of a will.

**muṣādarah** (*musadarah*) [moosse-aah-dah-rah] s. noun:

Expropriation.

**musāqāh** (*musākāt*) [moose-aah-kah] s. noun:

A contract for the irrigation of land, which may occur through an *ijāra* arrangement whereby an individual or firm is hired to provide water services.

**Muṣḥaf** [Moosh-haf] s. noun:

Literally, "collection of pages," or "manuscript bound between two boards." "*Muṣḥaf*" typically refers to the collected, written pages of the Qur'ān. A distinction sometimes is made among Muslim scholars between the "Qur'ān," which is the revelation to Muhammad (because "Al Qur'ān" means "The Recitation") and the "*Muṣḥaf*," which is the written expression of that revelation. During the *Rashidun* Caliphate of Abū Bakr, Zaid ibn Thābit, designated by this Caliph, produced the "*Muṣḥaf*," i.e., a collected bundle of *suhuf* containing all of the verses (*ayat*) of the Qur'ān, arranged in a particular order, and put in a single volume. This "*Muṣḥaf*" was the first, unofficial, non-canonical version of the Qur'ān. The plural is "*masahif*."

**mushārakah** (*musharakah, mushāraka*) [moo-shaa-ra-kah] s. noun:

Islamic project finance.

**mushrik** [moosh-reek] s. noun:

Loosely translated, "polytheist." Also translated as "idolator." The plural, polytheists, is "*mushrikeen*" or "*mushrikūn*."

**musī** (*musi*) [moo-see] s. noun:

Testator, i.e., a person who has made a will and upon his or her death also is known as the "decedent."

**Muslim** (*Moslem*) [Muz-lem] Proper or s. noun or adjective:

Devoted to God. An adherent to the Islamic faith.

**musrifin** [mus-ri-feen] pl. noun:

People who are wasteful, *i.e.*, who waste property.

**mustahabb** [moos-ta-haabb] noun or adjective:

Recommended. That is, a proposed action is recommended as favored or virtuous. *Mustahabb* is the opposite of *makrūh* (reprehensible). A synonym for “*mustahabb*” is “*mandub*.” Another synonym is “*fādilah*.” The term often is associated with the Scale of Five Religious and Legal Qualifications (*Al Ahkām Al Khamsa*).

**musta'min** [moos-ta-meen] s. noun:

Literally, “Protected One.” Technically, a *musta'min* is an enemy alien, but he or she has been given a temporary safe-conduct, or safe-passage, permit (*amān*). Typically, a *musta'min* is one who comes into an Islamic country as a messenger, merchant, visitor, or student wanting to learn more about Islam.

**mut'a** - 1st meaning (*mu'ta*) [moo-ta] s. noun:

An indemnity payable by a husband (*zawg*) to his wife (*zawja*) in cases of repudiation (*talāk*), namely, when the husband repudiates the marriage before it is consummated (but neither spouse has died). The indemnity is the remainder of the fair nuptial gift (*mahr al-mithl*).

**mut'a** - 2nd meaning (*mu'ta*, *mut'ah*) [moo-ta] s. noun:

Literally, “enjoyment or use.” The term is used to connote temporary marriage, which is permitted under Twelver *Shī'ism*, but forbidden (*ḥarām*) by all Four *Sunnite* Schools.

**mutashaddidin** [moo-ta-shad-dee-deen] pl. noun:

Strict, in the sense of excessively conservative-minded scholars, used in the context of scholars involved in the compilation of the *ḥadīth*.

**mutawali** (*mutawalli*) [moo-ta-wa-lee] s. noun:

Person appointed to administer a *waqf*, the first one of whom may be the founder of the *waqf*. A *mutawali* is akin to the trustee of a trust. A woman or non-Muslim can serve as a *mutawali*, and the *mutawali* may be compensated for his or her services.

**mutawā'in** (*mutawā'in*) [moo-ta-ween] pl. noun:

Religious police. Employed in some Muslim countries, such as Saudi Arabia and Iran, the job of the *mutawā'in* is to enforce Islamic moral precepts, including dress codes for women, and rules about inter-mingling among women and men (*ikhtilāt*). In Saudi Arabia, the *mutawā'in* officially are known as the Committee for the Promotion of Virtue and Prevention of Vice, and many of them operate as plain-clothes agents.

**mutawatir** [moo-ta-wateer] s. noun or adjective:

The highest of four levels of authenticity that a *ḥadīth* can have, *i.e.*, the *ḥadīth* has been highly corroborated. A *ḥadīth* that is “*mutawatir*” is reliable (*ṣaḥīh*).

**muwakkil** [moo-wak-keel] s. noun:

General term for “principal,” *i.e.*, the principal in contrast to the agent (*wakīl*).

**muwalat** [moo-wa-lat] s. noun or adjective:

Mutual or alliance.

**muzāra'a** (*muzāra'ah*, *muzara'a*) [moo-zaa-ra-hah] s. noun:

A type of *ijāra* contract that involves the lease of agricultural land. In effect, sharecropping.

**naar** [nar] s. noun:

Hell, *i.e.*, the general term for Hell. There are various regions of Hell, all encompassed by the generic term “*naar*,” but “*jahannam*” is the worst of them.

**nafaqa** (*nafaqah*, *nafaqah*, *nafakah*) [na-fa-kha] s. noun:

Maintenance, particularly in reference to the conditional obligation in Islamic Family Law that a husband owes to his wife or wives.

**nahb** [na-hb] s. noun:

Open theft, *i.e.*, stealing without the element of stealth. This act is not considered *sarika* (the *ḥaqq Allāh* crime of theft, triggering a *hadd* punishment). It is a *ḥaqq ādami* offense, thus it does not trigger a *hadd* punishment, but rather is actionable as a civil wrong, or tort (*jīnāyāt*).

**nahi** [na-hee] pl. noun:

Religious rulings of the Prophet Muhammad, as distinct from “*quadhā'*,” or adjudicatory rulings, set forth in the *ḥadīth*. One prominent *Usuli Shī'ite* scholar, Muhammad Baqir al-Sadr (1935-1980) relies on this distinction to argue that *quadhā'* may address a specific temporal concern before or during the life of the Prophet, and thus may be set aside, whereas the *nahi* cannot be disregarded.

**nā'ib** (*nā'ib*, *nā'ib al-'amm*):

See *safirs*.

**nakba** [nack-ba] s. noun:

Catastrophe. The word is used (*inter alia*) by Arabs to encapsulate the events of 1948, specifically, the mass exodus of Palestinians, numbering between 700,000 and 800,000. They fled their homes during the Arab-Israeli war, or were expelled by Israeli troops. The Arab minority in Israel commemorates the *Nakba* annually, on May 15, with demonstrations and marches to Palestinian villages inside Israel that were destroyed. In May 2009, draft legislation — the *Nakba* Day Bill — was introduced in the Knesset (Israeli parliament) by the right-wing Yisrael Beiteinu Party, which formed the second largest block in the governing coalition. The bill would make the celebration by any Israeli citizen a criminal offense punishable by 3 years imprisonment. Advocates of the bill defended it in the name of Israeli unity, and the legal fact Israeli Arabs are Israeli citizens. Critics charged it was a violation



of human rights, namely, freedom of speech.<sup>6</sup>

**naskh** [naskh] s. noun:

Repeal, abrogation. There is a doctrine of repeal in the *Sharī'a*, whereby one passage of the Qur'ān repeals another with which it is inconsistent, and likewise one practice of the Prophet Muhammad (*Sunnah*) repeals another one of his practices. Some Muslim scholars argue the doctrine of *naskh* is in the Qur'ān, specifically *surah* 2, *ayah* 106. But, *naskh* is not part of the Classical Theory of the *Sharī'a*. The Arabic term for a repealing passage is "*nāsikh*." The repealed passage is the "*mansūkh*." Both terms are nouns (singular). *Naskh* may occur through omission or Divinely controlled forgetting, "supersession" (*naskh al-hukm dāna al-tilāwa*), or erasure of the text of a religious rule, but the rule itself remaining valid (*naskh al-tilāwa dāna al-hukm*).

**nasi'a** (*nasi'a*, *nasi'ah*) [nas-ee-a] s. noun or adjective:

Deferral, delay. A "*nasi'a*" contract is one for immediate delivery of goods, but delayed payment of the purchase price.

**nāsikh** [naa-seek]:

See **naskh**.

**naṣṣ** (*nass*) [nashh] s. noun:

Designation, specifically, designation by Divine decree. A *Shī'ite* doctrine that each *Imām* is chosen by such a decree. This doctrine was developed fully by the 6th *Shī'ite Imām*, Ja'far Al Ṣādiq.

**nikāḥ** (*nikah*) [nee-kahh] s. noun:

Literally, "uniting," and thus used to mean "marriage."

**niqāb** (*niqab*) [nee-kaab] s. noun:

A general synonym for "*burkha*," thus, a full-face veil. However, a technical distinction exists between the two: a "*burkha*" covers the entire face, with no exception, as well as the body. A "*niqāb*" leaves the eyes uncovered, via a narrow slit, and is worn with an accompanying headscarf. A separate veil, covering the eyes, may or may not be worn with the "*niqāb*."

**nisāb** [nee-saab] s. noun:

The minimal or quorum amount above which every able Muslim is obligated to pay the *zakāt* tax. In effect, the *nisāb* is a *de minimis* threshold, below which a Muslim is not liable for *zakāt*.

**niyya** [nee-yah] s. noun:

Intent, intention.

**Nizārīs** or **Nizārītes** (*Nizaris* or *Nizarites*) [Nee-za-rees] pl. noun:

<sup>6</sup> See Tobias Buck, *Draft Bill by Israel to Ban Nikba is Attacked*, FINANCIAL TIMES, 26 May 2009, at 8.

The dominant branch of Sevener (*Ismā'īlī*) *Shī'ism*, known as "*Khojas*" in India, and known early in their existence as "*Tulimiyah*" (Assassins).

**nushāz** (*nushuz*) [noo-shuuz] noun or adjective:

Disobedience, or resistance, depending on the translation or interpretation. The term appears in *surah* 4, *ayah* 34 and 128, of the Qur'ān. Through the ages, the translations (all by men) of the Qur'ān interpret the term to mean "disobedience" in the context of *surah* 4, *ayah* 34, which leads to authorization for a husband to beat his wife. However, the translation by Dr. Laleh Bakhtiar — *The Sublime Quran* (6th ed., 2009) — interprets the word consistently in both passages to mean "resistance." Dr. Bakhtiar argues "disobedience" is a different word in Arabic (derived from "*apā'a*").

**nutfa** [noot-fa] s. noun:

A reproductive cell, scientifically known as a "gamete," which may be a male sperm or female ovum (egg). Through sexual intercourse, the mature reproductive cell of one sex unites with another mature cell of the opposite sex to form a *nutfa amshaj*, or zygote. Literally, "*nutfa*" refers to a drop or few drops of water, but the term is used in the Qur'ān to connote a gamete. (See *surah* 53, *ayah* 45-46, *surah* 80, *ayah* 17-19.)

**nutfa amshaj** [noot-fa am-shaj] s. noun:

A mixed reproductive cell, scientifically known as a "zygote." "*Amshaj*" is an adjective meaning "mixed." The term is used in the Qur'ān. (See *surah* 82, *ayah* 8.)

**Pancasila** [pan-ka-see-la] s. noun:

A Sanskrit word referring to the Indonesian secular political philosophy of Five Principles, advocated by President Sukarno (1901-1970). "*Pancasila*" consists of two Sanskrit words: "*panca*," meaning five, and "*śīla*," meaning principles. The Five Principles are:

- (1) Belief in the one and only God;
- (2) Just and civilized humanity;
- (3) The unity of Indonesia;
- (4) Democracy; and
- (5) Social justice for the whole of the people of Indonesia.

**pandits** [pan-dits] pl. noun:

A Hindi word meaning "Hindu jurists," that is, scholars and teachers, typically ones educated in Sanskrit and Hindu Law. In its early use, a "*pandit*" typically was of the Brahmin caste who had memorized large portions of the Hindu sacred scriptures, the *Vedas*, including the proper melody and rhythm to chant them. The singular is "*pandit*." The derivative English word is "pundits."

**PBUH**, noun phrase:

Peace Be Upon Him, Peace Be Unto Him. A term of respect used following the verbal or written mention of the name of the Prophet Muhammad. Technically,

PBUH should follow each repetition of the name. Sometimes, "PBUH" appears as "saaw" or "saw," which is based on the Arabic words for "Peace Be Upon Him."

**PBUT**, noun phrase:

Peace Be Upon Them, Peace Be Unto Them. A term of respect used following the verbal or written mention of the name of the Prophet Muhammad along with Jesus Christ and other significant religious figures.

**pir** [peer] s. noun:

Spiritual Director.

**qāḍī** (*qadi*, *kāḍī*, *kadi*, *cadi*) [kah-dee] s. noun:

Islamic judge. The term can be used narrowly to refer to a judge in a court in which the *Shari'a* is applied, or to any judge regardless of the applicable law. The institution of the *qāḍī* entered into the *Shari'a* in the late *Umayyad* Caliphate, along with the office of the clerk of the court (*katib*). The plural, Islamic judges, is "*quḍat*," though in English it is common to say "*qāḍis*."

**Qāḍī Al-Qudhat** (*Qadi Al-Qudhat*, *Qāḍī l-quḍat*) [kah-dee al koo-dhat] s. noun:

Chief *Qāḍī*, that is, Chief Justice. *Imām* Abū Yūsuf was the first *Qāḍī* Al-Qudhat in the Islamic world. Based in Baghdad, he served under the *Abbasid* Caliph Harūn Al Rashid, who reigned from 786-809 A.D. Yūsuf died in 798. Not only was he a member of the *Hanafi* School, but also he was a renowned student of *Imām* Abū Hanīfa, founder of that School, and helped spread the influence of the School.

**Qāhira** or **Al Qāhira** (*Al Qahira*) [Qaa-hee-ra] s. noun:

Cairo, established in 969 A.D. as the capital of the *Fatimid* Caliphate.

**qard al hassan** (*qard-e-hasna*) [card al has-san] s. noun:

An interest free loan. An interest-free loan involves neither interest nor payment of a fee, via a higher resale price, by the borrower. In essence, a charitable loan with no interest and a low expectation of repayment of principal. For instance, a lender loans U.S. \$100, and the borrower repays \$100. That is a pure loan, with no interest. *Qard al hassan* should not be confused with a non-interest bearing loan, i.e., *murābaḥa*. A non-interest bearing loan obligates the borrower to pay a fee, in the form of a higher price. For instance, a bank buys a house for a customer at U.S. \$100,000, and the customer repays the bank in installments a total of \$125,000. The \$25,000 is not interest, but rather the cost-plus pricing, or a fee.

**qibla** (*qiblah*, *kiblah*) [kib-lah] s. noun:

The proper direction a Muslim should face during prayer. Additionally, the *qibla* is the proper direction a Muslim should be buried (specifically, with his or her face in that direction) after death, and the direction in which the head of an animal being slaughtered to make *halal* meat should point. This direction is indicated in a mosque, as well as in certain buildings (such as hotels), by a niche or marking in the wall or on the ceiling. Originally, this direction pointed to Jerusalem. But, in year 2 A.H., the Prophet received a revelation, recorded in the Qur'an in *surah* 2, *ayat* 142-148, to change the direction to Mecca, which was the direction the Prophet

preferred.

**Qiran** [Kee-ran] s. noun:

One of three types of *Hajj* pilgrimages, in which a pilgrim performs '*Umrah*, followed by the *Hajj*, but without changing from customary religious garb (*iḥrām*) to normal clothes between the '*Umrah* and *Hajj*. Consequently, this type of pilgrimage is regarded as the most difficult of the three.

**Qirā'āt** [Kee-raa-aat] pl. noun:

Methods of reading or recitation, or more narrowly, methods of pronunciation. The term is used in connection with the seven different ways of reciting the Qur'an that emerged after the death of the Prophet Muhammad, owing two different Arabic dialects used for recitation. The 3rd *Rashidun* Caliph, 'Uthmān, ended the uncertainty by preparing a canonical text of the Qur'an. "*Qirā'āt*" is closely related to the term "*ahraf*," which refers to the seven different ways in which the Qur'an is said to have been revealed, that is, the seven Arabic dialects in which it was recited. They were standardized into a single dialect, *Qurayshi*, during the Caliphate of 'Uthman. The difference is that "*Qirā'āt*" concerns pronunciation. The singular is "*harf*."

**qisās** (*qisas*, *qisās*, *kisas*) [keess-ass] s. noun:

Legal retribution, i.e., retribution that is authorized by law, as in a case of premeditated murder.

**qital**:

See *jihād*.

**qiwamah** [kee-wa-mah] s. noun:

Protector, maintainer. More generally, responsibility for being the overall head or leader of a household. This superior position traditionally is assigned to a man (e.g., the husband and father).

**qiyamah** (*qiyamah*) [kee-ya-mah] s. noun:

Doomsday, that is, the end of time, also called the "Day of Judgment," "Day of Judgment," or "Last Gathering," when God (Allāh) judges all of humanity. A number of "Major" and "Minor" signs are to occur that mark the coming of this Day. The signs are set out (explicitly and implicitly) in the Qur'an and in *ḥadīths*, and the subject of much study by Muslim religious scholars (*ulema*). The 75th *surah* of the Qur'an bears the name "*Al Qiyamah*." The analog in Catholic Christianity to "*Qiyamah*" appears to be the Final Judgment.

**qiyās** (*qiyas*, *qiyāas*, *qiyās*, *kiyas*) [key-aahs] s. noun:

Analogical reasoning, analogical deduction, deduction by analogy, analogy.

**quadhā'** [qu-ad-ha] pl. noun:

Adjudicatory rulings of the Prophet Muhammad, as distinct from "*nahī*," or religious rulings, set forth in the *ḥadīth*. One prominent *Usuli Shī'ite* scholar, Muhammad Baqir al-Sadr (1935-1980) relies on this distinction to argue that



quadha' may address a specific temporal concern before or during the life of the Prophet, and thus may be set aside, whereas the *nahi* cannot be disregarded.

**Qur'ān** or **Holy Qur'ān** (Qur'an, Qur'aan, Quran, Quraan, Koran, Kur-ahn) [Core-ahn] s. noun:

Literally, "Recitation," or "Al Qur'ān," meaning "The Recitation." The Holy book of the Islamic faith. The perfect, immutable, and literal Word of God (Allāh) as revealed to the Prophet Muhammad through the Archangel Gabriel between 610 and 632 A.D.

**Quraysh** (*Quraysh*, *Kuraysh*, *Kuraysh*, *Kuraysh*, *Koreish*) [Qoor-aash, Khooor-aash] Proper noun:

The tribe of the Prophet Muhammad, and which was in control of Mecca during his lifetime.

**rabb al-māl** [rub-al-maal] s. noun:

The sleeping partner in a *sharikah al-muqārabah*.

**radā'** (*rada'*, *radaa'*) [ra-dhaa] s. noun:

Fosterage, as in foster children. The term arises in Islamic Family Law, and connotes an impediment to marriage in that persons related to each through fosterage (*radā'*) cannot marry one another.

**radd** [radd] s. noun or verb:

Literally, "return." A procedure used in Inheritance Law when the sum of the shares (*fards*) of Qur'ānic heirs is less than unity (1). Assuming there are no Agnatic heirs, the remainder returns to the Qur'ānic heirs, in proportion to their shares. The result is to bring the sum to one. Past tense of the verb "*yarudd*," which means "to return."

**Raḍīa Allāhu 'Anhu** [Ra-dhee-a Allaa-hu Agn-huu] noun phrase:

May Allāh Be Pleased With Him, or Blessings of God Be on Him. This appellation is used as a sign of respect, but among *Sunni* Muslims is restricted to the Four Rightly Guided Caliphs (*Rashidun*) and male Companions of the Prophet (*Ṣaḥābah*). Some *Shi'i* Muslims also apply the phrase to certain Imāms. Among some Muslims, the equivalent expression "*Rehmat Allāh*" is used. Typically abbreviated as "RA" and put in parentheses following the name of the person.

**Raḍīa Allāhu 'Anhā** [Ra-dhee-a Allaa-hu Agn-haa] noun phrase:

May Allāh Be Pleased With Her, or Blessings of God Be Upon Her. This appellation is used as a sign of respect, but among *Sunni* Muslims is restricted to the female Companions of the Prophet (*Ṣaḥābah*). Note there are no female *Shi'i* Imāms to whom to apply the phrase. Typically abbreviated as "RA" and put in parentheses following the name of the person.

**rahman** [rah-man] s. noun:

Mercy. Mercy is one of the most commonly expressed attributes of God (Allāh), including throughout the Qur'ān.

**rahn** [rahn] s. noun:

Pledge. An arrangement for providing property as security for a debt.

**raj'i** (*raj'i*) [raj-ee] s. noun:

Revocable. The term is used in Family Law in respect of *talāk* (repudiation of a wife by a husband). *Talāk* may be revocable, which results in a suspension of the marriage contract, or *bā'in* (definite), which results in dissolution of the marriage.

**rakaba** [ra-ka-ba]:

See *'ayn*.

**rak'ah** [rak-aghah] s. noun:

The physical movements that are part of Islamic prayer. A single, complete *rak'ah* involves standing, bowing, prostrating (i.e., on the floor, on one's knees, touching one's forehead to the floor), and standing up again. Each *rak'ah* also involves reading a passage from the Qur'ān while in the standing position. The plural is "*rak'at*."

**Ramaḍān** (*Ramādān*, *Ramadhan*, *Ramadaan*, *Ramdan*, *Ramazan*, *Ramzan*) [ra-ma-dhaan] s. noun:

A month in the Islamic Lunar Calendar during which, as the Fourth of the Five Pillars of Islam, Muslims fast (*saum*) from dawn to dusk. It was during this month that the first verses of the Qur'ān were revealed to the Prophet Muhammad.

**Rashidun** [Rash-ee-dune] pl. noun:

Literally, "Rightly Guided." The term refers to the Four Rightly Guided Caliphs, who reigned following the death of the Prophet Muhammad in 632 A.D. until the establishment of the Umayyad Caliphate in 660/661 A.D.

**rasāl** (*rasul*, *rasuul*) [ra-sool, ra-suul] s. noun:

Messenger. To be technically precise, Muhammad is referred to as the "Messenger of God." The term also is used in everyday commercial parlance, for instance, to indicate a messenger delivering a contract offer from an offeror.

**rawi** [ra-wee] s. noun:

A person engaged in the transmission of a *ḥadīth*, i.e., a transmitter. The plural, "transmitters," is "*ruwat*."

**ra'y** [ra-ee] s. noun:

Literally, "opinion," also translated as "sound opinion." The term, which is generic, is used to refer to individual reasoning, that is, reasoning based on personal preference. Thus, it sometimes is translated as "subjective opinion."

**re-takaful** [re-ta-ka-full] s. noun:

Technically not an Arabic word, but rather Anglicized with the prefix "re-" to signify reinsurance of Islamic insurance providers.

**ribā** (*ribā*) [ree-baa] s. noun:

Interest and/or usury are the typical definitions, but more accurately "*ribā*" means "increase" or "excess." That is, an excess paid or received on principal, or an increase in price or return, especially an excess or increase that is related to time. As a general rule, *ribā* is forbidden (*ḥarām*). The word "*ribā*" is derived from the Arabic verb "*raba*," which (like "*zaka*") means "to grow."

***ribā al-faḍl*** (*ribā al-faḍl*) [ree-baa ul Fad-l] s. noun:

An excess or increase arising from a spot market trade, in specified commodities, that is, in a hand-to-hand or barter exchange, of those commodities. *Ribā al-faḍl* is forbidden (*ḥarām*).

***ribā al-jahiliyya*** [ree-baa ul ja-heel-ee-yya] s. noun:

Defer and increase. That is, in the context of asset financing, a debtor-buyer-lessee pays an increase in the amount owed to a creditor-seller-lessor because of an additional delay or deferral in making timely payment of the purchase price or lease amount. *Ribā al-jahiliyya* is forbidden (*ḥarām*). A *ribā al-jahiliyya* transaction is the mirror image of a transaction involving *da wa ta'ajjal*.

***ribā al-nasi'a*** (*ribā al-nasi'a*, *ribā al-nasa'*, *ribā al-nasiyah*) [ree-baa ul na-see-a] s. noun:

An excess or increase arising from a credit transaction, that is, a money-to-money exchange, where there is a delay or deferral in the exchange and, therefore, there is a charge associated with the delay or deferral. *Ribā al-nasi'a* is forbidden (*ḥarām*).

***riḍā*** (*rida*) [ree-dhaa] s. noun:

Consent.

***riddah*** (*rida*) [reed-dah] s. noun:

Apostasy, specifically, conversion from Islam to a state of unbelief (*kufr*), possibly atheism or agnosticism. *Riddah* is to be distinguished from "*irtidād*," which is conversion away from Islam and to another religion.

***riwayah*** [ree-wa-yah] s. noun:

Transmission of a *ḥadīth* from one person to another. The transmitters are known as "*ruwat*." "*Riwayah*" also can mean "novel" (as in a book of fiction).

***rujū'*** (*ruju*) [ru-jew, ru-joo] s. noun:

Withdrawal, revocation, or retraction. The term may be applied, for example, with respect to an offer or acceptance of a contract, in relation to a confession for a criminal offense, or testimony given as evidence in a case.

***rukū'*** [ruu-kn] s. noun:

Obligation or duty. A synonym for "*waḥīb*."

***Saww*** (*Saw*):

See **PBUH**.

***sadaqa*** (*sadaka*, *sadaqah*) [ssa-da-kha] s. noun:

Charitable gift, i.e., purely voluntary charitable giving, as distinct from the obligatory religious almsgiving of *zakāt*.

***sadd al-dhara'i'*** (*sadd ul d-a-ragh-ee*) noun phrase:

Literally, closing (or blocking) off the means that can lead to evil.

***safahā'*** (*safaha*) [sa-fa-haa] pl. noun:

Weak-minded persons who are prone to profligacy and cannot be entrusted with money or other property. The singular, "weak minded person," is "*safih*."

***safirs*** [sa-feers] pl. noun:

Emissaries. The term is used by Twelver *Shī'ites* to connote the four persons with whom the 12th *Imām* communicated during the Lesser Occultation (*ghayba*), between 874-940 A.D.:

- 'Uthmān al-'Amrī
- Abū Ja'far Muhammad ibn 'Uthmān
- Abū Al Qasim Husayn ibn Ruh an-Nawbakhti
- Abū Al Husayn 'Alī ibn Muhammad as-Samarri

The *safirs* also are known as "*babs*" (doors, i.e., doors to Al Mādhi), or "*nā'ibs*" (deputies, i.e., his deputies). The term "*nā'ib al-'amm*" means "general representative."

***Ṣaḥābah*** (*Ṣaḥāba*, *Sahaba*) [Ssa-hhaa-bah] pl. noun:

Companions of the Prophet Muhammad (pl.). The singular (masculine) form is *ṣaḥābiy*, and the singular feminine form is *ṣaḥābiyah*. The *Ṣaḥābah* are the persons who, during the lifetime of Muhammad, were most closely associated with him. There were approximately 50-60 such persons, though of course a far larger number of people came into contact with him. The most renowned of the Companions are identified in the "List of Companions." The key reason for the importance of identifying the Companions concerns the compilation of the *ḥadīth*. After Muhammad died in 632 A.D., scholars accepted the veracity and accuracy of the testimony of the Companions concerning the *ḥadīth*. In addition, the later scholars trusted their testimony as to the revelation of the Qur'ān (e.g., when the revelations occurred), the *Sunnah* of the First Islamic Community, and important events in early Islamic history. Overall, from the evidence provided by the *Ṣaḥābah*, and through reliable chains of transmission or narrators (*isnad*), scholars were able to establish and elaborate many points concerning the *Sharī'a*.

***sahib al-souq*** (*sahib al-suk*) [sa-heeb ul sookh]:

See **muḥtasib**.

***ṣaḥīḥ*** (*sahih*, *saḥiḥ*) [ssa-hheeh] noun or adjective:

Literally, "valid" or "reliable." In Islamic Law, "*ṣaḥīḥ*" refers to validity from a legal standpoint, i.e., legally effective, in the sense of operative and establishing binding legal rights and obligations. Additionally, "*ṣaḥīḥ*" is used to distinguish between a valid *ḥadīth* and a weak *ḥadīth*, based on scholarly examination of the accuracy of



the chain of transmissions (*isnād*). To pronounce a *ḥadīth* “*ṣaḥīḥ*” is to say it is “reliable,” which implies it is “*mutawatir*.”

***saḥl al Imām:***

See *khums*.

***ṣakk* (*sakk*)** [ssack] s. noun:

Literally, a written document. In Islamic finance, an Islamic bond.

***Salaf* (*Salafī*)** [Sa-laf] s. noun:

Predecessor, forefather. The term is used in the context of an Islamic movement that emphasizes the pious predecessors, the *Salaf* of the Patristic Period of early Islam, as exemplary models, who are collectively referred to as the “*Salaf as-Saaleh*,” or Pious Predecessors. These Pious Predecessors are the the first three Muslim generations:

- (1) The *Ṣaḥābah* (“Companions”).
- (2) The *Ṭabī’un* (“Followers”).
- (3) The *Ṭabī’ al Ṭabī’in* (“Those after the Followers”).

Modern-day *Salafis* view the way in which these 3 generations read the Qur’ān and understood Islam and the *Shari’a* as a model for contemporary times. Commonly, *Salafism* is associated with orthodox, if not puritanical, *Sunnite* beliefs and puntitious personal piety and devotional practices. Typically in English, “*Salafis*” is the plural. “*Salafī*” is the adjectival form as used in English.

***salām*** [sa-lam] s. noun:

Prepayment contract, i.e., an agreement in which payment occurs first, followed later by delivery.

***salah* (*ṣalah*)** [sa-lah] s. noun:

Ritual prayer. “*Salah*” is commonly used among Arabic speakers, whereas “*salat*” is typically used in the Near East and on the Indian Subcontinent. The plural, “ritual prayers,” is “*ṣalawat*.”

***Salat Al Jum’a* (*Salat Al Jumu’ah*)** [sa-lat ul joo-ma] s. noun:

Friday prayers.

***sariḥa* (*sarika*, *sariqa*)** [sa-ree-kha] s. noun:

Theft, which is a *ḥaqq Allāh* offense and triggers a *ḥadd* punishment.

***saum* (*sawm*)** [saom, sawn] s. noun:

Fasting. *Saum* during the month of *Ramaḍān* is the Fourth of the Five Pillars of Islam.

**Sevener *Shī’ites*:**

See *Shī’i*, and *Ismā’īdī Shī’ites*.

***Shabab Al Moumineen*** [Sha-bab Ul Mou-min-ee] noun phrase:

Believing Youth, or Youthful Believers. A Fiver *Shī’ite* revolt movement against the government of Yemen, based in northwest Yemen and Southern Saudi Arabia. Also known as “Houthis,” the name of their former commander, Hussein Badreddin Al Houthi, who Yemeni forces reportedly killed in September 2004.

***Shāfi’i* (*Shafi’i*)** [Sha-fee-ee] Proper noun or adjective:

One of the Four Schools, and the third of the Four in chronological terms, founded by *Imām* Muhammad ibn Idris ibn Al Abbas ibn Uthman ibn Al Shāfi’i (768-820 A.D.), sometimes written as *Imām* “Shāfi.”

***Shahāda* (*Ṣahāda*, *Shahada*, *Ṣhadet*)** [Sha-haa-da] s. noun:

Witness, specifically, know and believe without doubt or suspicion, as if witnessed. “*Shahāda*” comes from the verb (infinitive) “*yashadu*,” which means “to witness,” and “*shahīda*” (sometimes transliterated as “*ṣhida*”), which means (past tense) “he witnessed.” A specific prayer recited by Muslims, and recited for conversion to Islam, which bears witness to the Oneness of Allāh and His Messenger, the Prophet Muhammad. The prayer is: There is no God but God, and Muhammad is his Prophet. Recitation of the *Shahāda* is the First of the Five Pillars of Islam, and the most important of the Pillars.

***shahīd* (*shahid*)** [Sha-heed] s. noun:

Martyr.

***shahīda*** [sha-hee-da] verb:

To witness, witnessing.

***Shari’a* (*Sharia*, *Sharia*, *Shari’a*, *Shar’iah*, *Shariah*, *Seriat* (Turkish), *Şeriat* (Turkish), *Şeriat* (Turkish))** [Sha-ree-agh] s. noun:

Literally, “path,” “way,” or “methodology.” A synonym for “Islamic Law.” Interestingly, “*Shari’a*” is used only once in the Qur’ān, in *surah* 45, *ayah* 18. Over time, “*Shari’a*” became a generic term to refer to the legal rules mentioned in the Qur’ān, and the jurisprudence concerning those rules.

***sharikah* (*sharikat*, *sharikāt*)** [shah-ree-kah] s. noun:

General term for a partnership or business association. The term also may be translated as “joint ownership” and “joint venture.” The partnership or business association could be based on:

- (1) An agreement of the parties (*sharikah al-‘aqd*).
- (2) An event, such as inheritance (*sharikah al-milk*), or
- (3) Common right (*sharikah al-ibāḥah*).

The plural, “partnerships,” is “*sharikat*.”

***sharikah al-‘abdān*** [shah-ree-kah al ab-dahn] s. noun:

A contract-based partnership that is a skill-based partnership.

***sharikah al-amwal*** [shah-ree-kah al am-wal] s. noun:

A contract-based partnership based on money.

**sharikah al-'aqd** [shah-ree-kah al ah-kid] s. noun:

Contract-based partnership, i.e., any partnership that is established on the basis of a contract. Depending on the dominant element of the capital of the *sharikah al-'aqd*, the partnership could take the form of:

- (1) skill-based partnership (*sharikah al-'abdān*),
- (2) money-based partnership (*sharikah al-'amwāl*),
- (3) credit-based partnership (*sharikah al-'ujūh*), or
- (4) partnership based on a mixture of skills and money (*sharikah al-'muḍārabah*).

Depending on the scope of the liability of the partners, the partnership could take the form of:

- (1) limited liability partnership (*sharikah al-'inān* or *sharikah al-'musāhamah*), or
- (2) unlimited liability partnership (*sharikah al-'mufāwadah* or *sharikah al-'taḍamun*).

**sharikah al-ibāḥah** [shah-ree-kah al ee-baa-ha] s. noun:

Common rights of acquisition (a kind of partnership not based on contract).

**sharikah al-'inān** [shah-ree-kah al ee-nan] s. noun:

A contract-based partnership that is akin to a limited liability company (LLC).

**sharikah al-milk** [shah-ree-kah al milk] s. noun:

Co-ownership, that is, a kind of partnership not based on contract, but rather which arises from the occurrence of an event, such as an inheritance.

**sharikah al-muḍārabah** [shah-ree-kah al moo-dhaa-ra-bah] s. noun:

A contract-based partnership that is a sleeping partnership, occasionally referred to as "*mu'āmalah*." The essence of the *muḍārabah* is profit sharing, that is, the sharing of profits between the sleeping partner (*rabb al-māl*) and working partner(s) (*muḍārib*). The profits (if any) are generated by a project the sleeping partner funds, and the working partners engage in through work.

**sharikah al-mohass'ah** [shah-ree-kah al mo-hass-ah] s. noun:

A contract-based partnership with minimal requirements and allows for informality.

**sharikah al-mufāwadah** [shah-ree-kah al moo-fah-wah-dah] s. noun:

A contract-based partnership that is an unlimited mercantile partnership. A non-Muslim cannot participate as a partner in a *mufāwadah*.

**sharikah al-musāhamah** [shah-ree-kah al moo-saa-ha-mah] s. noun:

A type of contract-based limited liability partnership.

**sharikah al-taḍamun** (*sharikah al-tathamon*) [shah-ree-kah al ta-dha-mon] s. noun:

A type of contract-based unlimited liability partnership that involves trading.

**sharikah al-tawsi'ah** [shah-ree-kah al taw-see-ah] s. noun:

A type of contract-based partnership that involves two tiers of interest and liability among the partners.

**sharikah al-uwjūh** [shah-ree-kah al woo-jew] s. noun:

A contract-based partnership that is a credit cooperative.

**shart** (*shart*) [ssharth] s. noun:

Condition, prerequisite, stipulation. The plural is "*shāraʿ*" (conditions).

**Shayk Al Islam** [Shake ul Is-lam]:

See *mufti*.

**Shiat-u-'Alī** [Shee-at-oo-Aglee] s. noun:

Party of 'Alī, i.e., *Shīʿite*.

**shibh** [shee-b] noun or adjective:

Quasi.

**shibh al-'amd** [shee-b al agh-med] noun phrase or adjective:

Quasi-deliberate intent.

**Shī'a** or **Shī'ite** or **Shī'ī** (*Shī'i*, *Shii*, *Shī'a*, *Shia*, *Shī'ah*, *Shī'ite*, *Shiite*) [Shee-ee] s. noun:

A broad term covering the largest minority branch of Islam (about 15-20 percent of all Muslims), and including the majority group within *Shī'ite* Islam, the Twelver (*Ja'fari*, *Imāmi*, or *Ithna'Ashari*) *Shī'ites* (who account for about 85 percent of all *Shī'ites*), plus the minority groups within *Shī'ite* Islam, namely, the Sevener (*Ismā'īlī*) *Shī'ites* and Fiver (*Zaydī*) *Shī'ites*. While many beliefs and practices are shared among all *Shī'ites*, the principal differences are over (1) the number of authentic *Imāms*, (2) the exact line of succession in the *Imāmate*, and (3) the exact definition and role of an "*Imām*." The word "*Shī'ī*" means "party," and the original *Shī'ites* were partisans of 'Alī, cousin and son-in-law of the Prophet Muhammad, and the first *Shī'ite Imām*. The term "*Shī'ī*" does not encompass *Sufi* Muslims, nor does it include the *Khārijites* or present-day *Ibādī* Muslims. Technically, "*Shī'ah*" is plural, but in English the plural commonly is expressed as "*Shī'ites*" or "*Shī'a*."

**shirā'** (*shira*) [shee-rah] verb:

Purchase.

**shirk** [shirk] s. noun:

Polytheism. "*Shirk*" refers to worshipping a god other than Allāh, associating a partner or partners with Allāh, ascribing the features of Allāh to others, or simply not believing in His characteristics. It is akin to a violation of the First Command-



ment in Catholic Christianity. “*Shirk*” is derived from a consonantal Arabic root word “*ṣrk*,” which means “to share.” Thus, “*shirk*” in the sense of polytheism means sharing with Allāh an equal partner. And, “*mushrikūn*” are those persons who practice polytheism. There is a distinction between “major *shirk*,” which is an unforgivable sin, and non-major, or minor, *shirk*, which is forgivable. Notably, then, Allāh forgives all sin except major *shirk*. The opposite of sin of *shirk* is the virtue of *tawhid*.

**shubha** [shoe-bah] s. noun:

Resemblance. A device used in Islamic Penal Law to minimize the scope of application of *ḥadd* punishments by presuming or deeming the lawfulness of an act committed that otherwise would be illicit, but resembles an act that is legal. The plural (resemblances) is “*shubhat*.”

**shubhat milk** [shoe-bah milk] noun phrase:

Resemblances to a marriage relationship. Two such resemblances are (1) where a marriage actually is *fāsid* (defective, voidable), but the husband thinks it is valid, and (2) the applicable waiting period for a woman (*‘idda*) is the one for an irrevocable (*i.e.*, definite) dissolved, but the husband thought this waiting period was similar to that after a revocable repudiation. In such cases, sexual intercourse is not considered unlawful (*i.e.*, not *zinā*).

**shuʿah** [shoe-fah] s. noun:

Right of pre-emption.

**shukrān** (*shukran*) [shook-raan] noun phrase:

Thank you.

**shura majlis:**

See *majlis*.

**shrub al-khamr** [shoorb al kha-mer, shrub al kha-mer] verb phrase:

Drinking the fermented brew of grapes, or more generally, drinking an intoxicating beverage, such as wine or beer. *Shrub al-khamr* is *ḥaqq* Allāh offense (though that is the subject of debate among Muslim scholars) and triggers a *ḥadd* punishment.

**shurta** [shure-ta, shure-tha] s. noun:

Police Department. The plural, “Police Departments,” is “*shurat*.”

**sighah** (*sigah*) [see-gah] s. noun:

Declaration. Specifically, the offer and acceptance by a testator (*musī*) to a legatee (*musa lahn*) of a gift of bequeathed property (*musa bihi*).

**sirah** (*sirah, sira, sira, seerah*) [see-rah] s. noun:

Life or journey, way of life, biography. The term often is used in respect of the Prophet Muhammad, suggesting that his way of life should be emulated. In this context, the full term is “*Sirah Rasūl Allāh*,” or “Life of the Messenger of God.”

**siyāsa** (*siyāsah*) [see-yaah-sa] s. noun:

Policy, administrative regulations.

**siyāsa sharʿiyyah** (*siyāsah sharʿiyyah*) [see-yaah-sa, sha-ree-yah] s. noun:

Policy or administrative regulations that are within the boundaries of the *Sharʿa*.

**souq** (*sooq, souk, suk*) [sookh] s. noun:

Market, commercial place, commercial part of a city or town. The plural, markets, is “*assuwaq*.”

**subashi** [soo-ba-shee] s. noun:

An Ottoman Turkish term for a local police chief. A *subashi* was answerable to the *qāḍi* in the relevant *kada*.

**Ṣaḥī** (*Suḥī*) [Soof-ee]:

See *Sufism*.

**Sufism** [Soof-ism] s. noun:

A mystical dimension of Islam emphasizing (in simplistic terms) the turning away from all worldly matters and toward Allāh. A practitioner is called a “*Ṣāḥī*.”

**Suhuf Ibrahim** [Su-hoof Ee-bra-heem] pl. noun:

Scrolls of Abraham.

**suhuf** [su-hoof] pl. noun:

Sheets, written pages, written sheets of parchment (*i.e.*, animal skin, especially that of a goat or sheep). The term is used in connection with the compilation of the Qurʾān during the Caliphate of Abū Bakr. Zaid bin Thabit, designated by this Caliph, collected primary source material from around the Arabian Peninsula as to the verses of the Qurʾān revealed to the Prophet Muhammad. He compiled them into a bundle, known as the “*Mushaf*,” which was the first, unofficial, non-canonical version of the Qurʾān. Note that “*suhuf*” does not mean book. The word for book is “*kitāb*.” The singular is “*sahifa*,” meaning “sheet” or “written page.”

**sukr** [soo-kr] adjective:

Drunkenness, *i.e.*, the state of being drunk as a result of drinking an intoxicating beverage. Some School texts list *sukr* separately from *shrub al-khamr*, thus treating each as a *ḥaqq* Allāh offense and triggering a *ḥadd* punishment.

**ṣukūk** (*sukuk*) [ssue-kook] pl. noun:

Literally, the plural of *ṣakk*, *i.e.*, written documents. In Islamic finance, Islamic bonds.

**ṣulḥ** (*sulh*) [ssulh] s. noun:

Amicable settlement, such as of a contractual dispute or a *jināyāt* case.

**sultan** [sul-tan] s. noun:

Ruler or king. “Sultan” is a secular, not religious, title.

**Sunnah** - 1st meaning (*Sunna, Sonna*) [Suun-aa, Soon-aa] s. noun:

Generally, practice or tradition. Specifically, in the context of the *Sharʿa*, a precedent, legal custom, legal norm that is established by practice, example, decision, dicta, or tradition of the Prophet Muhammad. As a source of Islamic Law, the *Sunnah* of the Prophet Muhammad is second in importance only to the Qurʾān itself. That *Sunnah* — in particular, the non-prophetic utterances of Muhammad — is manifest in compilations of the *ḥadīth*. “*Sunnah*” also can refer to the traditions of the First Islamic Community, or of a particular School of Islamic Law, as distinct from the *Sunnah* of the Prophet. The plural, the traditions of the Prophet, is “*Sunnan*.”

**Sunnah** - 2nd meaning:

See **Sunni**.

**Sunni** or **Sunnite** (*Sunnī*) [Suun-ee] s. noun:

One who practices the *Sunnah* of the Prophet Muhammad. The plural in Arabic is “*Sunnah*,” but in English is expressed as “*Sunnis*” or “*Sunnites*.”

**surah** (*sura, sūra*) [soor-ah] s. noun:

Chapter, referring to a Chapter in the Qurʾān. There are 114 Chapters in the Qurʾān. Typically, they are cited by number, followed by a colon and then a second number, which refers to the *ayah* (verse). Thus, for example, 5:20 refers to *surah* 5, *ayah* 20.

**surat** (*sārat, suraht*) [soor-at] pl. noun:

Chapters, referring to Chapters in the Qurʾān. However, it is common in English to refer to “*surahs*” to mean “Chapters.”

**taʿaddi** (*taʿaddi, taaddi*) [tah-ad-dee] s. noun:

Literally, “transgression.” A tort, *i.e.*, an illicit act that is a transgression giving rise to liability, but not under the Penal (Criminal) Law. Akin to the concept in Roman and Civil Law of delict.

**taʿāwun** (*taʿāwun*) [ta-agh-woon] s. noun:

Mutual support. More generally, cooperation and solidarity for the good of society, *i.e.*, the common good.

**Tabiʿ al Tabiʿin** [Ta-bee Ul Ta-bee-een]:

See **Salafi**.

**Tabiʿun** [Ta-bee-on]:

See **Salafi**.

**tafriq** (*tafriq, tafriq*) [ta-freekh] s. noun or infinite verb:

Literally, “separation,” or “to separate piece by piece.” Dissolution of a marriage, which is one of the means of divorce.

**tafsir** (*tafsir*) [taf-seer] s. noun:

Interpretation, commentary, or exegesis. “*Tafsir*” typically is used in relation to a careful, scholarly analysis of the Qurʾān. It is distinct from an esoteric or mystical interpretation of sacred scripture, which is called “*taʿwil*.”

**tafiid** (*tafiid*) [taf-weed] s. noun:

Literally, “delegation.” A legal power of a wife (*zawja*) to repudiate herself to her husband (*zawj*), and thereby terminate a marriage (*nikāh*) contract. This power must be exercised at a meeting (*majlis*) at which both the wife and husband are present.

**taghut** [tag-hoot] s. noun:

An unjust circumstance or cause, used in *surah* 4, *ayah* 60 and 76 of the Qurʾān to refer to persons who are opponents of the Prophet Muhammad, as well as to idols, oracles, or tyrants.

**tahdid** (*tahdid*) [tah-deed] s. noun:

Threat.

**tahiyah** [ta-hee-yah] Proper or s. noun:

Greeting.

**tahlil** (*tahlil*) [tah-leel] s. noun:

A device (*hila*) that makes a transaction lawful. Often used in the context of Family Law to refer to the use of a legal fiction (*hila*) to remove an impediment to marriage, and thereby make a marriage lawful.

**tajdid** (*tajdid*) [taj-deed] noun or verb:

Renewal or revival. The term is used in connection with the renewal of Islam, as by purifying and reforming society by making it more equitable and just. A practitioner of *tajdid* is called a “*mujaddid*.”

**takābud** (*takabud*) [tak-aa-budh] s. noun:

The reciprocal taking of possession, as in a contractual arrangement whereby a buyer takes possession of the thing (*māl*) purchased, and the seller takes possession of money.

**takaful** [ta-ka-full] s. noun:

Islamic insurance, Islamic insurance products. *Takaful* is based on the concept of mutual guarantee and mutual responsibility.

**takbir** (*takbir, takbeer*) [tak-beer] s. noun:

In Arabic, “*Allāhu Akbar*,” meaning “God is great,” or “God is the greatest.” The latter translation is more in keeping with the intent with which the phrase is recited. Muslims recite this phrase in a variety of circumstances, which broadly include prayer, expressions of approval or praise, great joy, stress, and battle.

**takiyya** (*takiyya, taqiyyah*) [ta-khee-yya] s. noun:



Literally, "simulation," that is, faking or feigning. For example, the feigning of apostasy under duress. The *Shi'ite* doctrine of *takiyya*, referring to hiding one's *Shi'ite* faith in times of risk or danger, was developed fully by the 6th *Shi'ite Imām*, Ja'far Al Šādiq.

**taklīd** (*taklid*, *taqlid*, *taqleed*) [ta-klead] s. noun:

Imitation, adherence, blind following, tradition. Generally, relying on the teachings, and following in the tradition established by an authority, such as a specific teacher or group of teachers. This imitation does not necessarily involve an examination of the basis for the teachings, either in terms of the Qur'ān, other sources, or rationale. Consequently, it is a trusting, if easy, acceptance and application of the verdicts of the teacher or teachers, as it does not demand an explanation for or scrutiny of the teachings. Thus, it can amount to blind following. In the Ancient Schools of Mecca, Medina, Basra, and Kufa, the term was understood to mean referring to the Companions of the Prophet. Later, especially after the purported Closing of the Door to *ijtihād*, *taklīd* meant adhering to the doctrines of a particular School (e.g., the *Ḥanafī* School). Indeed, *taklīd* was a countermeasure to the use of *ijtihād* for opportunistic reasons by certain rulers and leaders.

**talāk** (*talak*, *taluk*) [tta-laak] s. noun:

Literally, "divorce." Repudiation, specifically, of a marriage (*nikāh*) contract by the husband (*ṣawī*), which is one of the methods of divorce. *Talāk* may be *raj'i* (revocable) or *bā'in* (definite). The Verb (imperative tense) "*ṭallik*"

**taḥqīq** [tal-feek] s. noun or verb:

A concept in Islamic jurisprudence that translates as patching up, i.e., resolving a problem through a certain adaptation or practical route.

**Talimiyyah** [Ta-lee-meey-yah]:

See *Nizaris*.

**tamlīk** (*tamlīk*) [tam-leek] s. noun:

Ownership (feminine). Masculine form is *yamlīk*.

**ta'mīm** (*ta'mīm*) [tah-meem] s. noun:

Nationalization.

**tāmm** (*tamm*) [taam] s. noun:

Complete, as in a completed (established, formed) contract.

**taḥqīq** (*taḥqīq*) [tah-keek] s. noun:

Literally, "verification." *Tahqīq* is a type of *ijtihād* that is concerned with accuracy, such as the accurate perceptions and not making an empirical error. The application of *taḥqīq*. Its use can result in a revival, as in reviving an intellectual tradition.

**tamu'eel** [tam-weel] s. noun:

Finance, financing. Note "*tamu'eel*" does not mean "loan." In the conventional non-Muslim sense of the term "loan," a "loan" is prohibited (*ḥarām*) under the

*Sharī'a* because it bears interest (*ribā*).

**taqarrub** [tak-ar-rube] s. noun:

Act of devotion, i.e., an optional devotional act, designed to result in nearness to Allāh.

**tarāwīḥ** [ta-raa-wwh] adjective:

The special prayer offered every night during the month of *Ramaḍān*.

**tarbiyyah** (*tarbiyah*) [tar-bee-yah] s. noun:

Child upbringing, proper training, particularly with respect to religious education, i.e., shaping a person in accordance with Islam. "*Tarbiyyah*" comes from the Arabic root word "*raba*" or "*ra-ba-ua*," which means "to increase, grow, or rear," in the sense of measures for advancement and growth, including feeding a baby and providing proper moral training. The root word thus has a broader meaning than an Islamic education. The analogous Catholic Christian concept would be "catechesis."

**ta'rīf** (*ta'rīf*) [ta-reef] verb:

Make known publicly, publicize.

**tarikā** (*tarikah*) [ta-ree-ka] s. noun:

Estate, i.e., the estate of a decedent, which consists of all monetary and non-monetary assets, including items that cannot be converted to monetary form (e.g., the right to exact retaliation), and intangible property (e.g., intellectual property) as well as tangible property. The plural, "estates," is "*tarikāt*."

**tasallum** [ta-sal-lum] verb:

To take delivery, such as of a thing in acquiring derivative ownership thereof.

**taslīm** (*taslim*) [tas-leem] verb:

To deliver, as in delivery of possession.

**tawakkul** [ta-wak-kool] verb:

To trust or to depend. That is, trust or dependence on Allāh.

**tauba** [taw-ba] s. noun:

Repentance.

**tauhid** [taw-heed] s. noun:

Literally, "to declare One," or "to declare that which is One," as in the Oneness of Allāh. In other words, monotheism. The opposite of the virtue of *tauhid* is the vice, or sin, of *shirk*.

**ta'wīl** (*ta'wīl*) [tagh-weel] s. noun or verb:

Esooteric or mystical interpretation. "*Ta'wīl*" typically is used in relation to the Qur'ān, and contrasts with "*tafsīr*."

**ta'zīr** (*ta'zīr*) [tagh-zeer] s. noun:

A discretionary punishment that is decided upon by a *qāḍī*.

**ta'ziyyas** [ta-zee-yaas] pl. noun:

Passion plays during the *Shī'ite* Festival of 'Āshūrā in which the martyrdom of *Imām* Hussein is reenacted.

**thaman** [tha-man] s. noun:

Price. *Thaman* is distinct from *kīma* (value).

**Timatto'** [Tim at too] s. noun:

One of three types of *Hajj* pilgrimages, in which a pilgrim performs 'Umrah, followed by the *Hajj*, with the possibility of changing from customary religious garb (*iḥrām*) to normal clothes between the 'Umrah and *Hajj*. This type of pilgrimage is regarded as intermediate, between *Qiran* and 'Ifrād, in terms of difficulty.

**Torah** [To-rah] Proper noun:

The Hebrew word for the Old Testament, or specifically the First 5 Books of the Old Testament.

**Twelver Shī'ites:**

See *Shī'ī*, and *Ja'fari*, *Imāmi*, or *Ithna'Ashari Shī'ites*.

**'udhr** [ood-her] s. noun:

Compelling justification.

**ulema** (*ulamā*, *ulama*) [oo-leh-maah, oo-lah-maah] pl. noun:

Islamic religious scholars, i.e., respected specialists in Islam as a religion. The term "*ulema*" originates from the word "*ilm*," which means "knowledge." Note that "legal *ulema*," that is, specialists in Islamic Law, are "*fukahā*." The singular, Islamic religious scholar, is "*ālem*" ("*alem*," "*alam*," "*alim*").

**'uluq** [oo-look] s. noun:

Literally, "seed," but used to mean conception.

**umm** (*om*) [oom, ohm] s. noun:

Mother. Out of respect, females sometimes are called not by their given first name, but as "Mother of \_\_\_\_\_." The name of the eldest son fills in the blank. For example, a woman named "Noura," whose eldest son has the first name "Yousef," would be "Om Yousef." If there are no sons, then the woman would be called respectfully by her eldest daughter. More generally, "*umm*" refers to that which is all embracing, something that is a totality that encompasses all related concepts, persons, or things, a comprehensive body, entity, or principle.

**Umm al-Kitāb** (*Umm al-Kitaab*, *Umm al-Kitab*) [Oom al Kee-taah] s. noun:

Literally, "Mother of the Book," but also translated as "Guarded Tablet" or "Tablet Preserved." Some *ulema* speculate that the *Umm al-Kitāb* always existed, either before the creation of the world, or after the world was created and thus as part of time. (Sunni and Shī'a scholars differ on the point.) These *ulema* believe the *Umm*

*al-Kitāb* contains all of the sacred texts revealed by God (Allāh) to the pre-Islamic Prophets, as well as the final revelation, the Qur'ān, which supersedes the previous texts. The sending down by Allāh of the Qur'ān, from the *Umm al-Kitāb*, is thought to have occurred on one of the odd-numbered nights during the last 10 days of *Ramādān*. That night is the "*Laylatul Qadr*" (Night of Decree). It was sent from the highest heaven to the lowest heaven (*Bayt al-Izzah*).

**Umm al-Mominin** [oom ul mo-mee-noon] pl. noun:

Mothers of the Believers. A term of respect for the wives of the Prophet Muhammad. *Surah* 33, *ayah* 54 of the Qur'ān forbids any person from marrying them, should they become widow or divorce, precisely because of their status as Mothers of the Believers.

**ummah** (*umma*) [oom-ma] s. noun:

Literally, "community" or "nation," but used to refer to the community of believers, in the sense of all Muslims in the world.

**'Umrah** (*Umrah*) [oom-rah] s. noun:

Smaller or Lower Pilgrimage, as distinct from the Bigger or Higher *Hajj*, i.e., undertaking the Pilgrimage at any time during the year other than the designated *Hajj* period.

**'uqūbāt** ('uqubat, 'ukābat, 'ukubat) [oo-koo-baat] s. noun:

Criminal Law, or Penal Law. "*Uqūbāt*" is a generic term that covers what in Anglo-American and Civil Law would be considered distinct wrongs: criminal claims, and civil claims (torts). Under the Shari'a, both kinds of claims are treated as part of the subject matter of Criminal Law, and the key distinction is between *ḥaqq Allāh* (claims of God) *ḥaqq ādamī* (private claims). Noun (plural). The singular is "*uqūba*," and also refers to the punishment prescribed the *Māliki* School for cases of homicide in which the right or retaliation is waived, namely, 100 lashes plus one year imprisonment.

**urf** ('urf) [urf] s. noun:

Custom. A synonym is "*aada*."

**'urād** ('urud) [u-ruudh] s. noun:

Tangible property.

**Usuli or Usuli Shī'ism** [Oo-soo-lee] noun or adjective:

A dominant form of Twelver *Shī'ism* based in Najaf, Iraq.

**uṣul al-fiqh** (*usul al-fiqh*) [uu-sool al fick] pl. noun:

Literally, the roots of the jurisprudence, meaning the theoretical basis of the *Shari'a*. The singular, "root of the jurisprudence," is "*uṣl al-fiqh*."

**Velayat e faqih** [ve-lay-at ee fa-keey]:

The Persian for "*Wilayat al faqih*." See *Wilayat al faqih*.

**vizier** [vyee-zeer] s. noun:



Senior advisor to a ruler. "*Vizier*" is the Persian word for what in Arabic is "*wazir*."

**Wahhābī** (*Wahhabi*) [Wah-haa-bee] s. noun:

An adherent to *Wahhābism*.

**Wahhābism** (*Wahhabism*) [Wah-haab-ism] s. noun:

A political and religious movement established by Muhammad ibn Abd Al Wahhāb (1703/1704-1792). Wahhāb called for a return to a pure, undistorted version of Islam. This movement is prominent on the Arabian Peninsula, and is the official version of Islam in the Kingdom of Saudi Arabia and in Qatar. The movement is part of the *Hanbali* School.

**wahy** [wa-hee] s. noun:

Divine Revelation.

**wajh Allāh** (*wajh Allāh*) [wahj ul-laah] noun phrase:

The face of God, used in the sense of the presence of God.

**wājib** (*wajib*) [waa-jeeb] s. noun or adjective:

Obligatory, as in an obligatory right. Also, binding, definite, due, or duty. That is, a proposed action is required as an obligation under Islamic Law. It is not merely recommended (*mustahabb*), nor is the position of Islamic Law neutral on it (*mubāh*). A synonym for "*wājib*" is "*fard*." Another synonym is "*rukn*." The term often is associated with the Scale of Five Religious and Legal Qualifications (*Al Ahkām Al Khamsa*).

**wakālah** (*wakalah*) [wa-kaa-lah] s. noun:

Agency.

**wakīl** (*wakīl*) [wa-keel] s. noun:

General term for "agent," "proxy," or "deputy," as distinct from the principal (*muwakkil*). Also used to connote lawyer.

**walī** [wa-lee] s. noun:

General term for legal guardian.

**walī al-dam** [wa-lee al daam] s. noun:

Literally, "avenger of the blood." A legal guardian who is the next of kin of a person and has the legal right to demand retaliation on behalf of that person, to reach a settlement and accept blood money, or gratuitously waive the right of retaliation and confer a pardon. The *walī al-dam* is the nearest of the male ascendant or descendant relatives (agnates, or "*asaba*") of the victim.

**waqf** (*wakf, wakf*) [wahk-if, wahk-uf] s. noun:

Pious foundation, charitable trust. Sometimes translated as a "mortmain" (literally in French, "dead hand"), which refers to land or tenements that are held in perpetuity by an ecclesiastical or other corporation, and that are alienable, but which never pass by inheritance because their holder (e.g., the church or a

corporation) does not die.<sup>7</sup> Technically, the plural in Arabic for "charitable trusts" is "*awqaf*." However, virtually all English language sources on the law of charitable trusts refer to "*waqf*," and typically use this word in the singular or plural context, i.e., "*waqf*" and "*waqfs*."

**waqf ahli** (*waqf ahli, waqf al ahli, waqf al ahli*) [wahk-if ah-lee, wahk-uf ahh-lee] s. noun:

Private *waqf*, family *waqf*. A synonym is "*dhurri*."

**waqf khayrī** (*waqf khayrī, waqf al khayrī, waqf al khayrī*) [wahk-if khay-ree, wahk-uf khay-ree] s. noun:

Public *waqf*, charitable *waqf*.

**waqif** (*wakif*) [wah-keef] s. noun:

Founder of a *waqf*, akin to the settlor of a trust.

**wārith** (*warith*) [waa-reeth] s. noun:

Literally, "heir." A person entitled to property because of his or her relationship to its former owner, especially pursuant to a will drawn by that owner, who is the testator — decedent.

**wasf** (*wasf*) [was-sif] s. noun:

Circumstances of a transaction.

**was ī** (*wasi*) [wass-ee] s. noun:

An executor, a guardian, or both who is appointed as such by a testamentary instrument (i.e., a will). The plural is "*awṣiā*."

**wasīyya** (*wasiyya, wasiya*) [wa-ssee-ya] s. noun:

A will, legacy. The plural is *wasāyā*.

**wasīyya nama** (*wasiyya nama, wasiya nama*) [wa-ssee-ya na-ma] s. noun:

A written will, that is, a written bequest through which property is given.

**wazifah ijtīmā'yyah** [wa-zee-fah ij-tee-maa yyaah] noun phrase:

Social responsibility of a private owner with respect to acquisition and enjoyment of his or her property.

**wazir** [wa-zeer]:

See *vizier*.

**wilāyat** (*wilayat, wilāyat*) [wi-laa-yat] pl. noun:

Guardianship. The singular is "*wilāyah*."

**wilāyat al-faqih** (*wilayat al-faqih*) [wi-laayat al fa-keeh] noun phrase:

<sup>7</sup> See BRYAN A. GARNER, ED., *BLACK'S LAW DICTIONARY* 1105 (St. Paul, Minnesota: Thomson West, 9th ed. 2009) (entry for "mortmain").

A *Shīʿite* theory that the authority to lead the Islamic community comes from Allāh and was passed through a line of *Imāms* starting with 'Alī, the cousin and son-in-law of the Prophet Muhammad, and ending with the 12th *Imām*, who went into occultation (i.e., removal to a different realm of existence) in the 9th-10th century A.D. Until the return of this "Hidden *Imām*," this authority is held by a cleric selected as the "Supreme Leader." This theory is enshrined in the 1979 Constitution of the Islamic Republic of Iran. Hence, the Constitution legitimizes the Supreme Leader as the most important figure in government. In Persian, "*Velayat e faqih*."

**wilāyat al-istidānah** (*wilayat al-istidanah, wilayat al-istidaanah*) [wi-laa-yat al is-tee-daa-nah] noun phrase:

Permission or ability to borrow off of (i.e., backed by) a pool of capital or assets. Simply put, leverage.

**wudu** (*wuḍu'*) [woo-doo] s. noun:

As distinct from "*ghusl*," which is a full ablution, "*wudu*" is a partial ablution with clean water that is required before reading the Qur'ān or certain prayers.

**wukūf** [woo-khoof] s. noun:

Abeyance, suspension. That is, an abeyance or suspension of legal rights or effects.

**yad** [yahd] s. noun:

Literally, "hand." Used to connote possession, the right to possess, the right of possession. "*Yad*" also can refer to the authority of a husband in a marriage, or of a father in a family.

**yad amana** [yahd a-maa-na] s. noun:

Fiduciary possession.

**yad mubtila** [yahd mub-theela] s. noun:

Illegitimate (unlawful) possession.

**yad muhikka** [yahd moo-heekh-kha] s. noun:

Legitimate (lawful) possession.

**Zabur** [Za-boor] s. noun:

The Book given to David (Daoud'), i.e., the Book of Psalms.

**Zāhiri** (*Zahiri*) [Dhaa-hee-ree] s. noun or adjective:

A School of Islamic Jurisprudence founded by Daud ibn Khalaf, who died in 883 A.D. "*Zāhir*" means "manifest," the founder became known as "Daud al-Zāhir" because of his insistence on sticking to the literal meaning of the Qur'ān and *Sunnah*. For support for their literalist interpretative approach, the *Zāhiris* point to *surah* 16, *ayah* 103 of the Qur'ān, which states that the text is laid out in clear Arabic language. The *Zāhiris* emphasize the grammar and syntax of textual passages, and reject analogical reasoning (*qiyās*), as well as deductive reasoning, as method for interpreting passages or deriving legal rulings. A prominent *Zāhiri* scholar was Ibn Ḥazm (whose full name was Abū Muḥammad 'Alī ibn Aḥmad ibn Sa'īd ibn Ḥazm),

who lived from 994-1064 A.D. Born in Córdoba (in modern-day Spain), he lived in Andalusia and worked as a minister in the Umayyad government under the Caliphs of Córdoba. He authored over 400 works, of which 40 survive, not only on Islamic Law and jurisprudence, but also on theology, philosophy, and even comparative religion. Over time, the vast majority of Sunni and *Shīʿite* Scholars came to reject the literalist approach of the *Zāhiris*, and pronounced that School extinct. However, the modern *Salafi* movement is inspired by the *Zāhiri* School.

**Zāhiriyyah** [Dhaa-hee-ree-yah] noun or adjective:

The *Zāhiri* School and its followers.

**zakāt** (*zakat, zakāh, zakah*) [za-kaat] s. noun:

Almsgiving that is obligatory as a religious matter, and legally enforceable under the *Shari'a*. The Third of the Five Pillars of Islam. The word "*zakāt*" is derived from the Arabic verb "*zaka*," which (like "*raha*") means "to grow."

**zakāt al-ḥir** [za-kaat ul fit-tr] s. noun:

Literally, "fast-breaking alms." The practice of Muslims of giving alms during the month of *Ramaḍān* in connection with their fast (*sawm*). This practice is connected with the Fourth Pillar of Islam, fasting, and not part of the Third Pillar, *zakāt*.

**zann** [zann] s. noun:

Opinion.

**zawj** [zaw-j] s. noun:

Husband.

**zawja** [zaw-ja] s. noun:

Wife.

**Zaydī** or **Zaydis** (*Zaydi, Zaidi*) [Zay-dee] noun or adjective:

A synonym for Fiver *Shīʿites*.

**zeenah** [zee-nah] s. noun:

Beauty, adornment, charm, ornament, particularly as used in *surah* 24, *ayah* 31. In other parts of the Qur'ān, "*zeenah*" refers to children, wealth, and natural beauty.

**zinā** (*zina*) [zee-naa] s. noun:

Unchaste behavior, that is, unlawful sexual intercourse, such as adultery, fornication, or sodomy. *Zinā* is a *ḥaqq Allāh* crime that carries a *ḥadd* punishment.



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